Mahammad Razai, Arben Draga, Ahmed Rashid v Secretary of State for the Home Department

K v Secretary of State for the Home Department v Bail for Immigration Detainees

Case No: CO/5757/2010, CO/8782/2010

High Court of Justice Queen's Bench Division Administrative Court

2 December 2010

[2010] EWHC 3151 (Admin)

2010 WL 4955757

Before: The Hon. Mr Justice Nicol

Date: 02/12/2010

Hearing dates: 18th & 19th October 2010

Representation

Nick Armstrong (instructed by Pierce Glynn) for Messrs.

Razai , Draga and Rashid and (instructed by Luqmani Thompson and Partners) for Mr K.

Jeremy Johnson (instructed by Treasury Solicitor) for the Defendant.

S. Chelvan (instructed by Allen & Overy) for Bail for Immigration Detainees, intervening.

Judgment

Mr Justice Nicol:

1 At the time they started their applications for judicial review each of these four Claimants was in immigration detention. They wanted to apply for bail. In practice an Immigration Judge was likely to make any grant of bail conditional on residence at a specified address. None of these Claimants had an address to offer. However, the Secretary of State for the Home Department (the 'SSHD') is empowered by Immigration and Asylum Act 1999 s.4 to make accommodation available for immigration detainees who are released on bail. Each of the Claimants applied for accommodation under that provision. In these proceedings they allege that those applications were handled unfairly and unlawfully and that there was an unlawful delay before the applications were finally decided. Cranston J. granted Razai, Draga and Rashid permission to apply for judicial review. Mr Tim Owen QC, sitting as a Deputy Judge of the High Court, granted permission to K and ordered his case to be heard at the same time as the other three. Bail For Immigration Detainees ('BID') is a charity which, as its name suggests, provides assistance to immigration detainees who wish to apply for bail. BID applied to intervene because, it said, the experience of these claimants was symptomatic of a wider problem experienced by immigration detainees who were characterised as high risk when they applied for a bail address. On 30th September 2010 Ouseley J. granted BID's application for permission to intervene. I am grateful for the assistance which they have provided through written submissions, evidence from their Assistant Director, Pierre Makhlouf, and the oral submissions of Mr Chelvan.

The factual background of the Claimants

Mahammad Razai

2 Mr Razai is Iranian. He came to the UK on 23rd May 2004. He applied for asylum but was refused and his appeal was dismissed. In 2005 he was sentenced to 3 months imprisonment for motoring offences. He went to Germany and Ireland, but returned to the UK and claimed asylum again. This was refused without a right of appeal. On three occasions he was convicted of failing to comply with requirements set by the SSHD to enable him to be issued with travel documentation. He was sentenced to terms of imprisonment of 3 months, 12 months and 12 months. He was released from his final sentence of imprisonment on 2nd November 2007 and was then detained under the Immigration Act 1971 Schedule 3 pending his deportation. He had been served with a decision to deport on 30th October 2007. He did not appeal that decision. The deportation order itself was served on 31st May 2008. Between October 2008 and December 2009 Mr Razai made 13 bail applications. In advance of three of these applications the SSHD had allocated accommodation for him in the event that he was released, but he was not.

3 On 2nd February 2010, he applied for accommodation again. On 8th February 2010 BID (who were then acting on his behalf) spoke to the UK Border Agency. They were told that his application had been refused because he was regarded as posing a serious risk of harm. As a result, he withdrew his next bail application which had been due to be heard on the following day. On 12th May 2010 he had another bail application. The Immigration Judge said that in principle bail should be granted, but it was refused because no accommodation was available.

4 On 29th June 2010 Mr Razai was offered accommodation by the SSHD and he was granted bail on 7th July 2010.

5 In the SSHD's detailed grounds for opposing the claim reference is made to allegations about Mr Razai's behaviour while in custody. These or the details of them are disputed but the allegations were as follows. In February 2008 he made threats to burn down the library. In September 2008 he was violent and threatening and made threats to kill an officer. In November 2008 he was aggressive and abusive towards staff and attempted to assault the detention manager. In February 2009 he was fighting with another detainee and damaged property. In July 2009 he was threatening and intimidating towards a female member of staff. In November 2009 he made a series of abusive telephone calls to immigration offices and was informed that his case owner would no longer accept calls from him.

Arben Draga

6 Mr Draga is Kosovan. He came to the UK in 2001 as an unaccompanied minor. His asylum claim was accepted and he was granted indefinite leave to remain in the UK. He received a reprimand for shoplifting in 2002 and cautions for possession of drugs in 2003 and 2005. In May 2005 he was convicted of possessing heroin with intent to supply and sentenced to 18 months imprisonment. In March 2006 he was arrested and charged with possession of an imitation firearm, although the prosecution was not pursued.

7 On 2nd August 2006 he was arrested and detained because the SSHD had decided to make a deportation order against him. He appealed but the appeal was dismissed in February 2007. He sought reconsideration of that decision. He was granted bail on 30th March 2007. Reconsideration was refused, the SSHD signed the deportation order and Mr Draga was re-detained on 30th November 2007. Mr Draga had also, while on bail, been found in possession of a knife in a public place. No charges were brought in relation to that. In due course he asked the SSHD to revoke the deportation order. The SSHD refused but on 8th September 2010 his appeal was allowed, the SSHD was refused permission to appeal and in the course of the present hearing the SSHD accepted that some form of leave to remain in the UK would be granted to him. Because some form of leave to remain in the UK would be given to him I have rejected the application made on his behalf that his identity should be concealed. He was eventually granted bail on 30th September 2010 and released on 2nd October 2010 with a condition that he live at an address provided by the SSHD.

8 Mr Draga was thus in immigration detention between 30th November 2007 and 2nd October 2010. He applied for bail unsuccessfully in February, April and November 2008 and July and December 2009. He was offered accommodation under s.4 of the 1999 Act in advance of the bail hearing in July 2009. Mr Draga has brought separate proceedings challenging the length of his

immigration detention. In the course of them he applied unsuccessfully for bail to Owen J. on 15th June 2010.

9 Of more direct relevance to the present proceedings, is the application he had made for accommodation on 25th November 2009. His representatives were told sometime in January 2010 that he was regarded as high risk. Nothing further was heard until the day before the hearing of an application for interim relief in the present proceedings was due to take place. On that day, 28th June 2010, the SSHD did then offer accommodation. However, Mr Draga did not apply for bail in reliance on that address and the offer lapsed. Mr Draga applied again for accommodation in September 2010. This was granted and it was to this address that he was given bail on 30th September 2010. Since the SSHD is no longer proposing to deport Mr Draga, I assume that his bail has come to an end.

Ahmed Rashid

10 Mr Rashid is Iraqi. He came to the UK clandestinely in 2002. His asylum claim was refused and his appeal dismissed in 2004.

11 He has a poor criminal record. Although the evidence is not clear as to all the details, the following emerges. In December 2003 he was sentenced to 18 months imprisonment for wounding and was recommended for deportation. He accumulated convictions for advertising prostitution (2005), possessing or selling goods with a false trademark (January, June and October 2008), damaging property (September 2008), assaulting a constable, failing to surrender to custody and breaches of a conditional discharge (December 2008). Then in February 2009 he was convicted of using threatening, abusive or insulting words or behaviour with intent to cause fear or provoke violence and having a bladed article in a public place. That appears to have attracted a custodial sentence which came to an end in April 2009, but thereafter he was detained pursuant to the automatic deportation provisions in the UK Borders Act 2007 .

12 Mr Rashid was also found guilty of offences against prison discipline (March 2009) and possession of an unauthorised item (June 2009). In addition, the UKBA was informed by the police that they had serious child protection concerns regarding him.

13 Mr Rashid applied for accommodation as a bail address from the SSHD on 12th November 2009 and 12th March 2010. His application was refused by the SSHD in a letter dated 30th June 2010.

14 Against a refusal there is a right of appeal – see Immigration and Asylum Act1999 s.103 . In the past the appeal lay to Asylum Support Adjudicators. By the Transfer of Tribunal Functions Order 2008 , made under the Tribunals, Courts and Enforcement Act 2007 , the functions of Asylum Support Adjudicators were transferred to the First-tier Tribunal ('FTT') with effect from 3 November 2008. The First-tier and Upper Tribunal (Chambers) Order 2008 created chambers within the First-tier Tribunal and dealt with the allocation of cases to those chambers. Under article 3(a) of that order functions relating to appeals in asylum support cases were allocated to the Social Entitlement Chamber of the First-tier Tribunal ('SEC'). With effect from 18 January 2010 a new article 11 , inserted by the First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2010 , made that allocation subject to a power of direction enabling allocation of cases to a different chamber within the First-tier Tribunal. When exercising its jurisdiction in asylum support cases the First-tier Tribunal is commonly referred to as 'the FTT (Asylum Support)'.

15 Mr Rashid appealed and on 26th July 2010 the Tribunal Judge allowed the appeal. On 28th July 2010 the SSHD provided Mr Rashid with an accommodation address but on 26th August 2010 his application for bail was nonetheless unsuccessful. He made a further application for accommodation on 1st September 2010. The SSHD has confirmed that he is eligible and is seeking to identify accommodation for him.

K

16 K is Iranian. He entered the UK unlawfully in 2003. His asylum claim was refused and the appeal against that decision was dismissed. He has committed a number of offences which are sexual in nature or related to his sex offending.

17 In 2004 he masturbated in front of an unknown woman at a railway station in Liverpool and

received a 12 month conditional discharge for disorderly behaviour. In March 2005 he was convicted of sexually assaulting a 17 year old girl and two 14 year old girls. He had also indecently exposed himself to an 11 year old girl and a woman with a 13 year old girl and 9 year old boy. The assaults involved him rubbing his penis against children. The indecent exposure took place when he masturbated in public. Four of the offences had been committed on bail and the sentencing judge concluded that he had targeted his victims. He was sentenced to 12 months imprisonment and given an extended licence for 18 months. He was subject to sex offender notification requirements. In April 2005 he was released on licence but he was twice recalled to prison because he breached his licence conditions that had prohibited him from going into a public park.

18 K's imprisonment pursuant to the sentence of the criminal court came to an end on 22nd December 2006 but he continued to be detained pending his deportation. The SSHD had decided to deport him on 24th November 2006. His appeal against that decision was dismissed in February 2007 and the deportation order was signed on 15th March 2007.

