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Case No: CO/5330, 5333, 5335, 5336 & 5338/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2013

Before :

THE HON MR JUSTICE BURNETT

- -

Between :

THE QUEEN (on the applicant of EO, RA, CE, OE and RAN)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Paul Brown QC, Chris Buttler and Jamie Beagent (instructed by **Leigh Day**) for the **Claimants**
Tim Eicke QC and Joanne Clement (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 29, 30, 31 January and 1 February 2013

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Approved Judgment

The Hon Mr Justice Burnett:

Introduction

1. None of the five claimants whose cases were listed for hearing together has any connection with another save that each contends that he or she has been the victim of "torture" in the past. Each was placed in immigration detention pursuant to powers conferred upon the Secretary of State by Parliament through primary legislation. However, each contends that the Secretary of State failed to apply her detention policy relating to victims of torture. The failures are said to amount to breaches of public law which "bore upon and were relevant to" the decisions to continue detention. That is the formulation found in *R (Lumba) v. Secretary of State for the Home Department* [2012] AC 245. In those circumstances, the claimants say that their detention was, or became, unlawful. One claimant also alleges that the circumstances of his detention were in breach of Article 3 of the European Convention on Human Rights.

2. The focus of the claimants' attack upon the actions of the Secretary of State has been through Rules 34 and 35 of the Detention Centre Rules 2001 ("the 2001 Rules") and the policy set out in chapter 55 of the "UKBA Enforcement Instructions Guidance". The claimants also point to the "Detention Rule 35 Process Guidance" and the "Detention Service Order O3/2008" as forming part of the policy which the Secretary of State articulated and was obliged to follow.

3. The claimants are supported by Medical Justice, a charity that provides independent medical and legal advice to immigration detainees. Permission was granted in these cases on the basis that it was arguable that certain periods of detention were unlawful (indeed the Secretary of State has conceded in respect of a number of claimants that there were periods of unlawful detention) and that there are live arguments about whether, in respect of any periods of unlawful detention admitted or proved, the appropriate remedy should be limited to a declaration and nominal damages, rather than compensatory damages. That would be on the basis that the claimant concerned would anyway have been detained despite the breach of policy. In short, the task is to identify in respect of each claimant any periods of unlawful detention and specify in respect of each whether nominal or compensatory damages should be recoverable. One of the cases settled during the course of the hearing. The involvement of Medical Justice was prompted not only by its support for the claimants as individuals, but also by its belief that there is mounting evidence of a systematic failure on the part of the Secretary of State to release victims of torture from detention despite the policy being (in broad terms) that they should remain in custody only in very exceptional circumstances. Medical Justice is very critical of the way in which the policy has been operating and of the quality of medical involvement in reporting concerns about torture. The systematic breach of the policy was raised as a separate ground in the claim forms. On 25 July 2012 Ouseley J heard an oral application for permission on that matter (as well as generally in the case of RAN). He refused permission to raise the alleged systematic breach of the 2001 Rules and policies as a freestanding ground of challenge, albeit observing that the evidence would be before the court. It is before the court; and it is disturbing. However, an important consequence of his refusing permission was that the Secretary of State did not respond in any detail to the material

dealing with that issue. Mr Brown QC's skeleton argument sets out the evidence on which Medical Justice relies, but Mr Eicke QC did not respond in kind. In view of the refusal of permission there was no argument on the general issues raised by that proposed ground. In those circumstances it would be unwise to comment further on the material placed before the court in support.

4. The argument in these cases was wide-ranging, supported by extensive citation of authority. The evidence relating to each claimant is detailed. It will be convenient to begin by setting out the statutory and internal Home Office materials which, as is common ground, provide the framework for deciding the scope of the Secretary of State's power to detain. I shall then summarise what I understand to be agreed between the parties before identifying the legal issues which fall to be determined. Having discussed those legal issues I will turn to the individual circumstances of each of the remaining four cases.

The Power to Detain

5. The Secretary of State has statutory power to detain illegal entrants, overstayers, those in breach of their conditions of leave to enter the United Kingdom and those who are refused leave to enter. That power is subject to a number of implied limitations, conveniently described as the *Hardial Singh* principles (see *R v Secretary of State for the Home Department ex parte Hardial Singh* [1984] 1WLR 704). Nothing in these cases turns upon the different underlying statutory powers to detain or upon *Hardial Singh*.

6. The Secretary of State's detention policy is articulated principally through Chapter 55 of the Enforcement Instructions and Guidance. That refers to the 2001 Rules. They were made pursuant to section 153 of the Immigration and Asylum Act 1999. They are concerned with "the regulation and management of Detention Centres" and may, amongst other things, "make provision for the safety, care, activities, discipline and care of detained persons". The policy relating to detention is further explained in the Detention Rule 35 Process Guidance and, as relevant at the time of the detention of these claimants, the Detention Service Order 03/2008. That has since been superseded by the Detention Service Order 17/2012.

7. Rules 33, 34 and 35 of the 2001 Rules provide:

> **33 Medical practitioner and health care team**
>
> (1) Every detention centre shall have a medical practitioner, who shall be vocationally trained as a general practitioner and a fully registered person within the meaning of the Medical Act 1983 who holds a licence to practise.
>
> (2) Every detention centre shall have a health care team (of which the medical practitioner will be a member), which shall be responsible for the care of the physical and mental health of the detained persons at that centre.
>
> (3) Each member of the health care team shall (as far as they are qualified to do so) pay special attention to the need to recognise medical

conditions which might be found among a diverse population and the cultural sensitivity appropriate when performing his duties.

(4) The health care team shall observe all applicable professional guidelines relating to medical confidentially.

(5) Every request by a detained person to see the medical practitioner shall be recorded by the officer to whom it is made and forthwith passed to the medical practitioner or nursing staff at the detention centre.

(6) The medial practitioner may consult with other medical practitioners at his discretion.

(7) All detained persons shall be entitled to request that they are attended by a registered medical practitioner or dentist other than the medical practitioner or those consulted by him under paragraph (6), so long as –

a) The detained person will pay any expense incurred;

b) The manager is satisfied that there are reasonable grounds for the request; and

c) The attendance is in consultation with the medical practitioner.

(8) The medical practitioner shall obtain, so far as reasonably practicable, any previous medical records located in the United Kingdom relating to each detained person in the detention centre.

(9) The health care team shall ensure that all medical records relating to a detained person are forwarded as appropriate following his transfer to another detention centre or a prison or on discharge from the detention centre.

(10) All detained persons shall be entitled, if they so wish, to be examined only by a registered medical practitioner of the same sex, and the medical practitioner shall ensure that all detained persons of the opposite sex are aware of that entitlement prior to any examination.

(11) Subject to any directions given in the particular case by the Secretary of State a registered medical practitioner selected by or on behalf of a detained person who is party to legal proceedings shall be afforded reasonable facilities for examining him in connection with the proceedings.

34 Medical examination upon admission and thereafter

(1) Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered medical

practitioner in accordance with rules 33(7) or (10) within 24 hours of his admission to the detention centre.

(2) Nothing in paragraph (1) shall allow an examination to be given in any case where the detained person does not consent to it.

(3) If a detained person does not consent to an examination under paragraph (1), he shall be entitled to the examination at any subsequent time upon request.

35 Special illnesses and conditions (including torture claims)

(1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.

(2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.

(3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.

(4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.

(5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) which appear necessary for his supervision or care.

8. The material parts of the Enforcement Instructions and Guidance are as follows:

"55.1.1.General

To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with stated policy.

55.3.1. Factors influencing a decision to detain

- Does the subject have a history of torture?

55.8A. Rule 35 - Special Illnesses and Conditions

Rule 35 of the Detention Centre Rules 2001 sets out requirements for healthcare staff at removal centres in regards to:

- Any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention;
- Any detained person suspected of having suicidal intentions; and
- Any detained person for whom there are concerns that they may have been a victim of torture.

Healthcare staff are required to report such cases to the centre manager and these reports are then passed, via UKBA contact management teams in centres, to the office responsible for managing and/or reviewing the individual's detention.

The purpose of Rule 35 is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention. The information contained in the report needs to be considered in deciding whether continued detention is appropriate in each case. If it appears that the matters being considered under Rule 35 represent a significant risk to children, then it should be referred to the case owner and the Children's Champion simultaneously for advice on how to safeguard the children and promote their welfare.

Upon receipt of a Rule 35 report, caseworkers must review continued detention in light of the information in the report (see 55.8 – Detention Reviews) and respond to the centre, within two working days of receipt, using the appropriate Rule 35 pro- forma.