19 He applied for the SSHD to provide a bail address on 6th July 2010. His claim for judicial review was issued on 17th August 2010. On 26th August 2010 the SSHD refused his application for an address. He appealed to the FTT (Asylum Support). On 13th September 2010 his appeal was allowed. The SSHD accepted that she was obliged to provide him with accommodation. An offer was made on 8th October 2010, but when it was later realised that this address was within 250 metres of a junior school and 300 metres of a secondary school, the offer was withdrawn. The SSHD is continuing to look for suitable accommodation for him.

20 Because K is (at the time this judgment is due to be handed down) still in custody, because the nature of his offending might attract unwelcome and dangerous attention from other detainees and because there is not the facility in immigration detention for vulnerable prisoners to be held separately, I have acceded to the request that I not include his name in this judgment.

The legislative background

21 The Immigration Acts give a power to detain in various circumstances. All four of these Claimants were detained either following a decision to deport them or pending their deportation – see Immigration Act 1971 Schedule 3 paragraphs 2(2) and (3) . In these circumstances it is the SSHD who is given the power to detain. In other cases this decision can be taken by an immigration officer. A detainee can be bailed either by an immigration officer not below the rank of Chief Immigration Officer or by Immigration Judges, usually in the First-tier Tribunal (Immigration and Asylum) Chamber ('IAC') – see 1971 Act Schedule 2 paragraph 22(1A) and Schedule 3 paragraph 2(4A) . A like power is given to grant bail pending an appeal – 1971 Act Schedule 2 paragraph 29 and Schedule 3 paragraph 3 . If an immigration detainee wishes to challenge the legality of his or her detention an application for judicial review or habeas corpus can be brought in the High Court in which case a High Court judge can grant bail as a form of interim relief.

22 As I have said, the SSHD has power to provide accommodation for people admitted to bail from immigration detention. So far as relevant, s.4 of the 1999 Act provides:

> '(1) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of persons –
>
> ….
>
> (c) released on bail from detention under any provision of the Immigration Acts .
>
> (2) The Secretary of State may provide, or arrange to provide for the provision of, facilities for the accommodation of a person if –
>
> (a) he was (but is no longer) an asylum-seeker, and

(b) his claim for asylum was rejected.

….

(5) The Secretary of State may make regulations specifying criteria to be used in determining -

(a) whether or not to provide accommodation, or arrange for the provision of accommodation, for a person under this section;

(b) whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for a person under this section.

….'

23 Section 4(2) caters for the situation where a person is a failed asylum-seeker. The SSHD has made regulations under s. 4(5) specifying that accommodation can only be provided in those circumstances if the person is destitute. There is no such condition imposed on the provision of accommodation to people released from immigration detention. Indeed no regulations have been made under s.4(5) specifying the criteria to be applied in determining whether or not to provide accommodation in their cases.

24 It is to be noted that s.4(1) confers a *power* on the SSHD to provide accommodation, not a duty.

25 Nonetheless, Mr Armstrong on the Claimants' behalf submitted that the SSHD was under a duty to use reasonable endeavours to provide accommodation when application for such accommodation is made. He relies on a trilogy of cases concerning s.117 of the Mental Health Act 1983 . This gives health authorities a duty to provide aftercare services for those patients who have been discharged from compulsory detention under s.3 of the 1983 Act. The first of these cases, *R v Camden and Islington Health Authority ex parte K [2001] EWCA Civ 240* , concerned the position prior to discharge. The health authority conceded that it had a power to take preparatory steps; it should normally use this discretionary power to use reasonable endeavours to fulfil conditions dependent on which the Mental Health Review Tribunal had indicated it was prepared to order release; and failure to use such endeavours in the absence of strong reasons would be likely to be an unlawful exercise of discretion – see [20]. Lord Phillips M.R. endorsed these concessions — see [29]. Although, as Stanley Burnton J. observed in *R (B) v Camden London Borough Council [2005] EWHC 1366 (Admin)* at [60], the point was not the subject of competing argument, a similar conclusion was expressed by the *House of Lords in R (H) v Secretary of State for the Home Department [2003] UKHL 59* when Lord Bingham said at [29], "the duty of the health authority, whether under s.117 of the 1983 Act or in response to the tribunal's order of 3 February 2000, was to use its best endeavours to procure compliance with the condition laid down by the Tribunal."

26 Although the position in the present statutory context is not identical since the power of the SSHD is not exercised in the shadow of any form of statutory duty, Mr Johnson for the SSHD did not quarrel with the proposition that there was a duty on the SSHD to use reasonable endeavours to provide a bail address if the person concerned would otherwise be likely to remain in detention. I am prepared to consider the claim on this basis although its more precise elaboration may be necessary in another case.

27 Section 103 of the 1999 Act provides a right of appeal. In its current form it says,

"(1) If, on an application for support under s.95 [this section makes provision for support for asylum-seekers before their applications have been decided by the SSHD and while any appeals against refusal are being considered by the Tribunal], the Secretary of State decides that the applicant does not qualify for support under that section, the applicant may appeal to the First-tier Tribunal.

(2) If the Secretary of State decides to stop providing support for a person under s.95 before that support would otherwise come to an end, that person may appeal to the First-tier Tribunal.

(2A) If the Secretary of State decides not to provide accommodation for a person under section 4, or not to continue to provide accommodation for a person under section 4, the person may appeal to the First-tier Tribunal.

(3) On an appeal under this section, the First-tier Tribunal may—

(a) require the Secretary of State to reconsider the matter;

(b) substitute its decision for the decision appealed against; or

(c) dismiss the appeal."

28 Subsection (2A) was added by the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 s.10 . From a date which is yet to be appointed, s.103 of the 1999 Act will be replaced by a new version — see s.53 of the Nationality, Immigration and Asylum Act 2002 which itself has been prospectively amended by the 2004 Act s.10 . The new version of s.103 (with the 2004 amendment incorporated) will say:

"(1) This section applies where a person has applied for support under all or any of the following provisions–

(a) section 4,

(b) section 95, and

(c) section 17 of the Nationality, Immigration and Asylum Act 2002 .

(2) The person may appeal to an adjudicator against a decision that the person is not qualified to receive the support for which he has applied."

29 Currently, therefore, the Tribunal's jurisdiction is at large. It is to look again at the decision of the SSHD not to provide accommodation under s.4 of the 1999 Act and it must decide whether to require the SSHD to reconsider the matter, substitute its own decision or dismiss the appeal. When the new version of s.103 comes into force, its jurisdiction will be more constrained. Then it will be looking again only at the decision that "the person is not qualified to receive the support for which he applied." Currently, that is the narrower basis on which a decision in relation to an application under s.95 can be challenged – see s.103(1) of the current version. The effect of the new version of s.103 will be to restrict appeals against s.4 decisions in the same way.

The SSHD's evolving policy regarding applications for accommodation from immigration detainees

30 Until June 2009 the SSHD's practice was to respond to an application for a bail address within a few days and to allocate accommodation which could be used by the detainee on a long-term basis if bail was granted. The difficulty was that sometimes bail would be refused. In those circumstances the allocated property would have been held in abeyance unnecessarily and, for a period at least, was not available for use by others. The SSHD concluded that this was a costly and inefficient system and had to be changed. *Ad hoc* contracts were also relatively expensive and lacked a robust scheme for ensuring that accommodation providers complied with their contractual obligations.

31 The alternative which was then introduced was for the SSHD to enter into a series of standardised contracts with some public and some private accommodation providers. Immigration detainees who applied for accommodation under s.4 were to be given an address in hostel type accommodation. This is referred to as Initial Accommodation. If the detainee was granted bail he or she could expect to live there for two weeks or so while appropriate long term accommodation ('Dispersal Accommodation') was then arranged. Since hostel accommodation could be allocated and used more flexibly this involved less waste and inefficiency. An Initial Accommodation address could, as before, be given within a few days of application. Dispersal Accommodation would be in the same geographical area as the Initial Accommodation. Arrangements were made with the First-tier Tribunal (Immigration and Asylum) Chamber for bail conditions to be varied on paper to allow for the switch to the dispersal accommodation address.

32 However, this change threw up a problem which the SSHD says was unforeseen. In hostel accommodation, the residents would be living close to each other and sharing certain facilities. The SSHD came to realise that this would not be appropriate for some detainees. They have come to be referred to as 'high risk' applicants, although that term is not used in any of the various versions of the SSHD's written policy. The SSHD then found that there was a very limited supply of the self-contained single occupancy accommodation which was regarded as suitable for 'high risk' cases. The SSHD says that this prompted two things: a risk analysis for each individual case and a degree of negotiation and persuasion with the existing contractors. The SSHD is not willing to enter into bespoke contracts for individual high risk applicants because this would be expensive and the contract management would create difficulties.

33 The result has been that for high risk cases, rather than a bail address being given within a few days of application, the process can take weeks, months and in some cases lead to an outright refusal by the SSHD to provide accommodation.

34 In January 2010 UKBA published its policy for dealing with applications under s.4 . Rather, it published part of the policy. It describes the stages through which the applicant will pass. Relevant to these proceedings are Stages 3, 4 and 5. These say:

> **"Stage 3: Assessment of eligibility and granting a section 4 bail address**
>
> On receipt of an application for a section 4 bail address, the Section 4 Bail Team Caseworker should undertake a basic check to assess eligibility. As bail address applicants are not required to prove destitution or satisfy the eligibility conditions set out under the 2005 Regulations, the only eligibility criteria that a bail applicant must satisfy for the provisional grant of a section 4 bail address is that he/she is currently in detention, and intends to apply to be released on bail under any provision of the Immigration Acts … If the applicant is assessed as being eligible for a section 4 bail address, the Section 4 Bail Team Caseworker should proceed with the section 4 bail address process.
>
> **Stage 4: Determining the nature of any criminal offence committed by the applicant**
>
> Section 4 Bail Team Caseworkers should check CID to ascertain the nature of any criminal offence committed by the applicant to ensure suitable accommodation is allocated. [reference is then made to another section of the policy which directs Caseworkers to consult the records of criminal offences, whether the applicant has a MAPPA — Multi-Agency Public Protection Arrangements — rating and whether he has a Harm Matrix.]
>
> **Stage 5: Arranging a section 4 bail address**
>
> If the applicant is assessed as being eligible for a section 4 bail address, the section 4 Bail Team Caseworker must undertake the following: (a) send a section 4 Bail Address Grant Letter to the applicant providing the address of the nearest appropriate Regional Initial Accommodation to the detention centre he/she is currently detained."

35 The unpublished parts of the policy were disclosed in the course of these proceedings. Mr Johnson made no application for them to be treated as secret in these proceedings. Immediately below Stage 4 the following was included in a box marked 'Not for disclosure

> " — If the applicant has been convicted of a serious offence, such as murder, extreme violence, or sexual offences, the process specified in this Section 4 Bail Process for arranging a section 4 bail address should not be followed. The interim process specified in Serious Offenders should be followed instead.
>
> - If the applicant has not been convicted of a serious offence such as murder, extreme violence or sexual offences, the standard process for arranging a section 4 bail address set out below should be followed."

36 Later in the policy document is another unpublished section relevant to these cases. It says:

> "The following process is an amendment to the process specified in the Section 4 Bail Process. This process provides guidance on how to process applications for bail addresses under s.4(1)(c) of the Immigration and Asylum Act 1999 from applicants who have committed serious offences, such as murder, extreme violence and sex offences. This is an interim process until a long term process is determined.
>
> **Stage 1 Applicant has been convicted of a serious criminal offence** Applicant has been identified as having committed a serious criminal offence at stage 4 Bail Process …
>
> **Stage 2 Arranging a section 4 bail address for an applicant convicted of a serious offence** Instead of providing an IA address as a provisional bail address, the Section 4 Bail Team should undertake the following:
>
> (a) Further information should be requested from the Case Owner on the nature of the offence, health and safety issues, and any other information that may affect the allocation of accommodation. The Section 4 Bail Team must assess where the applicant has any special needs that affect dispersal. This may include a need to be accommodated in a particular location/certain type of accommodation, or a need to continue receiving ongoing medical treatment. When identifying whether the supported person has any special accommodation requirements, the Section 4 Bail Team Caseworker should check whether relevant information has been entered in the section 4 bail address application form and notes on ASYS. If specific accommodation requirements have been raised, when assessing what accommodation requirements are appropriate, the Section 4 Bail Team Caseworker should refer to Dispersal Arrangements, taking into account that IA is not being used.
>
> (b) Once the above information has been obtained, appropriate section 4 bail accommodation (Not initial accommodation) should be arranged. The accommodation provider should be notified that the applicant is a bail applicant, and as a result, will only move into property if bail is granted. Sufficient information should be provided to the accommodation provider relating to the criminal offence etc for them to assign appropriate accommodation for the bail applicant [this cross refers to another, open, part of the policy which notes, 'The level of information provided should be justified and proportionate, giving the accommodation provider enough information to enable them to make an informed decision but not too much as to make any disclosure disproportionate. For example, Case Owners could inform the accommodation provider that the applicant has a conviction for serious violence, but not reveal the details of the actual conviction or length of time served.'] …".

37 The SSHD issued a new version of the policy at the beginning of October 2010. Again some parts were published; some were not. Again the SSHD disclosed the whole document (with minor and irrelevant exceptions) in these proceedings and raised no objection to it being referred to in open court.

38 In an unpublished section, caseworkers are told that if it is not possible to issue a decision on

eligibility for support under s.4(1)(c) within 8 working days of the application's receipt, an acknowledgment of receipt should be sent. In a published section, caseworkers are (properly) reminded that suitability for release on bail is not a factor that is relevant in deciding whether a person is eligible for support under s.4(1)(c) . The application for that support should be considered on the assumption that bail is granted. Another open section says,

> " **Determining the nature of any criminal offence committed** This section outlines how the Section 4 Bail Team Caseworker should identify the nature of any criminal offences or conviction recorded for an individual applying for bail accommodation under s.4(1)(c) of the Immigration and Asylum Act 1999 . When processing an application for a section 4 bail address it is important to ascertain the nature of any criminal offence committed by an applicant, to facilitate the assessment process and to ensure that suitable accommodation is allocated as appropriate."

An unpublished section then directs caseworkers to the offences held on the UKBA's records and how to find out if there is a MAPPA rating or Harm Matrix for the applicant. A published part then continues:

> " **To determine whether a Section 4 Bail Accommodation Information Pro-Forma is required** Once the nature of any criminal offence committed has been confirmed, the Section 4 Caseworker should ensure the following process is followed:
>
> Does the applicant have a criminal conviction for a violent, sexual, or serious drug offence (bar minor possession)? Or
>
> Does the applicant fall into a MAPPA category 1,2, or 3 level 2& 3? Or
>
> Is there reliable evidence that the applicant has committed a violent, sexual or serious drug offence (bar minor possession)?
>
> If no, proceed to arranging section 4 bail accommodation.
>
> If yes, or if the Section 4 Bail Team Caseworker is unable to determine the severity of a criminal offence, the Caseworker should request further information from the applicant's Criminal Casework Directorate (CCD) Case Owner, or the UKBA Case Owner to evaluate the applicant's accommodation requirements.
>
> In these circumstances, a Section 4 Bail Accommodation Information Pro-Forma (pro-forma) should immediately be sent to the applicant's Case Owner by email, requesting that they complete and return the pro-forma to the Section 4 Bail Team within 2 working days. In the event that a new risk assessment is required, the pro-forma should be returned to the Section 4 Bail Team with in 5 working days.
>
> …
>
> The purpose of the pro-forma is to provide the Section 4 Bail Team with a sufficient level of information to enable them to arrange suitable section 4 bail accommodation if appropriate.
>
> …
>
> Following identification that a pro-forma is required, the Section 4 Bail Team should forward a blank pro-forma to the applicant's Case Owner. The Case Owner should complete the pro-forma and return it by email to the Section 4 Bail Team within 2 working days or within 5 working days if a new National Offender Management Service (NOMS) risk assessment is required.
>
> If a bail address is offered, the type of bail accommodation will be dictated by the information included in this pro-forma."

39 A lengthy unpublished section then follows which enlarges on the guidance in the published

section. The Claimants submitted that it was only in the closed section that it was said that a Case Owner might conclude that neither Initial accommodation nor dispersal accommodation was appropriate. While the unpublished section says this more explicitly, as the quoted extracts from the published policy show, a Case Owner has to arrange accommodation *if appropriate* and what type of accommodation to propose *if a bail address is offered.* The Claimants also alleged that the unpublished section of the policy described the test for suitability for Initial accommodation in wider terms than the published part. Both refer to those with convictions for violent, sexual or serious drug offences and a MAPPA category 1,2 or 3 at level 2 & 3. The unpublished section says that this list is not exhaustive and Case Owners should use their judgment when assessing suitability. A later, but also unpublished, section of the policy says

> "- If the applicant has a history of damaging public/private property, if appropriate, explain why the risk of the applicant damaging his/her bail accommodation is sufficiently likely and costly that makes the refusal of section 4 accommodation reasonable.
>
> - If the applicant has a risk of self-harm/suicide, if appropriate, explain why the risk of self-harm/suicide is sufficiently high to make the use of section 4 accommodation unsuitable."

40 The Claimants submit that the change of practice since mid-2009 has led to extraordinary delays in the allocation of addresses to those who are or might be 'high risk'. Furthermore, the process is opaque. Substantial parts of the policy were unpublished at the time their applications were being considered. Applicants are not told (except sometimes informally) that they are or might be considered to be high risk. Applicants are not told unless and until the SSHD refuses to provide any accommodation why they are regarded as high risk and are not given the opportunity to persuade the SSHD that they should not be so classified.

The evidence as to delays

41 The evidence as to this falls into broadly two categories: the evidence specific to these four Claimants and the generic evidence.

42 My account of each Claimant has already set out the first category. In summary, the position was as follows:

> - Rashid applied for a bail address on 12th November 2009. The SSHD refused this application on 30th June — about 7 ½ months later. He then appealed and on 26th July 2010 the SEC allowed the appeal. The SSHD provided him with a bail address two days later.
>
> - Draga applied for a bail address on 25th November 2009. He was given one on 28th June 2010 — a little over 7 months later.
>
> - Razai applied for a bail address on 2nd February 2010 and was given one on 28th June 2010 – a little under 5 months later.
>
> - K applied for an address on 6th July 2010. The SSHD refused the application on 26th August 2010 about 1 ½ months later. He appealed to the SEC which allowed his appeal on 13th September 2010. The SSHD accepts that she must find him accommodation but had not been able to do so at the time of the hearing.

43 The generic evidence put forward by the Claimants comes from several organisations which provide support for immigration detainees. BID is one. Another is the London Detainee Support Group ('LDSG'). The Immigration Law Practitioners Association is a third. They say that in their experience, if Initial Accommodation is not offered within a few days of application, delays of the kind experienced by Rashid and Draga are very common if not almost universal. Since the summer of 2010 some applicants who apparently were regarded as high risk have now been reassessed and have been given Initial Accommodation. LDSG, who make about 30 applications a month for bail addresses say that since 24th December 2009 no addresses have been given to their clients who were (or were presumably) regarded as high risk except where there had been a

successful High Court challenge to the lawfulness of their detention or where solicitors threatened legal proceedings. As of 1st October 2010, 16 of LDSG's 53 clients who (they assume) had been classified as high risk had been waiting for a bail address for more than 20 weeks. BID does not itself represent clients in their applications for a section 4 address, but they are aware that a number of the immigration detainees whom they encounter are inhibited from applying for a bail because they have had no response to a request for such accommodation. They say they are unaware of applicants (other than three of the present Claimants) who have presumably remained in the high risk category who have been allocated dispersal accommodation. It is common ground that the only applicants for section 4 accommodation who have reached the stage of a formal refusal by the SSHD are Rashid and K. Some of the evidence put forward by the Claimants and BID referred to individual cases. I regarded this as unhelpful. The Claimants can, of course, refer to the individual facts of their own cases. Generic evidence also helped to set those facts in context, but to allow debate about the individual circumstances of other cases (which were not always fully identified) would risk multiplying the evidence in a way that was disproportionate.

44 The SSHD accepts that the process of arranging suitable Dispersal Accommodation for some high risk cases has been protracted. As the Claimants have noted, since about the summer of 2010 there has been a review of the risk assessments of some of the applicants leading, on occasions, to a revised view that Initial Accommodation in their cases was appropriate. If the risk assessment remains the same, the obstacle of the limited supply of suitable dispersal accommodation also remains. The SSHD is unwilling to negotiate ad hoc contracts on cost and efficiency grounds. In principle, new standardised contracts could be negotiated, but to cater for residents of this type would lead accommodation providers to expect a significantly higher return and the SSHD does not consider that this would feasible.