If the detainee has an asylum or HR claim (whether concluded or ongoing), consideration must be given to the instruction:

55.10 Persons considered unsuitable for detention

Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.

> In CCD[1] cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.
>
> The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:
>
> - Unaccompanied children and young persons under the age of 18 (but see 55.9.3 above);
> - The elderly, especially where significant or constant supervision is required which cannot be satisfactorily managed within detention;
> - Pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this (but see 55.4 above for the detention of women in the early stages of pregnancy at Yarl's Wood);
> - Those suffering from serious medical conditions which cannot be satisfactorily managed within detention;
> - Those suffering from serious mental illness which cannot be satisfactorily managed within detention (in CCD cases, please contact the specialist Mentally Disordered Offender team). In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act;
> - Those where there is independent evidence that they have been tortured;
> - People with serious disabilities which cannot be satisfactorily managed within detention;
> - Persons identified by the Competent Authorities as victims of trafficking (as set out in Chapter 9)."

9. The Detention Rule 35 Process Guidance sets out its purpose in paragraph 1.2:

> "This instruction is intended to provide instruction on mandatory actions and considerations to be taken where a report is issued under Rule 35 of the Detention Centre Rules 2001. There are no exceptions to the mandatory character of the actions and considerations."

Further aspects of this guidance include (with underlining as in the original):

> **1.3 Background**
> Under Rule 35 of the Detention Centre Rules 2001, healthcare teams at Immigration Removal Centres (IRCs) who have concerns that a detained person has a special illness or condition or may have been a victim of torture, are required to report such cases to the centre manager. These reports are then passed via the UK Border Agency teams at the IRCs, to

[1] Criminal Casework Directorate

the office responsible for managing and/or reviewing the individual's detention and to the casework unit/case owner dealing with the individual's substantive case.

Detention Service Order 03/2008 lays out the policy and actions required of contractors and Detention Services staff and officers in IRCs, but these points will be repeated for clarity.

The principal purpose of Rule 35 is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing their detention. The information contained in such reports will in every case need to be considered in deciding whether continued detention is appropriate, and may also need to be considered in relation to its possible impact on the prospects for removal. It is also important that due consideration is given to these reports in connection with considering the substantive asylum and Human Rights Act application.

Many Rule 35 reports relate to torture allegations or concerns, and so accordingly, there is a certain focus on such cases in this instruction (particular at section 3). For the purpose of this instruction an allegation or claim of torture is defined as any act of torture which occurred outside of the United Kingdom.

However, it is important to note that many Rule 35 reports relate not to torture, but to the health or suicidal intentions of detainees.

All Rule 35 reports, regardless of subtype, must be handled professionally and promptly, according to the processes laid out in this instruction.

2 Administrative and Management Process

2.1 IRC Healthcare Team

Actions and considerations:

- Compile a Rule 35 report where any of the terms of Rule 35(1) to (3) are met, ensuring that the detainee signs the consent form;
- Pass any Rule 35 report immediately to the IRC contact management team, according to the locally arranged transaction process (e.g. by hand, faxed, scanned/emailed, etc.).

2.2 IRC UK Border Agency Contact Management Team

Actions and considerations:

- Ensure that all Rule 35 reports are allocated within 24 hours of receipt
- Ensure that the Rule 35 report from the healthcare team sets out the nature of the issue such that a response is possible. If it does not, ask the healthcare team for clarification. This must happen without undue delay, within the 24 hour receipt period, pre-allocation;

- Perform relevant quality checks (that the returned response relates to any substantive information identified in the Rule 35 report and clearly shows reasons for continued detention, if applicable). Ask the case owner for the report to be re-written if necessary;
- If the detainee has been transferred to another IRC, receive the response from the case owner, and forward the report to the relevant IRC, telephoning to confirm receipt;
- Compile management information returns for the period and send for collation to the central Detention Services contact, according to the established reporting process.

2.3 Case Owner

Actions and considerations:

- Respond to Rule 35 reports no later than two days after the second day after receipt;

3 Rule 35 Reports – Responses and Detention Reviews

3.1 Rule 35 Report – Content

Rule 35 reports are not solely produced to communicate concerns that the detainee may have been tortured. They can also identify and communicate health issues and suicide risks, and all officers must be alert to this. However, it is acknowledged that reports identifying concerns about torture are the most common type.

The weight to be placed on a Rule 35 report will depend upon what the report qualitatively states, and what is already known about the applicant and his/her case.

Any particularised concerns outlined in a Rule 35 report by a medical practitioner will constitute independent evidence, which is relevant to all considerations, about especially to the published detention policy that independent evidence of torture weighs heavily against detention. However, particularised Rule 35 evidence, though independent, will not necessarily constitute evidence that a person has in fact been the victim of torture.

Rule 35 reports are not medico-legal reports, but the evidence they contain must not be simply dismissed or undue inferences drawn because of the failure of the report to address an issue in the way that a detailed medico-legal report might.

Regardless of the source or nature of the information in a Rule 35 report (for instance, whether as a medical fact, as a concern, or simply as record of a claim made by the detainee), all information must be carefully and critically considered.

3.1.1 Rule 35 Responses
Irrespective of other actions that may be required, the strict Rule 35 timescales must be met for the formal Rule 35 response and detention reviews.

3.1.2 Rule 35 Report Discloses No Information
In rare cases, a report may be received by a case owner, without any content to identify any possible concern, or even to highlight the sub-category of Rule 35 that applies (e.g. where the report indicates Rule 35(3), it is at least known that torture is a consideration that the response must address). In such cases, there can be no meaningful consideration of the detainee's welfare or the appropriateness of detention in any other circumstances.
Actions and considerations:

- Inform the IRC officer that without any indication of the nature of the concern triggering the report, the blank report cannot constitute a Rule 35 report;
- Request further information from the IRC officer, and record on CID Notes the fact of the blank report, the outcome of the telephone call and the IRC officer's name;
- Only if and when further information is received (even if brief) must the case owner raise a CID Rule 35 case type (see 2.3 Case Owner).

10. The Detention Service Order 03/2008 was also concerned with Rule 35 reports, although it was not prescriptive of how medical practitioners should perform their functions.

"DETENTION SERVICE ORDER 03/2008

Special Illnesses and Conditions (including torture claims)

Introduction

This Detention Service Order replaces DSO D1/2007 and seeks to strengthen the way in which reports of special illnesses and conditions, including allegations of torture are recorded processed and considered in order to comply with the Detention Centre Rule 35.

For the purpose of this DSO, an allegation of torture is defined as any relating to an act of torture which occurred outside of the United Kingdom.

Allegations received by the UKBA Contact Management Teams in Immigration Removal Centres should be recorded and processed as outlined below.

Purpose

The purpose of this DSO is to ensure that all staff operating in an Immigration Removal Centre are aware of the procedures for recording and dealing with reports of special illnesses and conditions, including allegations of torture and the appropriate forms.

Procedures

It will be usual for the UKBA Contact Management Team to receive reports of special illnesses and conditions from Healthcare in the Centre. However, UKBA staff should be aware that reports may be received from other contractor staff or prison officers (in the case of IRCs operated by the Prison Service).

Upon receipt of a report, it should be faxed directly to the UKBA case-working office responsible for conducting the detainee's detention review within 24 hours to allow for the decision to maintain detention to be reviewed in light of the information.

The fax should take the form of the Rule 35 pro-forma (attached at Annex A) requesting that the report be considered as part of a review of the decision to maintain detention and that the detainee and/or his/her representative has been notified that the information has been received and reviewed. The pro-forma also requests that a copy of the report is passed to the relevant asylum case owner or caseworker (who may be different from the person responsible for the detention review).

A log should be kept of forms that are sent to detention/case-working offices and the log should include a record of the receipt of the confirmation. A review should be conducted no later than 2 working days, starting on the working day after the pro-forma has been faxed, to ensure that such confirmation has been received and a review of the decision to maintain detention completed.

The caseworker's response should be reviewed by the UKBA Manager in the IRC to satisfy him/herself that the information has been considered before forwarding to the detainee.

Arrangements should additionally be made for a copy of the report and the Rule 35 pro-forma to be placed on the detainee's medical file once it has been faxed to the relevant case-working office. Equally a copy of the case-working office's response should be placed on the file once received.

Reports received from third parties outside of the Immigration Removal Centre fall outside the terms of this DSO. Such persons making allegations should be referred to the relevant case-working office."

11. The brevity of the Detention Service Order 2008 is in marked contrast to the Detention Services Order 17/2012 dated 22 October 2012. That condescends to a great deal more detail. It followed discussions with Medical Justice and others, and appears to have been much delayed in its production. It was part of the Secretary of State's response to the generic concerns about the application of the "torture policy" articulated by Medical Justice and others. Its overall impact is to direct medical practitioners to ask questions of and examine detainees in a way which is very much more likely to generate relevant information for the case workers (elsewhere in the documentation referred to as case owners) than the pre-existing and unstructured approach which hitherto obtained. It requires medical practitioners to state why they have a concern about torture and to identify any medical evidence, physical or mental, in support. It expects the medical practitioner to ask to see scars. It suggests that the medical practitioner should question the detainee about the alleged torture. It confirms that the Rule 35 report is not a medico-legal report nor is it prepared by reference to the Istanbul Protocol. However, a new pro- forma contains body maps and a large section to enable relevant clinical information to be recorded. It also provides that the Rule 35 report should be prepared and submitted by medical practitioners only. If nurses or other healthcare professionals become aware of a claim of torture, the new Order requires them to make an appointment for the detainee with a medical practitioner.

12. The Detention Rules 35 Process guidance has also been updated recently with effect from January 2013. It makes explicit that when a case worker is considering section 55.10 of the Enforcement Instructions and Guidance the word "torture" is used in the sense defined by Article 1 of the United Nations Convention Against Torture, Inhuman and Degrading Treatment or Punishment 1984 ("UNCAT"). It requires the case worker to go back to the team in the detention centre if the Rule 35 Report lacks meaningful content. It reiterates that the reports will not have been written by medical practitioners with expertise in assessing whether someone has been tortured, and that allowances should be made as a result when considering the question of independent evidence of torture.

13. Not all immigration detainees are detained in Detention Centres to which the 2001 Rules apply. Many are detained in prisons which are subject to different Rules. Rule 35 of the 2001 Rules has its analogue in Rule 21 of the Prison Rules 1999:

> **"**21**.**—(1) The medical officer or a medical practitioner such as is mentioned in rule 20(3) shall report to the governor on the case of any prisoner whose health is likely to be injuriously affected by continued imprisonment or any conditions of imprisonment. The governor shall send the report to the Secretary of State without delay, together with his own recommendations.
>
> (2) The medical officer or a medical practitioner such as is mentioned in rule 20(3) shall pay special attention to any prisoner whose mental condition appears to require it, and make any special arrangements which appear necessary for his supervision or care."

A comparison between this rule and Rule 35 of the 2001 Rules shows that the latter draws directly on the former. The prison rule makes no mention of suicide risk or

torture, although the identification of prisoners at risk of suicide and measures designed to ameliorate that risk are at the heart of policies relating to the care of prisoners. In the context of prisons and serving prisoners, there are statutory provisions which enable the Secretary of State to transfer a prisoner to a hospital (while still being 'detained') but also, in appropriate circumstances, to sanction his early release from custody.

Common ground between the parties

14. It is common ground that the broad discretionary powers contained in the statutory provisions which enable the Secretary of State to detain in immigration cases are narrowed by her policy on detention set out in Chapter 55 of the Enforcement Instructions and Guidance. She is required to abide by that policy in the absence of good reason. It is for the Court to determine the meaning of the policy: *R (Raissi) v. Home Secretary* [2008] QB 836.

15. There are conflicting authorities on whether the court should itself decide whether there has been a breach of the relevant policy (having determined its meaning) or review the legality of detention on traditional public law grounds. On the one hand *R (Anam) v. Secretary of State for the Home Department* [2010] EWCA Civ 1140 at para 77; *R(A) v. Secretary of State for the Home Department* [2007] EWCA Civ 804 at para 71; and *R (AM) v. Secretary of State for the Home Department* [2012] EWCA Civ 521 at para 21 support what Rix LJ (recording a concession made on behalf of the Secretary of State) said at para 26:

> "The decision on such questions is for the court itself, and does not depend upon on the application of the *Wednesbury* principles of review."

In each of those cases the contrary was not argued. On the other hand in *R (LE) Jamaica v. Secretary of State for the Home Department* [2012] EWCA Civ 597 at para 29 Richards LJ said that compliance with the policy limitations should be reviewed on *Wednesbury* grounds, echoing the same conclusion he had reached in *R (OM) v. Secretary of State for the Home Department* [2011] EWCA Civ 999 at para 24. The observation in *LE* was obiter, but in *OM* it formed part of the essential reasoning of the court.

16. For the purposes of these proceedings Mr Brown accepts that the court should review the legality of detention on traditional public law grounds (i.e. follow the approach of Richards LJ in *LE* and *OM*) but reserves his position to argue the point differently elsewhere should the circumstances arise. It follows that in considering the question whether something constitutes independent evidence of torture, and also the question whether there are very exceptional circumstances justifying continued detention, the court's role is to ask whether the Secretary of State was entitled on the information before her to come to the conclusion or conclusions that she did. The second aspect, whether there exist very exceptional circumstances, is one that might lead to legitimate differences of view between different people considering the same material. The first aspect, even though governed by public law principles, is in reality fairly hard-edged. Whether something is, or is not, independent evidence of torture, will less often be capable of two different answers.

17. The Secretary of State accepts that her policy has the following five components:

a) A report produced pursuant to Rule 35 must be passed by the healthcare team to the UKBA contact management team at the detention centre, who have an obligation to ensure that all such reports are allocated to a case worker within 24 hours of receipt, in accordance with the Detention Rule 35 Process.

b) The contact management team at the detention centre must "ensure that the Rule 35 report from the healthcare team sets out the nature of the issue such that a response is possible." If a response is not possible the contact management team must ask for clarification without undue delay, and within the 24 hour period allowed for allocation to a case worker: Detention Rule 35 Process.

c) The case worker must review continued detention in the light of the content of the report and respond to the contact management team within two working days of receipt, as required by paragraph 55.8A of the Enforcement Instructions and Guidance. The Detention Rule Process suggests that case workers must respond to Rule 35 reports no later than two days after the second day following receipt. The Detention Service Order requires that the response must come no later than two working days, starting on the working day after the Rule 35 form has been faxed to the contact management team. (There is likely to be no difference between those formulations because the Rule 35 report is "received" in the detention centre whose staff then have 24 hours to forward it.)

d) If detention is maintained a detention review must be completed according to ordinary procedures but ensuring that the material contained in the Rule 35 report is considered. Any written response to the report must deal with the substantive issues raised: Detention Rule 35 Process.

e) Case workers are required to carry out an ad hoc review of detention within a reasonable period of receiving a medico-legal report raising issues covered by Rule 35.

These aspects of the policy, which apply to all components of Rule 35 and not only to the torture element, are procedural matters which inform the substantive decision relating to detention. In the context of these cases the substantive question is whether there is independent evidence that a person has been tortured. If so, the Secretary of State may normally maintain detention only if there are very exceptional circumstances.

18. The parties agree that the Secretary of State can depart from her policy if there are good reasons for doing so. They are also agreed that a material breach of the Secretary of State's policy relating to the detention of those covered by the 'torture policy' gives rise to a claim for false imprisonment. The question of what constitutes a material breach is at the heart of the issues in contention in these proceedings. The answer is found in two decisions of the Supreme Court: *Lumba* and *R (Kambadzi) v. Secretary of State for the Home Department* [2011] 1 WLR 1299.

The Legal Issues for Decision

19. A number of the issues raised in these cases are dependent upon the individual facts. Others are of general application. First, they concern failures to comply with Rules 34 and 35 of the 2001 Rules in their own terms and failures to undertake tasks which the claimants contend are, or should be, implied into the Rules. Within these issues are questions about who should establish that the failure resulted in continued detention, when otherwise the detainee would have been released on temporary admission. Secondly, they raise practical questions about the application of the policy. Thirdly, there is a disagreement between the parties concerning the meaning of the word "torture" in the policy. The claimants submit that the term should be given a non-technical, colloquial meaning whilst the Secretary of State submits that it should be given the meaning it bears under the European Convention on Human Rights, UNCAT and domestic statute.

20. The issues comprise the following:

(i) Does a failure to comply with Rule 34 of the 2001 Rules (i.e. to conduct a medical examination within 24 hours) result in detention thereafter becoming unlawful? And, if so, does the detainee have to show that he would have been released at an earlier date?

(ii) In cases where a medical practitioner has a concern that a detainee may have been tortured, does Rule 35 of the 2001 Rules require him to go on to express a view upon whether his medical examination supports that concern?