The decisions to refuse to provide accommodation to Rashid and K and the decisions of the First-tier Tribunal (Asylum Support) in their cases

45 Mr Rashid was refused accommodation in the SSHD's letter of 30th June 2010. This was explained as a consequence of his criminal record and history of aggressive and volatile behaviour. The SSHD relied also on an attempt by Mr Rashid to commit suicide at UKBA offices by covering himself in petrol and setting himself on fire. The SSHD said that there were records of other attempts at committing suicide. She relied as well on his non-compliance with immigration reporting requirements and on disciplinary charges against him while in detention (the charge of intent to set fire to the prison had been dismissed but possession of an unauthorised item and another of assault on an inmate were proved). All of this had led the SSHD to conclude that she was unable to source suitable section 4 bail accommodation that would meet his needs, the needs of other users of accommodation provided under section 4 and the general public. Because of the risk that the SSHD considered that he posed to other users of that accommodation, he could not be offered accommodation within existing facilities that were available to the SSHD under existing contracts and it would not be appropriate to enter into a new contract just for his case. The SSHD considered, but rejected, the proposition that this decision would be contrary to Mr Rashid's rights under Articles 3, 5, or 8 of the European Convention on Human Rights .

46 Mr Rashid appealed to the FTT under s.103 and the appeal was heard by the SEC. His grounds of appeal were that the SSHD's guidance had said that the only eligibility criteria were that the applicant was currently in immigration detention and intended to apply for bail. Mr Rashid satisfied those criteria and, therefore, it was said, he was entitled to accommodation.

47 The Tribunal was referred to the SSHD's policy in relation to s.4 accommodation for immigration detainees. This does not seem to have been done by taking the Tribunal to the guidance that was published in January 2010 but to an abbreviated form that was set out in a letter of 1st April 2010 to the LDSG. Notably, this had said,

> “As a general guide we would not provide IA as a bail address for offences such as serious violence or sexual offences. In these circumstances section 4 dispersal accommodation is provided as a provisional bail address should bail be granted … Bail applicants who have been convicted of serious offences will have accommodation requirements that are usually more complex than applicants that have committed and/or

> been convicted of lesser crimes … Consequently, in these more complex cases, it takes more time to identify suitable bail accommodation."

48 In reaching its conclusion, the FTT said this:

> "24. Both parties may wish to consider whether the appellant has been refused section 4(1)(c) support: arguably the respondent has not refused this application but approved it subject to sourcing accommodation appropriate for someone with the appellant's history of violent behaviour.
>
> 25. In any event, I make the following findings:—
>
> (i) this Tribunal's jurisdiction is limited to the appellant's eligibility for support as defined by section 4(1)(c)
>
> (ii) that the reasonableness of UKBA's decision to source accommodation via CCD/NOMS (or any delay in this regard) is not a matter for this Tribunal but could be for the Administrative Court
>
> (iii) that the decision whether or not to grant bail is for an Immigration Judge and not for this Tribunal
>
> (iv) that the appellant satisfies the definition found at section 4(1)(c) and the respondent's guidance in cases of this nature: he is an immigration detainee who has applied for bail.
>
> 26. It is for the reason at paragraph 25(iv) above that I allow this appeal.
>
> 27. This is not meant to detract in any way from the reasonableness of the respondent's approach to the particular circumstances of the appellant's case. My decision is predicated only on the application of section 4(1)(c) and the respondent's guidance, to the facts of this case. Should the appellant be granted bail, I can see no barrier to the respondent's continuing in her approach with regard to the sourcing of appropriate accommodation for the appellant: the respondent retains her discretion under section 4 as to how she provides accommodation to successful applicants."

The FTT also made clear that its decision was not intended to influence an Immigration Judge faced with a bail application from Mr Rashid.

49 In Mr K's case, the SSHD's letter of 26th August 2010 refusing section 4 support referred to his previous convictions, his involvement as one of the ring leaders in a disturbance at his Immigration Removal Centre when, it was said, he had incited others not to lock up and was himself involved with causing damage to property. Similar general comments were made as in the letter relating to Mr Rashid.

50 The Tribunal referred to the decision in Mr Rashid's case. Here, too, the FTT found that Mr K satisfied the statutory eligibility criteria and came within the SSHD's guidance. The Tribunal said that that was enough for the appeal to be allowed, which it was.

Comments on the Role of the FTT (Asylum Support) in appeals against refusals to provide bail addresses to immigration detainees

The parties' submissions

51 The Claimants observed that the right of appeal to the FTT, if its role was limited to deciding whether an appellant satisfied the statutory test of eligibility for support under s.4(1)(c) , was of little use. Since the criteria were broad (in immigration detention and intending to apply for bail), an appeal was bound to succeed in every case and the appeal served no purpose.

52 The SSHD responded that the FTT had taken too narrow a view of its task. If the Tribunal was not going to dismiss the appeal it could either require the SSHD to reconsider the matter or could substitute its own decision. The second alternative, in particular, allowed the Tribunal to retake

the decision for itself. In doing so, it had the SSHD's detailed refusal letter before it. If it considered on all the evidence and in the light of all the circumstances that support should be provided it could say so. But this then called for a more nuanced approach than the Tribunal had adopted in these two cases. In any case, it simply was not correct to submit that Tribunal's decisions had served no purpose. On the contrary, it had led the SSHD to change her position in relation to both Mr Rashid's and Mr Khantuni's application for accommodation.

53 The Claimants replied by saying that the SSHD was now challenging the Tribunal's approach, but she had not appealed its decision in either Mr Rashid's or Mr K's case.

Discussion

54 I remind myself that these two decisions of the FTT are not the immediate subject of the present proceedings. By section 103(5) the decision of the Tribunal is final. That would preclude an appeal to the Upper Tribunal but, on ordinary principles, it would not oust the jurisdiction of this court to grant judicial review if the Tribunal had misinterpreted its jurisdiction. The SSHD did not seek to take that course in relation to either decision. Instead she has provided a bail address for Mr Rashid and accepted that she must do so for Mr K. Nonetheless, although these decisions are not directly in issue, as can be seen, the parties sought to deploy their critique of them as parts of their arguments in the case.

55 I first observe that there is only a right of appeal if the SSHD “decides not to provide accommodation”. If there is no such refusal, there is no right of appeal and the FTT does not have jurisdiction. As can be seen, in Mr Rashid's case, the Tribunal wondered whether the Appellant had been refused section 4(1)(c) support. It went on, “In any event … ” to make findings and allow the appeal. But where a Tribunal's jurisdiction is dependent on a factual situation, it cannot duck the issue of whether that situation prevails or not. As it happens, in Mr Rashid's case, in my view the letter from the SSHD of 30th June was unambiguous. It is headed “Refusal of section 4 support”. The second sentence begins “After careful consideration I have made a decision on behalf of the Secretary of State that you are not entitled to section 4 support.” The remainder of the letter is wholly consistent with this being a decision not to provide support.

56 I make this point because the right of appeal to the FTT is available only in cases where the SSHD has reached a final decision that support will not be provided. There is no appeal where the SSHD is only experiencing difficulties in sourcing appropriate accommodation but has not taken a final decision to refuse support. In other words, section 103 does not give a right of appeal if all that the SSHD has decided is that she will not provide support *now* . The Claimants emphasise how unusual it is for the SSHD to make an outright refusal. Indeed, the evidence from the SSHD confirms that it has only been done twice: in the cases of Mr Rashid and Mr K.

57 If the FTT does have jurisdiction to consider the appeal, I respectfully disagree with the comment in the decision in Mr Rashid's case (and adopted by the Tribunal in Mr K's) that “the Tribunal's jurisdiction is limited to the appellant's eligibility for support as defined in section 4(1)(c) .” That *will be* the case when the changes to be made to s.103 of the 1999 Act by s.53 of the 2002 Act and s.10 of the 2004 Act come into force. Until then, however, the Tribunal has the wider power for which the SSHD contends.

58 Mr Armstrong and Mr Chelvan submitted that the SEC was not the best forum in which to litigate issues of risk posed by the applicant. The SEC lacked experience of dealing with these matters and there may be difficulties in obtaining legal aid for appellants in that forum. By contrast, the Immigration Judges of the IAC were well used to bail applications and the risk assessments which they required. It would avoid duplication if they could deal compendiously with the issues of whether bail should be granted in principle and whether the SSHD should be required to provide accommodation. All of this is very interesting and may feed into discussions in other places as to whether Immigration Judges should be more willing to entertain applications for bail in advance of a bail address being obtained. There might be advantages in amending the First-tier Tribunal and Upper Tribunal (Chambers) Order so that an appeal against the SSHD's decision not to provide accommodation under s.4(1)(c) of the 1999 Act is allocated to the IAC rather than the SEC. In the meantime, the position is not as inflexible as appeared at the hearing. As I have said, the President of the SEC can allocate a case to a different Chamber with the consent of the President of the Chamber concerned. That power existed in the summer of 2010 (see the 2008 Chambers Order Article 11) and will be preserved in the replacement Order which

will come into force from 29th November 2010 (see the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 SI 2010 No. 2655 Article 15). No-one asked the President to exercise that power in the present cases.

59 In deciding whether to exercise the power to substitute its own decision, the Tribunal can, of course, take into account the policy which the SSHD says that he or she is going to apply. It is understandable that when presented with the letter to LDSG of 1st April 2010 the tribunal thought that the SSHD's policy was, in effect, never to say never to applicants. Indeed, that is the impression which is given by the January 2010 version of the policy as published. That would be something for the FTT to take into account, but the Tribunal would also be obliged to consider the matters which were set out in the SSHD's letters of refusal. The SSHD's policy or guidance does not have the status, for instance, of the Immigration Rules whereby an Immigration Judge must allow an appeal if the decision under challenge was not in accordance with the Rules.

60 Finally, at the conclusion of the appeal, it would be helpful if the FTT said in terms which of the three statutory alternatives it was adopting: dismiss the appeal, direct the SSHD to reconsider or substitute its own decision and, if the latter what its own decision is. In the cases of Mr Rashid and Mr K, it simply said that it was allowing the appeal. Clearly it had not chosen the first option. It probably was not merely requiring the SSHD to reconsider her decision, but, particularly in view of paragraph 27 of the decision in Mr Rashid's case, it is not entirely clear what decision of its own it was substituting. The parties should not have to infer the outcome of an appeal. The Tribunal should state its decision in unequivocal terms.

Is the existence of a right of appeal to the FTT a good reason why the Court should decline to intervene?

61 Ultimately, if the SSHD refuses to provide accommodation there will be a right of appeal to the FTT. Does the existence of this alternative remedy mean, as Mr Johnson submitted, that the Court should decline to grant judicial review?

62 In my judgment, the Claimants were correct in their response. The right of appeal only arises if the SSHD takes the positive decision that accommodation will not be provided. She (or he) has rarely done that. The right of appeal, as I have just emphasised, does not arise unless and until such a decision has been made. Secondly, even where there is ultimately a refusal, the FTT cannot address the complaints of delay and unfairness in dealing with the applications for accommodation which the Claimants now make. In my judgment, therefore, the right of appeal is not an alternative remedy which should preclude the Court considering the present applications for judicial review.

63 The SSHD takes a more specific point in Mr Razai's case. The SSHD comments that on his evidence his representatives were told orally on 8th February 2010 that his application was being refused. That would have allowed him to appeal immediately to the FTT. Mr Armstrong replies that, in the absence of a written refusal, an appeal would have been impossible. He points out that the standard form Notice of Appeal refers to Guidance Notes for further information on completing the form. Paragraph 2 of the Guidance Notes says, “You MUST enclose a copy of the UKBA decision letter, or your appeal may be treated as invalid.” Mr Johnson responds that the legislation does not require a notice of appeal to be accompanied by a written refusal and the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 SI 2008 No. 2685 r.22(4) says only that the appellant must provide with the Notice of Appeal “a copy of any written record of the decision being challenged.” The reasonable inference, says Mr Johnson, is that if there is no written record it cannot and does not have to be provided. Mr Johnson may well be right about this. If that is so, and had the FTT refused to accept a Notice of Appeal without a written decision, Mr Razai may have been able to compel it to do so.

64 I would not decline to consider the present application on these grounds. The existence of an alternative remedy is only a good reason for refusing judicial review if it would have been reasonable for the Claimant to have had recourse to it. Here the Guidance Notes were in categorical terms. If, as was likely to be the case, the FTT refused to entertain the appeal, a legal challenge would have been necessary. I also bear in mind that this challenge would be yet one stage further removed from Mr Razai's ultimate objective which was to obtain his release on bail. A further reason for not accepting Mr Johnson's argument is that this objection to Mr Razai's claim was first made in the SSHD's skeleton argument, a few days before the present hearing. It

did not feature in the Treasury Solicitor's response to the letter before claim, nor in the SSHD's summary or detailed grounds of defence. Those omissions are not necessarily determinative but they add weight to my conclusion that Mr Razai's failure to have recourse to this alternative remedy should not preclude me determining his present claim for judicial review.

Should the Court decline to deal with the applications on the grounds that they are now academic?

65 Mr Johnson argues that the claims are now academic. The SSHD either has, or has agreed, to provide accommodation to each of the Claimants. The SSHD has explained the history of the policy which has, in any case, been amended and published since the Claimants' applications were considered. It is not appropriate to use these proceedings to seek to mount a challenge to the new policy which was not applied to the present Claimants. Mr Razai has separate proceedings challenging the lawfulness of his detention. Any issues relevant to that claim should be resolved in those proceedings.

66 The Claimants accept that the mandatory relief which they sought in the original claim forms is now unnecessary. However, they argue that accommodation has only been provided or promised in at least two of these cases because of the present proceedings. The problems which these 4 cases illustrate are systemic. They say that this is borne out by their evidence. It is also supported by the permission which was granted to BID to intervene in the present proceedings (after the individual Claimants had either been granted or promised accommodation) and because other judicial review claims have been stayed pending a decision in this case. Although there were some amendments to the policy in October 2010, some of the previous problems persist. Thus, not all of the October version was published and the SSHD's evidence shows that delays in providing accommodation for high risk detainees continue. In addition, the Claimants would say, the problems with the unfairness of the system also remain.

67 The Claim Forms originally sought declarations and damages on the grounds that the Claimants' rights under Articles 5 and 6 of the ECHR had been violated. Save to a limited extent in the case of Mr Razai (as I shall explain in due course) these arguments were not pressed.

68 For the reasons given by the Claimants I have concluded that I should not decline to consider the applications on the grounds that they have become academic. The resolution of their individual applications may well be material as and when it comes to the question of the appropriate remedy. However, their cases do illustrate generic issues which, the Claimants say, demonstrate the unlawfulness of the SSHD's policy and these can, at least to some extent, still be appropriately addressed. If this occasion is not taken to consider them, there is a risk of further delay and potential injustice before another case can reach a final hearing. I note that R (Salih) v Secretary of State for the Home Department [2003] EWHC 2273 (Admin) is another example of a case where the Court considered the lawfulness of the SSHD's general policy even though the individual claimants had already achieved the accommodation and support which they had wanted when the proceedings commenced – see Salih at [2].

Was the failure to publish the full policy of the SSHD regarding bail accommodation unlawful?

69 The Claimants contend that the incomplete publication of the policy was unlawful because applicants did not know the criteria against which their applications would be measured or what would turn their case from one in which Initial Accommodation would be offered within a few days to one which might take weeks or months before Dispersal Accommodation was offered. Furthermore, nothing in the published policy (at least prior to the October 2010 version) indicated that bail accommodation might be refused outright.

70 Mr Johnson responds that the SSHD is under no legal obligation to publish her policy. He relies on the decision of the *Court of Appeal in R (WL (Congo)) v SSHD [2010] EWCA Civ 111* . Permission to appeal to the Supreme Court has been granted against that decision and the hearing was due to take place a month after the hearing in the present cases, but unless and until the Supreme Court rules to the contrary, I must take the Court of Appeal's judgment as representing the law.

71 WL (Congo) concerned a policy operated by the Home Office in connection with foreign national prisoners who had completed the custodial part of the sentence imposed by the criminal court but who were liable to be subjected to immigration detention while the SSHD considered whether to deport or remove them. The published policy said that there should be a presumption that detention would not be used. An unpublished policy which was in operation between April 2006 and September 2008 was to the contrary. Quite what was the effect of the unpublished policy was in dispute. At first instance Davis J. found that it operated as a presumption in favour of detention (rather than a blanket policy requiring detention in every case) – see *R (Abdi) v SSHD [2008] EWHC 3166 (Admin)* . He made two declarations. First, that the unpublished policy was unlawful because it conflicted with Immigration Act 1971 Schedule 3 paragraph 2 . Second, that it was unlawful for the SSHD to operate the policy introduced in April 2006 because "it was not sufficiently published or accessible until its publication on 9 September 2008". He dismissed the Claimants' damages claims because he concluded that they would anyway have been detained even if the published policy had been applied. Two of the Claimants appealed to the Court of Appeal against the dismissal of the claim for damages. The SSHD cross appealed against the first of the declarations. The Court of Appeal dismissed the appeal and allowed the cross appeal. Its decisions on these matters are not directly relevant. The Court's judgment, however, also reviewed the second declaration which Davis J. had made and it ordered that his second declaration should be amended so that it read that the policy which operated from April 2006 was unlawful "for the reasons set out in the judgment of the Court of Appeal."

72 In those reasons, the Court said at [70] that there was no general rule that a policy had to be published "even one relating to as sensitive a subject as detention" and the failure to publish could not "for that reason alone" make the policy unlawful. The appellants in that case had relied (see [71]) on comments by Sedley LJ in R (*Begbie) v Secretary of State for Education and Employment [2000] 1 WLR 1115* at 1132 that there were "cogent objections" to the operation of undisclosed policies relating to individual entitlements and by Stanley Burnton J to the "constitutional imperative" that statute law be made known which required "the government should not withhold information about its policy relating to the exercise of a power conferred by statute" (R (Salih) v SSHD [2003] EWHC 2273 (Admin) [52]). However, in WL (Congo) the Court of Appeal , in a judgment given by Stanley Burnton LJ, said at [72] that Sedley LJ's statements concerned good administrative practice and Stanley Burnton J's comments had been made in the quite different context of the Secretary of State's decision to withhold from the individuals concerned an internal policy relating to a statutory scheme designed for their benefit. In the latter case the SSHD had deliberately withheld information about his policy for providing hard cases support to failed asylum seekers for fear that this would encourage unfounded applications — see Salih at [44].

73 In the event, the Court of Appeal in WL (Congo) differed from Davis J. It found that the unpublished policy operated as a blanket policy in favour of detention (not merely as a presumption). That policy was unlawful for two reasons: because it operated on a blanket basis and because it conflicted with the published policy. As Stanley Burnton LJ put it at [79], "the vice was not the lack of publication, but the operation of the unpublished policy in a manner inconsistent with the published policy."

74 Mr Armstrong said in his oral submissions that those in immigration detention who were contemplating asking the SSHD for accommodation would be seriously disadvantaged if they did not know the criteria which the SSHD would apply: they would not know the target at which they should be aiming. There is good sense in this. Moreover, as Sedley LJ was treated as saying in Begbie , publication of policies is good administrative practice. I confess to being puzzled as to why the SSHD thought that there was a need to keep confidential the guidance to case workers on the types of cases which would be unsuitable for Initial Accommodation. But, having said all that, for the time being at least, I consider that WL (Congo) is clear authority for Mr Johnson's proposition that the failure to publish a policy is not itself unlawful even where the policy may have a bearing on whether a person is or is not detained. Mr Armstrong sought to rely on what had been said at [70] that non-publication would not "alone" make the policy unlawful. In my judgment, what Stanley Burnton LJ was doing there was anticipating the contrast which he later made between the simple fact of non-publication (which would not be unlawful) and an unpublished policy which was inconsistent with a published policy (which would or might be unlawful).

75 Mr Armstrong argues that there was an inconsistency between the published and unpublished

parts of the January 2010 version of the policy. He submits that from the published sections the reader would draw the conclusion that the only conditions of eligibility were those in s.4 of the 1999 Act (i.e. in immigration detention and applying for bail). Stage 5 of the published policy said that if an applicant was assessed as being eligible the Caseworker must send a section 4 Bail Address grant letter. Later parts of the published policy did refer to the relevance of criminal offences, a MAPPA rating and any information from a Harm Matrix, but this was in the context of ensuring that allocated accommodation was appropriate, not as a reason for refusing accommodation altogether.

76 In my judgment, this argument cannot succeed for a number of reasons. First, it fails on the facts. There is no inconsistency, because even the unpublished part of the January 2010 policy did not say that an application for accommodation from an eligible applicant might be refused outright because of risk factors. Secondly, where there is an inconsistency between the published and unpublished versions of a policy, any illegality is founded in the doctrine of legitimate expectation — see WL (Congo) at [78], but it is difficult to see what Mr Rashid or Mr K would have done differently if they had known of the possibility that the SSHD could refuse their applications for accommodation outright. Thirdly, in both their cases, the SEC has reversed the decision of the SSHD. In their cases, therefore, any cause of complaint which they might have had on this score has been cured. As the evidence of the SSHD confirms there have been no other cases where applications in similar circumstances have been refused.

77 The unpublished parts of the October 2010 policy do expressly contemplate that some high risk applicants might be refused both Initial and Dispersal Accommodation, but that policy was applied to none of these Claimants, the relevant unpublished parts of this policy have (through this judgment) now been disclosed and, even in its published version it said that the purpose of the pro forma was "to provide the Section 4 Bail Team with a sufficient level of information to enable them to arrange suitable section bail accommodation *if appropriate* ." The following section says, " *If a bail address is offered* , the type of accommodation will be dictated by the information included in this pro-forma", again hinting that a bail address might not be offered.