(iii) In the absence of such an expression of view, does the Secretary of State's policy require the case worker (a) to ask the medical practitioner for such information; or (b) to seek further information by referring the detainee to a suitably qualified practitioner to produce a medico-legal report?

(iv) Is it a breach of Rule 35(3) for a report to be prepared by a nurse but subsequently approved by a medical practitioner?

(v) What is the relevance, if any, of a detainee's credibility in assessing whether there is independent evidence of torture? Alternatively, does this matter fall to be considered when weighing whether 'very exceptional circumstances' exist to maintain detention?

(vi) If false imprisonment is established, what standard of review should the court apply to the question whether he would have been detained anyway?

(vii) Who bears the burden of proving that a person would have been detained anyway, assuming that a material breach of the Secretary of State's policy has been established?

(viii) What does "torture" mean in the 2001 Rules and the Secretary of State's policy?

An additional question arises in the case of EO namely, by what measure should a 'reasonable period' be judged during which detention must be reviewed following receipt of an independent medico-legal report?

Lumba and Kambadzi

21. *Lumba* is a case in which many issues were considered by the Supreme Court sitting as a bench of nine justices. Eight judgments were delivered (Lords Brown of Eaton-under-Heywood and Rodger of Earlsferry gave a joint judgment). Their Lordships aligned themselves in many different combinations on the various issues. Nonetheless, the essence of the Supreme Court's conclusion material to these cases can be distilled to two propositions:-

> (1) A breach of public law duties when exercising a discretionary power to detain renders the subsequent detention unlawful (i.e. amounts to the tort of false imprisonment) if the breach bears on and is relevant to the decision to detain;
>
> (2) Whilst it is no defence to a claim for false imprisonment to show that the Claimant could and would have been detained lawfully, if such were established the Claimant would be entitled to nominal damages only.

22. Six of their Lordships joined in the majority that favoured the conclusion that a breach of a public law duty could render detention unlawful (Lords Dyson, Hope of Craighead, Walker of Gestingthorpe, Collins of Mapesbury, Kerr of Tonaghmore and Lady Hale of Richmond). The language, "bears on and be relevant to the decision to detain", is found in para 68 of Lord Dyson's judgment. Lady Hale put the test slightly differently at para 207:

> "I would therefore answer "yes" to the first question. I would also answer the second question in the way proposed by Lord Dyson JSC. In other words, the breach of public law duty must be material to the decision to detain and not to some other aspect of the detention and it must be capable of affecting the result – which is not the same as saying that the result would have been different had there been no breach."

23. The first question to which her Ladyship was referring was whether a breach of a public law duty could render detention unlawful. The second question was directed to which breaches of public law duties had that consequence. Whilst answering the second question in different language Lady Hale clearly understood her formulation to have the same result as Lord Dyson's.

24. Lord Collins agreed with Lord Dyson on this point, at para 219. Lord Kerr also agreed with Lord Dyson, para 238, although his analysis of the nature of the public law breach required to invalidate the detention (between paras 248 and 251) proceeds by reference to the underlying statutory purpose of the power to detain. Lord Walker had analysed the matter in a similar way.

25. At para 193 Lord Walker favoured a more demanding test: "there would be a private law claim only if the misuse amounted to an abuse of power (including but not limited to cases of misfeasance or other conscious misuse of power)." Lord Hope aligned himself with that formulation, at para 170. Both considered the conduct of the Secretary of State extreme enough in the cases before them comfortably to fall within that definition.

26. There was a clear majority in favour of the proposition relating to nominal damages.

27. Both Mr Brown and Mr Eicke spent some time in the course of their submissions on the question whether *Kambadzi* modified or affected the central features of *Lumba*. *Kambadzi*, which had started life as *R (SK (Zimbabwe)) v Secretary of State for the Home Department* [2009] 1 WLR 1527, was given leave to appeal to the House of Lords in May 2009. The appeal was heard by the Supreme Court on 10 and 11 February 2010. On 14 April 2010 permission to appeal in Lumba's case was given by the Supreme Court. That appeal was heard over four days in November 2010. Judgments were delivered on 23 March 2011. The five members of the Court who had heard *Kambadzi* were on the enlarged panel in *Lumba.* Judgments in that case having been delivered, written submissions were invited on the impact of *Lumba* on the arguments in *Kambadzi.* Judgments followed on 25 May 2011.

28. *Kambadzi* was concerned with the Secretary of State's policy periodically to review detention. In para 42 of his judgment Lord Hope applied the test (bears on and is relevant to the decision to detain) articulated by Lord Dyson in *Lumba*. At para 69 Lady Hale repeated her formulation from *Lumba.* Lord Kerr agreed with Lord Hope (para 78) and then at para 80 added:

> "The essential question must be whether there is an adequate connection between compliance with the duty and the lawfulness of the detention."

29. The Secretary of State's policy dealing with periodical reviews was set out in the Operations Enforcement Manual and precisely mirrored the statutory duty imposed upon the Secretary of State by the 2001 Rules. In para 70 of her judgment Lady Hale referred to *R (D & K) v Secretary of State for the Home Department* [2006] EWHC 980 (Admin) which concerned the 2001 Rules (at least in part). Her observations about that case gave rise to considerable debate whether a breach of the 2001 Rules is to be treated differently from the breaches of public law duties discussed in *Lumba*.

30. The paragraphs that have generated the debate are paras 70 and 71:

> "[70] Sometimes a statute puts the effect of a failure to follow procedural requirements beyond doubt. Section 34(1) of the Police and Criminal Evidence Act 1984 states that 'A person … shall not be kept in police detention except in accordance with the provisions of this Part of this Act'; those provisions require regular reviews; failure to conduct those reviews on time renders the detention beyond the time when they should have been conducted unlawful; see *Roberts v. Chief Constable of Cheshire Constabulary* [1999] 1 WLR 662. Sometimes a statute does not say in so many words that failing to comply with one of its procedural requirements will render the resulting detention unlawful' but the courts will construe the statute to mean that it does. An example is the prohibition in s 11(4)(a) of the 1983 Act, of making an application for compulsory admission to hospital if the patient's nearest relative objects: *Re S-C (mental patient: habeas corpus)* [1996] QB 599. In these cases, it is irrelevant that the person concerned could have been

> lawfully detained had the correct procedures been followed. Sometimes, however, the court will conclude that the lawfulness of the detention does not depend upon the fulfilment of a particular statutory requirement. For example, in *R (on the application of D) v Secretary of State for the Home Department, R (on the application of K) v Secretary of State for the Home Department* [2006] EWHC 980 (Admin), it was common ground that failing to comply with the requirement in the (Immigration) Detention Centre Rules 2001, SI 2001/238 that immigration detainees be given a medical examination within 24 hours of arrival did not render the detention unlawful unless the detainees could show that it would have led to their earlier release.
>
> [71] In short, there are some procedural requirements, failure to comply with which renders the detention unlawful irrespective of whether or not the substantive grounds for detention exist, and some procedural requirements, failure to follow which does not have this effect. If the requirement is laid down in legislation, it will be a matter of statutory construction into which category it falls. A clear distinction can be drawn between a requirement which goes to whether or not a person is detained and a requirement which goes to the conditions under which a person is detained. If the grounds exist for detaining a person in a mental hospital, for example, and the procedures have been properly followed, it is not unlawful to detain him in conditions of greater security that are in fact required by the nature and degree of his mental disorder."

31. Taken in isolation, the sentence in para 70 referring to *D & K* might be thought to endorse a different approach in cases involving a breach of Rule 34 of the 2001 Rules. The detention would be rendered unlawful if the claimant could show that he would have been released if there had been a medical examination. Mr Eicke submits that to the extent that the claimants rely upon alleged breaches of Rules 34 and 35 of the 2001 Rules, the burden remains on them to prove that absent the breaches they would have been released. It should be emphasised that the approach in *D & K* to the consequences of breaches of Rules 34 and 35 of the 2001 Rules proceeded upon a concession, as Lady Hale notes (see para 108 of the judgment of Davies J), and was not the subject of any argument.

32. In *Lumba* the majority of the Supreme Court had been at pains to emphasise that because false imprisonment was a tort actionable *per se* (i.e. without proof of damage) it was unnecessary for the Claimant to prove that he would, absent the public law failing, have been at liberty. The Court nonetheless identified an injustice in compensating claimants who could and would have been lawfully detained anyway. It was for that reason that only nominal damages would be awarded in such circumstances.

33. In my judgment, Lady Hale was not seeking to carve out a subspecies of public law failing (a breach of the 2001 Rules) which was subject to a different approach from

that in *Lumba*. That would be inconsistent with the majority view in *Lumba*. It is not possible to accept that it could have been Lady Hale's meaning since the judgments in *Kambadzi* reflected the outcome of *Lumba*.

34. However, when the context in which these observations were made is understood, it appears that Lady Hale was doing no more than suggesting that a failure to comply with the 2001 Rules does not, without more, render the subsequent detention unlawful. *Lumba* concerned the criteria for detention, rather than a procedural failing in the process of authorising it. Lady Hale had flagged up the possible difference between cases which go to the criteria for detention as opposed to those relating to the procedure for authorising it, in para 198 of her judgment in *Lumba*. *Kambadzi* was a procedural case resting on a failure to undertake reviews mandated by the Secretary of State's policy (and by the 2001 Rules).

35. Paras 15 and 16 of Lord Hope's judgment in *Kambadzi* cast important light upon the way in which the 2001 Rules impact upon a question whether the Secretary of State has abided by her policy in connection with detention, and if not, whether any failure to abide by the policy renders detention unlawful because it 'bears on, and was relevant to, the decision to detain'. He said:-

> "[15] Before I come to the published policy I should mention that the Secretary of State was given power by the Immigration and Asylum Act 1999 to make Rules for the regulation and management of detention centres. Rule 9 of the Detention Centre Rules 2001, SI 2001/238 provides:
>
> > '(1) Every detained person will be provided, by the Secretary of State, with written reasons for his detention at the time of his initial decision, and thereafter monthly.
> >
> > (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.'
>
> Rule 9(3) sets out a list of relevant matters for the purposes of that paragraph.
>
> [16] In the Court of Appeal, at [45], Keene LJ said that it was clearly implicit in the Rule that the Secretary of State has to reconsider the justification for detention, month by month, in the light of changing circumstances. At [46] he said:
>
> > " … The need for such regular reviews stems from the necessity for the Secretary of State to monitor changing circumstances in a given case, lest his power to detain, on the principles set out in *R v. Governor of Durham Prison, ex p Singh* [1984] 1 All ER 983, [1984] 1 WLR 704, no longer exists. Even if the power still exists, he has a discretion to exercise which

> he must also keep under review. The importance of the detainee receiving regular statements of the reasons why he is still detained is self-evident: he needs to be in a position to know whether he can properly challenge the Secretary of State's decision 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. So the requirements imposed by r 9 cannot be treated lightly, especially when one is dealing with administrative detention which deprives a person of his liberty without a court order.'
>
> I agree with these observations, but I would prefer to apply them to the system of review that is set out in the policy rather than to the system required by r 9(1). This is because it seems to me that the 2001 Rules are concerned with the regulation and management of detention centres, not with the way the discretion to detain is exercised. This is what the explanatory note says, and I think that Keene LJ was right to conclude in para [47] that r 9(1) is not concerned with limiting the Secretary of State's power to detain. In any event the appellant was detained in prison conditions to which the Rules do not apply for the first 14 months of the period of his detention. It was not until April 2007 that he was moved to a detention centre and the Rules applied to his case."

36. Lord Hope's observations in para 16 make the point that the 2001 Rules are not themselves concerned with the decision to detain, or maintain detention. It was because the requirements of Rule 9 relating to reviews were mirrored in the relevant policy in a manner which bore upon and was relevant to the decision to maintain detention in Mr Kambadzi's case that it was considered. As he put it in para 51 and 52:

> "[51] The question then is what is to be made of the Secretary of State's public law duty to give effect to his published policy. In my opinion the answer to that question will always be fact-sensitive. In this case we are dealing with an executive act which interferes with personal liberty. So one must ask whether the published policy is sufficiently closely related to the authority to detain to provide a further qualification of the discretion that he has under the statute. Unlike the 2001 Rules, Ch 38 of the manual is concerned with the lawfulness of the detention. That is made clear in the opening paragraphs, see para [18], above. It has been designed to give practical effect to the *Ex p Singh* principles to meet the requirement that to be lawful, the measures taken must be transparent and not arbitrary. It contains a set of instructions with which officials are expected to comply: see para 1(3) of Sch 2 to the 1971 Act. As I see it, the principles and the instructions in the manual go hand in hand. As Munby J said in para [68], the reviews are fundamental to the propriety of continued detention. The instructions are the means by which, in accordance

> with his published policy, the Secretary of State gives effect to the principles. They are not only commendable; they are necessary.
>
> [52] The relationship of the review to the exercise of the authority is very close. They too go hand in hand. If the system works as it should authorisation for continued detention is to be found in the decision taken at each review. References to the authority to detain in the forms that were issued in the appellant's case illustrate this point. Form IS 151F, which is headed 'Monthly Progress Report to Detainees', concludes at the top of page 3 of 3 with the words 'Authority to maintain detention given', on which the officer's comments are invited and beneath which his decision is recorded. The discretion to continue detention must, of course, be exercised in accordance with the principles. But it must also be exercised in accordance with the policy stated in the manual. The timetable which para 38.8 sets out is an essential part of the process. These are limitations on the way the discretion may be exercised. Following the guidance that *Nadarajah v Secretary of State for the Home Dept* [2004] INLR 139 provides (see paras [39] and [40] above), I would hold that if they are breached without good reason continued detention is unlawful. In principle it must follow that tortious remedies will be available, including the remedy of damages."

37. Lord Hope finished his judgment by expressly agreeing with the reasons of both Lady Hale and Lord Kerr who were also in the majority in allowing the appeal.

38. The conceptual difference between *Lumba* and *Kambadzi* was that *Lumba* was concerned with a breach of a policy which authorised detention if specific conditions were met, *Kambadzi* was concerned with a procedural requirement.

39. So in para 64 of her judgment in *Kambadzi* Lady Hale identified the issue for decision in these terms:

> "The only question, therefore, is what the limits are to the Home Secretary's power. In particular, are there procedural as well as substantive limits?"

40. In *Kambadzi*'s case it was common ground that there was no breach of any substantive limit of the power to detain. Her Ladyship continued at para 69:

> " … it is also not surprising that the majority of this court has now held, in *R (on the application of Lumba) v Secretary of State for the Home Dept, R (on the application of Mighty) v Secretary of State for the Home Dept* ... that a failure to comply with the Secretary of State's published policy may also render detention unlawful for the purpose of the tort of false imprisonment. While accepting that not every failure to comply with a published policy will render the detention unlawful, I remain of the view that –
>
> > 'the breach of public law duty must be material to the decision to detain and not to some other aspect of the detention and it must be capable of affecting the result –

> which is not the same as saying that the result would have been different had there been no breach.' (See *R (on the application of Lumba) v Secretary of State for the Home Dept* at [207].)
>
> The question remains, however, whether a material breach of a public law duty to conduct regular reviews – that is, a procedural obligation – has the same consequence as a material breach of a public law duty to detain only if certain criteria are fulfilled. … Might there be a distinction between the substantive limitations on the power to detain and the procedural requirements for exercising it."

41. Lady Hale's conclusion was that the breach of a procedural public law obligation imposed upon the Secretary of State could render detention unlawful if the procedural requirement went to whether or not a person was detained. In that, her conclusion was the same as Lord Hope's and Lord Kerr's, the latter in particular at para 89. The answer to the question she posed in para 69 was "yes". A breach of such a public law duty does have the same consequences. What followed in paras 70 and 71 was part of Lady Hale's reasoning which was directed towards a discussion of the consequences of failures to comply with statutory procedural requirements. In para 72 she went on to discuss the consequences of failing to comply with procedural requirements imposed by the common law. Then at para 73 Lady Hale returned to the substance of the issue for decision in *Kambadzi*:

> "It is not statute, but the common law, indeed the Rule of Law itself, which imposes upon the Secretary of State the duty to comply with his own stated policy, unless he has a good reason to depart from it in the particular case at the particular time. Some parts of the policy in question are not directly concerned with the justification and procedure for the detention and have more to do with its quality or conditions. But the whole point of the regular reviews is to ensure that the detention is lawful. That is not surprising. It was held in *Tan Te Lam*, above, that the substantive limits on the power to detain were jurisdictional facts, so the Secretary of State has to be in a position to prove these if need be. He will not be able to do so unless he has kept the case under review. He himself has decided how often this needs to be done. Unless and until he changes his mind, the detainees are entitled to hold him to that. Just as Mr Leachinsky's detention was unlawful even though there were in fact good grounds for arresting him, the detainees' detention is unlawful during the periods when it has not been reviewed in accordance with the policy, irrespective of whether or not the review would have led to their release. In my view, Munby J was right to hold that the reviews were "fundamental to the propriety of the continuing detention" and 'a necessary prerequisite to the continuing legality of the detention.' "

42. The effect of the two cases is to assimilate the approach between substantive and procedural breaches of policy. A failure to comply with the 2001 Rules does not

without more render subsequent detention unlawful but it may do so if the Rule is reflected in the Secretary of State's policy and the *Lumba* test is met. The procedural requirement considered in *Kambadzi*, namely to review detention, bore upon and was relevant to the decision to detain; it was material to the decision to detain and not to some other aspect of the detention and was capable of affecting the result; there was an adequate connection between compliance and the lawfulness of detention (to paraphrase each of the formulations) because a review was inevitably followed be a decision whether or not to maintain detention. It might be explained in this straightforward way. At the end of every monthly review the caseworker was required to make a binary decision, either to maintain detention or release on temporary admission.