78 Accordingly, I conclude that the failure of the SSHD to publish all of the policy regarding the provision of bail accommodation was not unlawful. I add at the end of this judgment some comments prompted by post hearing submissions from the parties.

Were the Claimants treated unfairly because of the failure to tell them that they were regarded as 'high risk' and/or the basis on which that view was being taken?

79 The Claimants submit that this system operated with an unacceptable degree of unfairness. The SSHD would reach a view that an applicant for accommodation was unsuitable for Initial Accommodation but (save occasionally on an informal basis) this assessment was not communicated to the applicant. Still less was the applicant told why it had been reached. Yet the decision could have a significant impact on the applicant. Instead of being provided with a bail address within a few days of application, the applicant might have to wait weeks or months before suitable Dispersal Accommodation was identified. It was unfair to keep applicants in the dark in this way and it was unfair to deprive them of the opportunity to make submissions to the SSHD which might change her view as to whether Initial Accommodation was unsuitable or lead to her widening the range of Dispersal Accommodation which she would consider suitable.

80 These general points are elaborated in relation to the individual Claimants.

> i) Mr Razai, as summarised in paragraph 5 above, was considered unsuitable because of his misbehaviour in detention. He says that until these proceedings, he did not have an opportunity to comment on these allegations. Had they been put to him, he would have said that he did not threaten to burn down the library in the detention centre. He recalls that another detainee (whom he names) was accused of this. In other words, he says that the SSHD has simply got the wrong person in this regard. He denies that he threatened to kill an officer and says that the other incidents have been exaggerated. There is no adjudication process in immigration detention centres as there is in prison and so there were no independent findings against him. Such as they were, the matters complained of were the result of his frustration at a very lengthy period of detention and should not have led to the conclusion that he was unsuitable for Initial Accommodation.

ii) Mr Draga had a conviction for possession of heroin with intent to supply (see paragraph 6 above). For this reason he was considered unsuitable for Initial Accommodation. The summary grounds also said that this decision had been taken because of his history of aggressive behaviour. In that regard, his solicitor points to a report from his Diversity and Regimes Manager at the Detention Centre where he was held who said that he was “polite … respectful … hardworking … well liked.”

iii) Mr Rashid was thought to be unsuitable for Initial Accommodation because of his previous convictions, concerns expressed by Islington Children's Services that he might abduct his (now adopted) child and because of a number of attempts to commit suicide. His solicitor says that he was not previously aware of the concerns regarding his child and denies making any threats to abduct her.

iv) Mr K was not thought to be suitable for Initial Accommodation because of his serious history of sex offending and it was considered that any dispersal accommodation would have to take into account the need to ensure that the public (and particularly young girls) were not put at risk. Mr Armstrong says that if there had been an opportunity to make submissions, the SSHD would have been urged to be realistic and not confine the search to accommodation which would be free of all risk.

81 Mr Johnson did not dispute that it was incumbent on the SSHD to treat the Claimants fairly. As the *Court of Appeal said in R (Q) v SSHD 2003] EWCA Civ 364* at [69] the SSHD must set up a fair system and see that it operates fairly. That case concerned the provision of support to those who first claimed asylum. The Nationality Immigration and Asylum Act 2002 s.55 provides in summary that the SSHD shall not provide such support unless the person concerned claimed asylum as soon as reasonably practicable after their arrival in the UK. The Court of Appeal endorsed the view of Collins J. at first instance that the duty to act fairly there required the SSHD not only to interview applicants to give them an opportunity to show that they had satisfied this criterion, but also to give the applicant a reasonable opportunity to deal with and explain any matter that was to be relied upon against him — see [90].

82 What fairness requires is, of course, dependent on the context. In *Q* both Collins J. and the Court of Appeal considered that it was relevant that a decision on the s.55 test which was adverse to the applicant could not be appealed to a Tribunal under s.103 of the 1mmigration and Asylum Act 1999 – see s.55(10) of the 2002 Act. By contrast, Mr Johnson submits, there is a right of appeal to a Tribunal against a decision to refuse to provide bail accommodation. The SSHD's letter of refusal will give a full explanation of her reasoning and the applicant is able to challenge or test this at the hearing of the appeal.

83 All of what Mr Johnson says is correct, but the Claimants would say it comes too late if it comes at all. I agree. As I have emphasised, there is no right of appeal against a decision to delay the provision of accommodation (or to delay taking a decision whether to agree or refuse to provide accommodation). Those detainees who are knowledgeable (or who have knowledgeable representatives) may be able to infer that if they have not received an offer of Initial Accommodation within a few days of application, they are being treated as high risk cases and potentially face very substantial delays in being allocated accommodation. They may be able to guess why they have been treated in this way, but guesswork is not a satisfactory component of a fair system. Even those with a poor criminal record may be unaware that there are other matters (e.g. suicide attempts, adverse reports from Children's Services, or alleged disciplinary infractions in detention) which are also regarded as relevant to the type of accommodation which they should be offered.

84 Mr Johnson accepted that there was no reason in principle why the applicant should not be told after the pro forma had been returned that he was not going to be offered Initial Accommodation and the reasons why. He did submit that it would lengthen the process, since the applicant would have to be given an opportunity to respond and any submissions in reply would have to be considered by the Caseworker. These additional steps would also have resource implications. He submits (correctly) that it is not for the Claimants or the Court to design a better system for the SSHD. Objection can only be made successfully if the present system is

unfair.

85 In my judgment a decision, even a provisional decision, that a detainee is not suitable for an immediate offer of Initial Accommodation is of such significance that fairness does require the SSHD to tell the applicant that is what she has in mind and why. That is because of the stark difference between the time that it takes to offer Initial Accommodation as a bail address (only a few days) and the delays that can occur if Initial Accommodation is not offered (on the evidence, delays of weeks or months). Fairness also requires the SSHD to take into account any representations that are made in response. I see no good reason why this should cause significant additional delay. According to the October 2010 policy, a request for a pro forma will be prompted by a criminal conviction, a MAPPA rating or (what is understood to be) reliable evidence that the applicant has committed a violent, sexual or serious drug offence. Simultaneously with making the request of the Caseworker, the applicant can be told that (for the moment at least) he is not being offered Initial Accommodation and the reasons why (or at least the gist of the reasons). The time for him to make submissions in response can run at the same time as the period for the Caseworker to complete the pro-forma. If this reveals additional reasons why Initial Accommodation is unsuitable or leads the Caseworker to specify the criteria which ought to be applied in looking for dispersal accommodation, fairness requires that they, too, are disclosed or at least summarised for the applicant who should be invited to make submissions in response. Any additional delay which this process causes is likely to be marginal, especially when set against the delays which have been experienced in the past in finding appropriate dispersal accommodation for high risk cases. Mr Johnson's suggestion that fairness could be satisfied by disclosing the pro forma when it has been completed does not, in my view, go far enough. A letter from the Treasury Solicitor of 17th October 2010 included a table which showed that in some cases there have been very substantial delays in returning the pro forma. It does not seem to me that fairness would be satisfied if the applicant had to wait that long before being told the reasons why he was not (at least provisionally) to be offered Initial Accommodation.

86 Rule 9(1) of the Detention Centre Rules 2001 SI 2001 No. 238 requires that

> "Every detained person will be provided, by the Secretary of State, with written reasons for his detention at the time of his initial detention, and thereafter monthly."

After the hearing I was provided with examples of the monthly detention reviews which were provided to the Claimants in this case. Mr Johnson submitted that through these reviews the Claimants were informed broadly of the aspects of their conduct that were thought to be relevant, albeit in the context of the decision to maintain detention rather than sourcing accommodation. Mr Armstrong accepted that there was a degree of overlap, but submitted that there was no necessary coincidence between the reasons for holding a person in detention and the reasons why, if bail was to be granted, he was or might be regarded as a 'high risk' case for whom Initial Accommodation was unsuitable. Clarity was particularly important since many immigration detainees who sought accommodation and bail were unrepresented.

87 On this matter, I agree with Mr Armstrong. In *R (SK Zimbabwe) v SSHD [2009] 1 WLR 1527* at [46] Keene LJ said that the reason behind r.9(1) was self-evident: the detainee needed to be in a position to know whether he can properly challenge the Secretary of State's decision to detain him in the courts by way of an application for habeas corpus or judicial review or whether he can apply for bail on a meaningful basis. The reason why the detainee needs to know why he is regarded as a high risk case, on the other hand, is so that he can make submissions to the contrary to the SSHD or, I suppose, to decide whether there are grounds to challenge the legality of the decision not to treat him as suitable for Initial Accommodation. I also agree that the inexactness of the match between reasons for detaining the person concerned and the reasons why Initial Accommodation is thought to be unsuitable and the desirability of clarity mean that the detention reviews are no substitute for the information which I consider the SSHD is lawfully obliged to provide to an applicant who is not thought to be suitable for Initial Accommodation.

88 I note, incidentally, that the remainder of rule 9 provides:

> "(2) The Secretary of State shall, within a reasonable time following any request to do so by a detained person, provide that person with an update on the progress of any

relevant matter relating to him.

(3) For the purposes of paragraph (2) “relevant matter” means any of the following—

(a) a claim for asylum;

(b) an application for, or for the variation of, leave to enter or remain in the United Kingdom;

(c) an application for British nationality;

(d) a claim for a right of admission into the United Kingdom under a provision of Community law;

(e) a claim for a right of residence in the United Kingdom under a provision of Community law;

(f) the proposed removal or deportation of the detained person from the United Kingdom;

(g) an application for bail under the Immigration Acts or under the Special Immigration Appeals Commission Act 1997 ;

(h) an appeal against, or an application for judicial review in relation to, any decision taken in connection with a matter referred to in paragraphs (a) to (g).”

Mr Johnson did not seek to argue that, because r.9(3) made no mention of the progress of an application for bail accommodation, the SSHD could be under no duty to provide this information. He was right not to do so. It would take much clearer language to exclude an obligation to act fairly, particularly in relation to a matter which potentially bore on the length of detention.

89 Had the Claimants in these cases been told why they were regarded as unsuitable for Initial Accommodation then, as I have indicated, there are submissions which they would have wished to make. It would, of course, have been for the SSHD to consider the responses and decide whether they altered her view that Initial Accommodation was unsuitable or the type of Dispersal Accommodation (if any) which would have been appropriate should have been enlarged. All I can say at this stage is that those submissions are not so powerful, that if they had been seen by the SSHD, they would have compelled the conclusion that Initial Accommodation had to be offered or that the SSHD would have been obliged to widen her criteria for suitable Dispersal Accommodation.