Subsequent Authority in the Court of Appeal and High Court

43. At paragraph 23 of his judgment in *OM* Richards LJ considered the standard and burden and proof once unlawful detention was established and the question whether the claimant would have been detained in any event is being determined. The standard of proof is the civil balance of probabilities. He added that "it may be that in circumstances such as these the burden shifts to the defendant to prove that the claimant could and would have been detained if the power of detention had been exercised lawfully." The additional point did not call for determination on the facts in that case and has not been determined in any of the cases decided in the High Court since *Lumba* cited by counsel. Rather the court has engaged in an evaluation of the evidence available to decide whether a claimant would have been detained in any event.

44. Of those High Court Cases, it is necessary to dwell upon only two. The first is the decision of Kenneth Parker J *R (RT) v. Secretary of State for the Home Department* [2011] EWHC 1792 (Admin) and the second the decision of Haddon-Cave J *R (Belkasim) v. Secretary of State for the Home Department* [2012] EWHC 3109 (Admin).

45. *RT* concerned a detainee who claimed to have been the victim of torture. He contended that there was a breach of Rule 34 of the 2001 Rules. At para 34 of his judgment, Kenneth Parker J concluded that there was a conspicuous failure to apply Rule 34. At para 40 he said:

> "For the reasons given in *D & K* and *PB*, the policy on medical examinations is closely related to the decision to detain because such examinations may well reveal independent, corroborating evidence that the person examined has been tortured and is not, therefore, generally suitable for detention."

He went on to refer to Lady Hale's endorsement of *D & K* (he had earlier quoted para 70 of *Kambadzi*). In *D & K* at para 50 Davis J had described Rule 34 as an 'important part' of the safeguards in place to determine whether a person should continue to be detained and the Rule 35(3) report as an important component in transmitting information relevant to the decision whether to detain. *PB* was an earlier decision of Kenneth Parker J following a similar approach.

46. *Belkasim* concerned a detainee who claimed to suffer from mental illness and to have been the victim of torture. The question arose whether breaches of Rules 34 and 35 of the 2001 Rules without more rendered detention unlawful. Haddon-Cave J concluded that the answer was no. The claimant must prove causation (applying *D & K*) because those Rules are concerned with the conditions of detention rather than legality of detention – see paras 121 to 126. At paragraph 163 he concluded that the claimant must show that "but for the failure to carry out a Rule 34 examination, the claimant would have been released."

The Submissions

47. Mr Brown submits that Rules 34 and 35 of the 2001 Rules are intimately connected with the decision to detain. A failure to abide by their provisions bears upon detention and renders it unlawful. The claimants thereafter have no burden of proof to show that the breaches of the Rules made a difference. He submits that the policy implicitly requires the Secretary of State to ensure that medical practitioners at work in detention centres are experienced in the detection of the signs of torture and obliges those practitioners to carry out a thorough examination. It is not permissible for a nurse, rather than a doctor, to compete a Rule 35 form, even if a doctor subsequently adopts its content and signs it. He further submits that there is a duty upon the case worker to pursue further information in the event that a Rule 35 report is non-specific, that it provides no medical view upon the veracity of any claimed torture. If necessary an independent medico-legal report should be obtained. If an unsolicited outside medico-legal report is provided, even though the Secretary of State's policy is silent about how quickly it should be considered, a reasonable period should be exactly the same as that allowed for responding to a Rule 35 report, namely two days. Mr Brown submits that the word "torture" in the 2001 Rules and policy should be given its broad non-technical meaning, namely the infliction of severe bodily or mental pain as a punishment or means of persuasion, without reference to the identity of the person or body responsible for inflicting it.

48. Mr Eicke submits that a failure to comply with Rule 34 of the 2001 Rules does not render detention unlawful unless the claimant can go on to show that he would have been released if the examination had been conducted as required. He otherwise accepts its materiality to a decision to maintain detention. He submits that the identity of the person completing the Rule 35 report is not important, if it is endorsed by a doctor. As a fall back, he submits that, if a Rule 35(3) report is completed by a nurse (and signed by a doctor) that does not render detention unlawful unless the claimant can show that a report produced by a medical practitioner would have led to release. Mr Eicke submits that detention does not become unlawful on the hypothesis that a medical practitioner should have expressed concerns regarding torture but failed to do so. There is no obligation on a doctor to say more than he considers appropriate in the circumstances he finds. It is matter of professional judgment for the doctors concerned. The case workers are required to evaluate what they receive by way of Rule 35 reports (whether relating to torture or its other components), not to issue instructions to medical practitioners about how they should operate. The Rule 35 report may provide independent evidence of torture but its purpose is to identify a 'concern'. The concern may arise simply because the detainee asserts that he has been the victim of torture. The policy does not require the case workers to get independent evidence from outside sources. If an outside report is received, a

reasonable period within which to respond to it is fact specific, but there is no reason to impose a two day timescale. Such reports are often lengthy and might generate further inquiry. He submits that it is reasonable to take it into account at the next detention review, whenever that is. Mr Eicke submits that the word "torture" in the 2001 Rules and policy should be given the same meaning as found in Article 1 of UNCAT:

> "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based upon discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity…."

In short, the difference between the parties on this last point concerns the underlined words.

Discussion on the legal issues

Non-Compliance with Rule 34 of the 2001 Rules

49. The 2001 Rules are concerned with the regulation of the management of detention centres. They have no direct bearing on the power of the Secretary of State to detain. A failure to comply with those Rules does not render detention unlawful; neither does it give rise to a private law claim for breach of statutory duty. Rule 34 of the 2001 Rules is designed to ensure that new arrivals are medically examined. That medical examination is in addition to a medical screening which is routinely conducted on admission by nursing staff. In the case of an immigration detainee the Rule 34 examination need not be conducted by the appointed medical practitioner, but can be done by a doctor chosen and paid for by the detainee. It is necessary for new arrivals to have a medical screening and examination to ensure that their medical needs are catered for in detention. Whilst Rule 35 is concerned with mental illness and other conditions which might make detention inappropriate, as well as with torture, the information provided at or by a Rule 34 medical examination will generally be concerned with the rather more prosaic. It ensures that those in need of medication receive it and that those with any illnesses or ailments are provided with appropriate care and treatment.

50. In *Kambadzi* Lord Hope was careful to approach the "breach" of Rule 9 of the 2001 Rules via its features being incorporated into the Secretary of State's policy. The Secretary of State's policy relevant to these claims is redolent with references to the Rule 35 report being the trigger which leads to consideration whether a detainee should be released. That trigger applies in cases involving the three sub-sets referred to in the Rule. The Rule 35 report, although it can come at any time and result from information or an examination which post-dates initial reception in the detention centre, is likely in many cases to be a product of the initial examination at which physical and mental health problems may well be revealed as well as issues relating to torture. It was for that reason that Davies J in *D & K* and Kenneth Parker J in both *RT*

and *PB* spoke of the close connection between the Rule 34 medical examination and the decision to detain. The policy does not directly refer to Rule 34. It would be arguable that as a result, its breach is not a public law failing which is material for the purposes of deciding whether detention is unlawful. Nonetheless, I do not understand Mr Eicke to dispute that at the heart of the policy is the requirement, no different from that under the 2001 Rules, that a medical examination should occur within 24 hours of admission. That is so even though the Rule contemplates that it may be conducted by a medical practitioner of the detainee's own choosing. Neither is it part of the Secretary of State's case to suggest that the approach of Davies J and Kenneth Parker J as to the materiality of the Rule 34 examination to the question of detention is wrong. In any event such an argument could not prosper at this level given the consistent approach in this court to its materiality.