Has there been unlawful delay in offering accommodation to any of these Claimants?

90 Mr Armstrong submitted that the delays in dealing with the applications from these Claimants was unlawful. He argued that they were, in part the product of the unfairness which I have previously discussed. The risk assessment process was taking too long and was unnecessarily cautious, as could be seen by the fact that Mr Rashid was granted a bail address very quickly after his appeal succeeded. More generally, it could be seen that the SSHD was applying a policy which set the standard of safety at too high a level as could be seen by some of the comments about unsuitability of accommodation for Mr K because schools were in the area. While the Court could take account of the resource constraints under which the SSHD had to operate, the SSHD should have been readier to renegotiate contracts, particularly if, as seemed to be the case, the SSHD had underestimated the need for self-contained accommodation. The time spent in pursuing the appeals to the SEC was wasted because the favourable outcome for Mr Rashid and Mr K was obvious. Mr Chelvan submitted that the SSHD's policy since June 2009

was open to a more fundamental objection. Those who were characterised as high risk were often foreign national prisoners who had come to the end of their custodial terms and who would (absent immigration detention) be entitled to be released on licence. Through the terms of their licences and the supervision of the National Offender Management Service there was already the means of controlling their risk. It was not necessary for the SSHD to duplicate those measures through decisions about section 4(1)(c) accommodation.

91 Mr Johnson reminded me that unlawfulness had to be distinguished from maladministration or muddle. He referred to what Carnwath LJ had said in *R (S) v SSHD [2007] EWCA Civ 546* at [41] and which had been quoted and adopted by Stanley Burnton LJ in WL Congo at [56]:

> "The court's proper sphere is illegality, not maladministration. If the earlier decisions were unlawful, it matters little whether that was the result of bad faith, bad luck or sheer muddle. It is the unlawfulness, not the cause of it, which justifies the court's intervention, and provides the basis for the remedy. Conversely, if the 200 decisions were otherwise unimpeachable in law, I find it hard to say why even 'flagrant' incompetence at an earlier stage should provide grounds for the court's (as opposed to the ombudsman's) intervention."

92 Mr Johnson submitted that the SSHD was acting responsibly in making a risk assessment. The SSHD had to take account of potential risks to other occupants of the same accommodation and (for instance, in Mr K's case) to those in the immediate neighbourhood. The impact of the change in 2009 had not, as I have said above, been at first appreciated. When it was, steps were taken to see whether some of the assessments had been too cautious and this had led to some cases, previously characterised as high risk, being offered Initial Accommodation. The SSHD's evidence had explained why *ad hoc* arrangements had not been made for the individual high risk cases. There were plans being made for the next round of contracts to make greater provision for self-contained accommodation, but this had to be done within the department's limited budget. As Collins J. had said in *R (FH and others) v SSHD [2007] EWHC 1571 (Admin)* at [10],

> "a system of applying resources which is not unreasonable and which is fairly and consistently applied can be relied on to show that delays are not to be regarded as unreasonable or unlawful."

93 Mr Johnson did not accept that the time that Mr Rashid and Mr K had spent in pursuing their appeals to the FTT (Asylum Support) was wasted. On the contrary, it had led in both their cases to the SSHD reversing her decision not to provide them with accommodation.

94 More particularly, Mr Johnson submitted that it was not possible for the Court to make a ruling about delay in general terms and divorced from the circumstances of the individual cases. As to these, he argued:

> i) Mr Rashid had been refused bail even after accommodation had been made available. Thus, if there had been any delay in his case it had not had any material impact.
>
> ii) Mr Draga had been offered accommodation in June 2010, but he did not then apply for bail. In his case as well, the delay in providing the address had therefore not had any material effect.
>
> iii) A decision was made in Mr K's case 7 weeks after the application for accommodation was made. Especially, in view of the particular difficulties which his case, that could not be regarded as unlawful delay.
>
> iv) There had been a substantial period between Mr Razai's application and the offer of accommodation, but this followed reasonably quickly (28th June 2010) after an Immigration Judge had decided that bail should be granted in principle (12th May 2010).

95 Furthermore, setting Mr Razai's case aside, nothing would be achieved by a declaration regarding delay in any of these cases. In all of them accommodation had either been provided or agreed in principle. Although the Amended Claim Form had argued that the Claimants' rights under Articles 5 and 6 of the European Human Rights Convention had been violated and that damages should be awarded, those claims were not pursued. The exception was Mr Razai. He had separate judicial review proceedings in which he was claiming unlawful detention. In that claim, he alleged that his detention had become unlawful even before he said the SSHD should have provided an accommodation address. As Mr Armstrong acknowledged, if that claim succeeded it would render moot his complaint about the delay in supplying an accommodation address. Mr Armstrong had argued that I should nonetheless make findings of illegality under domestic law as a result of that delay which Mr Razai could then deploy, if necessary, as the foundation for a fall back argument that detention at least thereafter was unlawful. Mr Johnson submitted that it would not be right to divide up the adjudication on Mr Razai's complaints about unlawful detention in this way.

96 I have already given my views as to the unfairness in the system operated by the SSHD up to now. I have not been persuaded that this unfairness was the (or even a) reason for delay in providing accommodation addresses to any of these Claimants. As I said above, while in fairness the Claimants should have had the opportunity to make representations, these are not situations where, if those representations had been made at the time, they would necessarily have led to the speedy provision of accommodation. Nor do I accept Mr Armstrong's submission that the time taken up with the appeal to the FTT was wasted. As it happened, that did lead the SSHD to reverse her decision not to provide accommodation. Mr Rashid and Mr K were fortunate in that the FTT saw its task as restricted to deciding whether they were eligible for support. If indeed the FTT's jurisdiction was limited in that way, Mr Armstrong might have had a point that such a predictable outcome should have been reached far more quickly. However, for the reasons which I have given, I do not consider that the FTT's power was so limited. That was an error on the part of the FTT, but it was an error that favoured Mr Rashid and Mr K. It does not help them in my consideration of whether delay in providing accommodation to them was unlawful. The SSHD has accepted that in theory one off contracts could be negotiated to provide bail addresses for all high risk cases, but this would be disproportionately expensive and burdensome to manage. This is an example of the type of situation envisaged by Collins J. in FH where the system of applying resources is not unreasonable and is applied fairly and consistently.

97 In Mr K's case, I reject the argument that the delay in the SSHD reaching a decision was unlawful. I accept that his history of offending meant that the SSHD was entitled to take particular care before offering accommodation. In the circumstances of his case, it was not unlawful for the SSHD to take 7 weeks before coming to the conclusion that she could not do so. Now that the FTT has reversed that decision, the SSHD has agreed that she will respect the Tribunal's ruling. The decision to withdraw the initial offer of accommodation because it was close to two schools was not unreasonable.

98 So far as Mr Razai is concerned, I agree with Mr Johnson that it would not be right for me to try to make findings for the purpose of them being deployed in the separate proceedings which he is bringing to challenge the legality of his detention. It should be for the Judge seized with the task of trying that claim to make all necessary findings of fact and law for its resolution.

99 I also agree with Mr Johnson that a declaration in favour of Mr Rashid and Mr Draga (even if otherwise justified) would serve no purpose and, for that reason, should not be considered. I say ‘even if otherwise justified’ because, while it is not necessary for me to make a definitive ruling, there is force in the more general submissions which Mr Johnson made. This was a policy in evolution. Its impact on high risk detainees had not been foreseen, but, when identified, some steps were taken to address it. Notably, in the summer of 2010, there was a reappraisal of some of the cases which had previously been identified as requiring self-contained accommodation and offers of Initial Accommodation were made instead. Steps are being taken to expand the amount of self-contained accommodation that is available. But, as the Claimants accept, the amount of available resources, is a real constraint which the Court cannot ignore. It would seem that the completion of some pro formas is taking very much longer than the policy itself says is appropriate. The reasons for this are not very clear, but, here too, the SSHD appears to be taking steps to deal with the issue. In any case, as Carnwarth LJ emphasised, maladministration and muddle have to be distinguished from illegality.

100 I reject Mr Chelvan's more fundamental attack on the SSHD's policy as an unnecessary

duplication of measures already adequately catered for by NOMS. By taking positive action in providing accommodation the SSHD could properly have regard to the effect of this on others who would share that accommodation, property owners and others in the vicinity. It is not necessary to decide whether the SSHD would owe them a duty of care in tort. It is sufficient to say that their interests were matters to which she could properly have regard and it was not irrational for her to consider that they could not be adequately protected by the conditions of any licences or the measures adopted by other agencies. As it happens all four Claimants are examples of foreign national prisoners in immigration detention who have completed their prison sentences entirely. If they were granted bail, they would not then be on licence.

Discrimination

101 In its skeleton argument BID argued that the policy operated by the SSHD discriminated on grounds of race or nationality. It was argued that the delays in providing accommodation addresses for foreign national prisoners who were in immigration detention were far longer than was the case for high risk prisoners who were serving sentences imposed by the criminal courts but who were eligible to be released on licence and to be accommodated.

102 Mr Johnson made a procedural and a substantive response.

103 I will take first the procedural objection. Mr Johnson argued that it was not open to BID as an intervener to argue a new ground of challenge which was not one that was taken by the Claimants. Had BID wished to challenge the lawfulness of the policy on this discrete ground it could itself have issued proceedings for judicial review. Furthermore, BID's skeleton argument had been delivered only 1 week before the hearing.

104 Mr Chelvan responded that BID had been authorised by Ouseley J. to make written representations and submit evidence. It was not precluded by those terms from raising a new ground of challenge. It had served its skeleton in accordance with the timetable which Ouseley J. had set.

105 BID's application to intervene was made by way of a letter dated 13th September 2010 from its solicitors, Allen and Overy. That had explained,

> “Should permission to intervene be granted, BID will submit that the Defendant's policy is arbitrary, irrational and unfair, resulting in continued detention and an ongoing violation of Article 5 of the European Convention on Human Rights . In particular, BID would seek to assist the Court by addressing legal and policy factors from a wider perspective than may be possible in the case of an individual claimant, and by highlighting (where useful) BID's own evidence concerning the application and effect of the Defendant's unpublished policy.”

There was no mention in that letter of its intention to raise a discrimination argument. The Claimants consented to BID's application. The Treasury Solicitor was content to leave the matter to the Court. Had BID decided by the time of its application that it wished to raise a discrimination argument, it should have said so in its letter. In that case, the Treasury Solicitor's approach may have been different and the Court could have resolved whether this ground could be argued at the same time as it decided the application to intervene. Of course, BID may not have reached this decision until later. What should the position be now?

106 A Claimant for judicial review must obtain permission from the Court and, permission, if granted, is given by reference to the grounds of challenge which are set out in the Claim Form. The court's permission is required if a claimant seeks to rely on grounds other than those for which he has been given permission to proceed – see CPR r.54.15 . BID was given permission to intervene under r.54.17 under which “Any person may apply for permission (a) to file evidence; or (b) to make representations at the hearing of the judicial review.” Interventions can be extremely valuable, particularly in public law matters. I see no reason why interveners should not, where appropriate, raise new grounds which (if well founded) would impugn the lawfulness of the decision under challenge. After all the Court strives to reach a legally correct conclusion and it is all to the good if an intervener can prevent it falling into the error of upholding a decision as sound if, for some reason that the Claimant has not taken, it is flawed. However, if a Claimant

needs the Court's permission to argue new grounds, an intervener can have no greater right to do so absent the Court's leave. Accordingly, I conclude that BID needs my permission to argue the discrimination point.

107 In deciding whether to grant permission a proper consideration is whether it would cause prejudice to any of the parties. Although Mr Johnson complained that the point had emerged only late in the day, he was able to put forward arguments on the SSHD's behalf as to why the argument should be rejected in substance. That is not to say that he may not have wished to supplement these with further evidence and argument if he had had more time to do so.

108 A further consideration in deciding if permission should be granted is whether the new ground is reasonably arguable. After all, a Claimant will only be granted permission to apply for judicial review in the first place on grounds that meet this test. A Claimant who wished to rely on an additional ground ought logically to have to show that the new ground likewise satisfies this test. Again, I see no reason why the position should be different if the new ground is advanced by an intervener.

109 That brings me to Mr Johnson's substantive response. He argues the SSHD's power to provide accommodation can only arise in the case of foreign nationals. It is only they who can be held in immigration detention. It is only foreign nationals, therefore, who can apply for accommodation under s.4(1)(c) of the 1999 Act. There is no category of British Citizens in a comparable position. He observes that Davis J. rejected a similar argument that the SSHD's undisclosed policy in relation to the detention of foreign national prisoners meant that they (unlike British Citizen prisoners who completed their custodial terms) faced a discriminatory risk of detention – R (Abdi) v SSHD at [127]. This aspect of his judgment was not challenged when the case was considered by the Court of Appeal under the title WL (Congo) v SSHD . Many immigration detainees were provided with bail accommodation by the SSHD. In cases where no offer had been made (or not yet made) the reason was because of the applicant's previous convictions or other features which led them to be categorised as unsuitable for Initial Accommodation or created difficulties in finding suitable Dispersal Accommodation. Race (or for that matter nationality) had nothing to do with that categorisation.

110 In my judgment this ground of challenge is not reasonably arguable and, although I heard submissions on it *de bene esse* , I will formally refuse BID permission to advance it. BID has simply not begun to show that there is a proper comparator group which has received more favourable treatment and which is distinguishable on grounds of race or nationality. Mr Chelvan advanced the possibility of prisoners eligible for release on licence who were provided with accommodation notwithstanding the risk they posed. But there was a lack of clarity as to how BID drew the boundaries of this group. There was no evidence as to its racial makeup or what arrangements were made for their accommodation. The one document to which Mr Chelvan referred was a Probation Circular PC32/2007 ‘Management of Foreign National Prisoners: Licences, Bail Hearings, Releases from Immigration Detention and Deportation.’ This said that Foreign National Prisoners who were not detained under immigration powers should be considered pre-release for management in the community in the same way as other prisoners. This hardly supported a discrimination argument. The Circular pre-dated the policy which I am considering and the assistance which it could therefore provide was very limited. Nor was there any evidence on which Mr Chelvan could begin to construct an argument that the resources made available for accommodation of immigration detainees released on bail was in some way discriminatory.

Summary and conclusion

111 I summarise my conclusions as follows:

> i) The Secretary of State for the Home Department has now either provided or agreed to provide accommodation addresses to each of these four Claimants. However, I reject the SSHD's argument that I should decline to consider these applications for judicial review at all on the basis that they are academic. The evidence shows systemic difficulties with the SSHD's policy of providing accommodation for immigration detainees who are considered to be high risk. To some extent it is still appropriate to deal with the allegations that these rendered the policy unlawful.

ii) I also reject the argument that all of the Claimants did have or would have had an alternative remedy available to them. If and when the SSHD decided not to provide accommodation, there was or would have been an appeal to the First-tier Tribunal pursuant to s.103 of the Immigration and Asylum Act 1999 . However, such a remedy is available only if the SSHD reaches the conclusion that accommodation will not be provided (as opposed to a decision or inability to provide accommodation at the present time). Furthermore, that remedy cannot address the complaints of the Claimants that the scheme operated by the SSHD was unfair and led to excessive delays.

iii) I also reject the argument that I should decline to grant any relief to Mr Razai and to which he might otherwise be entitled because his representatives were told orally that he was to be refused bail accommodation within a few days of his application and because he would then have had the alternative remedy of an appeal to the First-tier Tribunal. Since the decision was only oral, Mr Razai would not have been able to supply a copy of a written decision which, as a matter of practice, the Tribunal insisted should accompany a notice of appeal. In theory Mr Razai could have challenged the lawfulness of that practice by another application for judicial review, but this would have been a cumbersome way of achieving what he really wanted which was bail. Consequently, I would not in my discretion decline to decide his application for judicial review because he had not pursued that sequence of alternative remedies.

iv) If and when the SSHD decides not to provide accommodation for an immigration detainee under s.4(1)(c) of the Immigration and Asylum Act 1999 the person concerned has a right of appeal to the First-tier Tribunal. If he does so appeal, then

a) The appeal is presumptively allocated to the Social Entitlement Chamber of the Tribunal. However, it is possible for the appeal to be transferred to another Chamber (e.g. the Immigration and Asylum Chamber) if the Presidents of both Chambers of the FTT agree. No one raised such a possibility in the two appeals which have so far taken place but, if in any future appeal, the parties or the FTT itself thought that the IAC would be a more appropriate forum, that possibility could be considered.

b) The Tribunal can dismiss the appeal or refer the matter back to the SSHD or substitute its own decision. As and when amendments to s.103 of the Immigration and Asylum Act 1999 are brought into force, its task will be limited to deciding whether the Appellant was eligible to receive this form of support. However, at present the Tribunal's jurisdiction is wider. If it is not going to dismiss the appeal or refer the matter back to the SSHD, it will substitute its own decision. In that case, it will have to consider all relevant matters including the reasons why the SSHD took the decision that she did as well as the SSHD's policy and the representations of the parties to the appeal.

v) The two appeals which have been heard by the Tribunal so far (those of Mr Rashid and Mr K) were not a waste of time. They led to the SSHD reversing her former decisions not to provide those two with accommodation.

vi) The policy which the SSHD applied to the present Claimants was in part unpublished. It is good administrative practice for such policies to be published and I have (for the most part) been unable to understand the SSHD's reasoning behind the decision to conceal the material parts of this policy. Nonetheless, recent Court of Appeal authority determines that the policy was not unlawful for that reason. An unpublished policy which conflicts with a published policy may be unlawful, but that proposition does not assist the Claimants.

vii) The policy did operate unfairly. Because of the stark difference in the time taken to make offers to those who were considered suitable for Initial Accommodation (just a few

days) and those who were, at least provisionally, thought not to be so suitable (when an offer of accommodation might not be made for weeks or months), applicants who were (even provisionally) thought to be unsuitable should have been told that this was the case and, in at least summary form, the reasons why. Fairness required this to be done and for such applicants to be given the opportunity to make representations in response to that view and/or to any indication which the SSHD has given as to the nature of Dispersal Accommodation which was thought to be appropriate. The information provided to the Claimants in their detention reviews was not a sufficient means of fulfilling this duty.

viii) Whether there has been unlawful delay in considering applications for accommodation has to be considered on the facts of individual cases. I will not grant a declaration that any of these Claimants' applications was unlawfully delayed. That is because in the case of Mr Rashid and Mr Draga any delay was immaterial and in the case of Mr K, there was no unlawful delay. Mr Razai is pursuing separate proceedings challenging the lawfulness of his detention and it is appropriate that any findings relevant to that issue are made by the Judge trying that case.

ix) BID needs my permission to argue a new ground of challenge. It is not reasonably arguable that the SSHD's policy was unlawful on grounds of discrimination and for that reason I refuse permission for that new ground to be advanced.

Postscript

112 I circulated a draft of this judgment shortly after the oral argument had taken place in the Supreme Court in WL (Congo) . The Supreme Court had not then (and has not at the time that this judgment is to be handed down) given its judgment. The Claimants drew attention to a concession which they understood had been made in the course of submissions on behalf of the SSHD. In his submissions in response, Mr Johnson said that the concession was that

> "if a detention policy under schedule 3 of the Immigration Act 1971 is unpublished it must not 'adversely contradict any published policy which is a source of legitimate expectation for those to whom it is applied and/or a relevant consideration for those by whom it is applied' and that the policy 'should itself be published if it will inform discretionary decisions in respect of which the potential object of those decisions has a right to make representations.' However, the SSHD expressly excluded from the ambit of this concession policies that had not been finalised and were in a form of evolution (and also excluded those parts of a policy which were concerned with administrative detail). The reason that the SSHD intends to publish the material parts of the current policy is not because it is accepted that it has been unlawful to keep some of it out of the public domain up to now, but because it is recognised that once the policy is in a final state it should be published as a matter of good administrative practice. Moreover (lest it be said that legitimate expectations arise from the foregoing) it should be made clear that the policy is subject to change. The SSHD is not committing herself to maintaining the policy in its current form and it is entirely possible that when it is published it will have been varied from the form of the policy which was before the court."

113 I see some force in the Claimants' response that, even though this policy was in the process of evolution, it was, in this form applied to the present Claimants (and others who were also regarded as unsuitable for Initial Accommodation). I have also found that these were situations in which the Claimants were entitled, in fairness, to be told that the SSHD was, at least provisionally, minded to regard them as unsuitable for Initial Accommodation and the reasons why. But, if that was done, it is difficult to see what disadvantage there would have been in the policy not being published in advance. In all the circumstances and particularly in view of the fact that the Supreme Court is about to give its judgment imminently, there seemed to be no purpose in delaying this decision to allow further argument on the issue. For the time being, as I have said

above, I must continue to apply the Court of Appeal's judgment in WL (Congo) .