51. That being so, it also follows (and again it is not disputed by the Secretary of State) that a failure to carry out or arrange such an examination would amount to a public law failing which bore upon and was relevant to the decision to detain. It may be that Lord Kerr's formulation in *Kambadzi* is most apposite in these circumstances: there would be an adequate connection between compliance and the lawfulness of detention. Mr Eicke's argument is that Lady Hale's reference to Rule 34 of the 2001 Rules in para 70 of her judgment in *Kambadzi* leads to the conclusion that it remains for the claimant in such circumstances to prove that the failure would have made the difference between detention and release. In the absence of such proof, the public law failure to comply with the policy does not lead to the conclusion that detention was unlawful.

52. In considering the cases of *Lumba* and *Kambadzi*, in particular between paragraphs 28 and 40 above, I examined in some detail the passage from Lady Hale's judgment on which Mr Eicke founds this part of his argument. For the reasons there set out, I do not accept this aspect of the Secretary of State's submissions. Causation is relevant to the question whether a claimant should be entitled to compensatory damages. It is not relevant to the question whether the detention was lawful. To the extent that either *RT* or *Belkasim* suggest otherwise I would respectfully decline to follow them.

53. In the light of the Secretary of State's acceptance of the materiality of Rule 34, the conclusion dictated by *Lumba* is that if an immigration detainee, in the absence of good reason, is not medically examined within 24 hours of his arrival at a detention centre, his detention thereafter will be unlawful. That is not to say that there is scope for a multiplicity of actions against the Secretary of State on this narrow ground. There is no reason to suppose that Rule 34 medical examinations are not usually conducted within 24 hours. Because the legality of detention is concerned with compliance with the Secretary of State's policy (and not with a direct breach of the Rule) a good reason for non-compliance would save the legality of detention. The Rule 34 examination is, in the context of a decision to detain, but a stepping stone to a Rule 35 report. If no Rule 35 report were raised when a medical examination did take place (albeit late) then it would follow that the decision to detain would have been the same.

Is a medical practitioner obliged to express a view about whether his medical examination supports his 'concern' that a person may have been a victim of torture?

54. The Rule imposes an obligation upon the medical practitioner to "report …on the case of any detained person who he is concerned may be a victim of torture". There is a pro-forma document for the purpose of making such a report. It enables the medical practitioner to identify which paragraph of the Rule is in issue and provide such further information as he wishes.

55. Mr Brown submits that it is implicit in the rule (and also in the Secretary of State's policy) that the medical practitioner must set out as much detail as is possible from an examination of the detainee. He submits that the obligation to report on a concern is in reality an obligation to express a medical opinion upon whether the claim to have been tortured has support. He also submits that it is implicit in the rule (and thus in the policy) that only medical practitioners with necessary experience in dealing with torture victims should be involved in the process. In oral argument he put it this way, "the Rule 35 report must be fit for purpose otherwise it is useless".

56. In *D & K* Davies J, albeit considering Rule 35 in the agreed pre-*Lumba* framework that its breach would found a claim for false imprisonment if the detainee could show it would have made a difference, made a number of observations which remain apposite. Their context was a suggestion that doctors were discouraged from expressing a view about the veracity of a claim of torture.

> "A doctor will not necessarily have concerns that there may have been torture where a detainee is alleging torture or where scars or marks are visible. In some cases there may be no scars or marks. In others the doctor may, for example, form the view that such scars or marks have no obvious relation to the torture alleged. Or, for example, it may be that the detainee is alleging only recent torture but such marks as are visible are clearly longstanding. It may be also that such marks as are noted are trivial. But in other cases – and it must not be overlooked that the [Rule 34] examination is a mental examination as well as physical – that may not be so. That is not to say, where the doctor has concerns, that he or she necessarily is positively required to express a view that there may have been torture. Really it is a matter for the doctor involved; but as it seems to me the medical practitioner is not to be precluded, if he or she has concerns, from at least expressing a view that the scars or marks or other injury noted are consistent with the detainee's claims of torture … If a report is put in, in accordance with Rule 35(3), then that is at least capable of constituting independent evidence. It is for the IND then to assess it in deciding, considering the case as a whole, whether to release … on the basis that there is an allegation of torture supported by independent evidence …" (para 117)

57. The Rule is not prescriptive about what a report should contain. It requires the medical practitioner to report on the case of a person about whom he has any of the concerns identified in paragraphs (1) to (3) of Rule 35. It is for the medical practitioner to provide such support for his concerns as he considers appropriate. In many cases, it may be that the 'concern' arises simply because the detainee alleges torture. The Secretary of State's policy contemplates her officials receiving the report and then taking various steps in response. I do not consider that it is possible to spin out of the policy (whether via the Rule or otherwise) a stipulation concerning the content of a Rule 35 report which could bear upon the legality of detention. The

Process Guidance has a section dealing with the content of Rule 35 reports: Section 3 set out in paragraph 9 above. That section recognises that "particularised concerns" may amount to independent evidence of torture and also that reports may have different qualitative worth. In terms, the section states that Rule 35 reports are not medico-legal reports and notes that the content of a report may be a medical fact, a concern or "simply the record of a claim made by the detainee".

58. There is a danger in the context of these cases, all of which relate to alleged torture victims, to overlook that the 2001 Rules (and the policy) contemplate that the medical practitioners who carry out Rule 34 examinations and submit Rule 35 reports are general practitioners. Rule 33(6) enables such general practitioners to consult other doctors at their discretion. No doubt, as a result of their involvement with immigration detainees, they gain experience in dealing with problems associated with that specific group of individuals. Rule 33(3) is directed towards that. It is likely to include experience of those who have suffered violence of many sorts before coming to the United Kingdom. But the 2001 Rules do not require, and the Secretary of State's policy does not contemplate, that the Rule 35 reports will be produced by specialists in mental health; or by specialists in the various disciplines who might be able to give a more informed view about Rule 35(1) health issues; or by doctors with the specialist expertise in dealing with torture victims of those producing detailed medico-legal reports for Medical Justice; or, in providing information by reference to the detailed provisions of the Istanbul Protocol. That is the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, submitted to the United Nations High Commissioner for Human Rights on 9 August 1999. That document has undergone a number of revisions. It is, in effect, a text book comprising 315 paragraphs and six annexes.

59. It is desirable that those conducting medical examinations have wide experience as general practitioners including experience of mental health. It is desirable that those conducting medical examinations have experience of dealing with victims of torture and other inhuman and degrading treatment. It is desirable that if there are physical signs which provide independent evidence to support an allegation of torture they are picked up as early as possible. There is no doubt about the underlying rationale of the policy. Those who have suffered torture in the past are disproportionately adversely affected by detention. That is why the Secretary of State will normally detain those in respect of whom there is independent evidence of torture only in very exceptional circumstances. However, in my judgment it is a mistake to conflate what is desirable with what is required by the policy operated by the Secretary of State in this area. The policy of the Secretary of State at the time (and for that matter Rule 35 itself) did not implicitly require the medical practitioner to provide any particular detail in his report or to have any particular specialist skill beyond that required by the 2001 Rules. Mr Brown also developed a submission to the effect that if the report were shown to be inadequate because, for example, the doctor concerned has missed some objective signs consistent with torture, that too would render detention unlawful because either the rule requires the examination to be thorough and competent or the policy requires it. In short, he submits that an examination carried out negligently would result in subsequent detention being unlawful. I do not accept that submission. The Secretary of State's policy, which is the vehicle through which the lawfulness of detention must in my judgment be gauged, determines that independent evidence of torture will tell against detention. It assumes that there will be a medical examination on entry into

the system and that a medical practitioner will report on a case where he has concerns that the detainee may have been tortured. Rules 34 and 35 are important features in a process which is designed to ensure that case workers are provided with material upon which to consider the policy relating to torture. However, there is no failure by the Secretary of State to comply with her policy were a medical practitioner to miss signs of torture even if, for the sake of argument, a claimant could show that the failure was negligent in the *Bolam* sense: *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582.

Does the policy require the case worker to seek further information from the author of the Rule 35 report, alternatively to seek an outside medico-legal report?

60. The Enforcement Instructions and Guidance states (and it is repeated in the Rule 35 Process Guidance) that the purpose of the procedure is to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising detention. The procedures put in place concerning Rule 35 reports contemplate that the report form will be given to the manager of the detention centre. The 'contact management team' in the detention centre then transmit it to the UKBA office responsible for considering continued detention (Process Guidance 2.1) and must do so within 24 hours of receiving the report (Process Guidance 2.2). Before doing so they must ensure that the report 'sets out the nature of the issue such that a response is possible' (Process Guidance 2.2). If it does not, the same paragraph requires that the healthcare team is asked for clarification. That must happen within the 24 hours allowed for passing the report on to those responsible for making the decision about detention.

61. Section 3 of the Process Guidance provides in paragraph 3.1.2 for circumstances in which the Rule 35 report "discloses no information". That is described as being "without any content to identify any possible concern", or "even to highlight the sub-category of Rule 35 which applies." By this time the Rule 35 form would have been forwarded by the staff at the detention centre in circumstances where a request for further information by them for elaboration of the nature of the issue has produced no response. So this part of the Detention Rule 35 Process is a "belt and braces" provision. Nonetheless, its terms do not support a contention that the policy required the case worker to seek detailed information evidencing the basis for the medical practitioner's concern, still less to commission an external medico-legal report on the question whether there is independent evidence of torture. There is nothing in the policy documents which govern these cases which precluded a case worker from seeking further information of the sort which under the new Detention Services Order the medical practitioner is obliged to provide in support of a Rule 35 report. However, the policy did not require him to do so.

Is it a breach of Rule 35(3) for a report to be prepared by a nurse but subsequently approved by a medical practitioner?

62. It is question of fact whether, in compliance with Rule 35, a medical practitioner has 'reported' on a detainee. The Secretary of State's policy proceeds from the basis that a Rule 35 report has been prepared. It appears from the evidence adduced in these cases that there are circumstances in which the form will have been completed by a nurse but then reviewed and signed off by a medical practitioner. The detail of the process in individual cases is not dealt with in evidence. A report drafted by a nurse

and then considered and approved by a medical practitioner would, in my view, amount to a report on the detainee by that medical practitioner for the purposes of Rule 35. The medical practitioner would be expressing his own concern based in part on what he has been told by others. I do not accept the claimants' submission that it is necessarily a breach of the rule, or a failure to comply with the Secretary of State's policy, for a Rule 35 report to have input from more than one person in this way.

63. Mr Eicke also points to para 68 of the judgment of Lord Dyson in *Lumba*, where he said,

> "It is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment. … Thus, for example, a decision to detain made by an official of a different grade from that specified in the detention policy would not found a claim for false imprisonment."

He submits that even were there a breach of Rule 35 in these circumstances (and a breach of the Secretary of State's policy) it would not bear upon and be relevant to the decision to detain. The concern about torture would have been conveyed with the imprimatur of the medical practitioner. It is the content of the report that matters and which informs the decision whether to maintain detention. Furthermore, he suggests that it is far from accurate to suggest that nurses are necessarily less able to identify those about whom there are such concerns.

64. Even were I wrong to conclude that the involvement of a nurse in the process did not amount to a breach of Rule 35 and the Secretary of State's policy, I accept that this failure falls on the wrong side of the line identified by Lord Dyson (and in the other formulations discussed above) to lead to the conclusion that the detention which followed was unlawful. The particular qualifications of the person concerned would not be so closely connected to any decision to detain to fall within the various formulations in *Lumba.*

What is the relevance, if any, of a detainee's credibility in assessing whether there is independent evidence of torture? Alternatively, does this matter fall to be considered when weighing whether 'very exceptional circumstances' exist to maintain detention?

65. The meaning of 'independent evidence of torture' was considered by the Court of Appeal in *AM*. The Court rejected a submission that a report on a claimant's scarring did not provide independent evidence of torture, if it was unable to shed light on how the injuries resulting in scarring were caused. One of the underlying factors in that case was the claimant's credibility. There had been a Tribunal decision that included the finding, "I believe none of her evidence." Scarring, some of which was consistent with, or highly consistent with and one of which was tantamount to being "diagnostic" of torture amounted to independent evidence of torture. All three descriptions are terms used in the Istanbul Protocol. The author of the report in that case used the first two terms, but not the third. There are two further descriptions found in the Istanbul Protocol which should be mentioned in this context, namely "not consistent" and "typical of". "Not consistent" means:

> "[T]he lesion could not have been caused by the trauma described."

"Consistent" means:

> "[T]he lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes."

"Highly consistent" means:

> "[T]he lesion could have been caused by the trauma described, and there are few other possible causes."

"Typical of" means:

> "[T]his is an appearance that is usually found with this type of trauma, but there are other possible causes."

"Diagnostic" means:

> "[T]his appearance could not have been caused in anyway other than that described."

66. The distinction and experience of the report's author was a factor that weighed with the court (see para 17). She was especially well equipped to express an opinion on the causation of the injuries. The report came from Lucy Krajl of the Helen Bamber Foundation who, whilst not a doctor, had enormous experience in assessing scarring on refugees in the context of claims for torture.

67. It was the overall effect of the scarring report which led the Court of Appeal to conclude that it amounted to independent evidence of torture That one of the scars was tantamount to being diagnostic (although not so described by Lucy Krajl) was a powerful factor on its own. When taken with some scarring which was highly consistent, other which was consistent and none that was inconsistent, the inexorable conclusion was that it amounted to independent evidence of torture. Each case inevitably will have to be considered upon its own facts to determine whether the evidence provided does no more than repeat the claim to have been tortured or provides additional objective evidence.

68. The court contrasted 'independent evidence of torture' with proof that there had been torture. The same distinction is drawn in the Secretary of State's policy documents. There is a clear difference between something that amounts to independent evidence of a fact and proof of that fact. In making any finding of fact, the fact-finder will weigh all of the evidence according different weight to different pieces. The credibility of a witness will be critical in determining the answer to any factual question; and when a witness is making a claim his credibility will be crucial. But that does not mean that a piece of evidence which supports his central claim is any less 'independent evidence' even if, in the end, the claim is rejected. The underlying credibility of a detainee does not, in my judgment, go to the question whether something amounts to independent evidence of torture. Such evidence is necessarily something beyond the say so of the person concerned.

69. The whole rubric of the relevant part of the policy is :

> "The following are normally considered suitable for detention in only very exceptional circumstances."

The full list follows as set out in paragraph 8 above. If the detainee falls within one of the categories listed the default position must be release. The policy gives some help with what may inform whether there are very exceptional circumstances. It refers to the need to weigh risks to the public of releasing convicted offenders with particular care. A very high, rather than routine, risk that the detainee will abscond might well also provide a proper basis for maintaining detention. The rubric is such that a host of factors may come into play. It was not suggested by the claimants in these cases that credibility is an irrelevant consideration in determining this question. In my judgment, the credibility of a detainee may be a factor which informs the question whether there are very exceptional circumstances for maintaining detention. Doubts about the credibility of the detainee would not be sufficient – that is commonplace. Acting on doubts would be tantamount to requiring the detainee to prove that the allegation of torture was true. The policy does not require that. However, there may be cases in which information available to the decision maker leads him to the firm conclusion that the torture claim is untrue, that is to say incredible or very unlikely to be true. It would be a perverse application of the policy to require the Secretary of State to release from custody someone in respect of whom there exists independent evidence of torture but also where it is clear that the claim is untrue. The policy does not require that. However, it should not be overlooked that the fact that a person is in detention in the first place will often have followed, or be associated with, a conclusion that an underlying claim has little or no substance. The fact that a person is in detention with usually suggest that an assessment has been made that there is a risk of absconding, or a risk of offending or some threat to the public. The policy assumes that these facts, presenting in a way which would ordinarily justify detention, are not without more sufficient to do so when there is independent evidence of torture

If false imprisonment is established, what standard of review should the court apply to the question whether the detainee could and would have been detained anyway and who bears the burden of proving that he would have been detained anyway?

70. In paragraph 43 above, I referred to para 23 of the judgment of Richards LJ in *OM*. The Court of Appeal decided that the question whether the claimant would have been detained anyway on the lawful application of the policy was to be decided on the balance of probability. The context of that conclusion was a submission on behalf of the claimant that the standard was higher, and amounted to a legal test of inevitability. The court did not need to decide where the burden of proof lay because the information available showed so clearly that the claimant would have been detained anyway. Nonetheless, Richards LJ indicated that it may rest upon the Secretary of State. Mr Eicke disputes that contention. He submits that the burden of proof rests upon the detainee to prove on balance of probabilities that in the absence of the material breach of policy he would have been released. Mr Brown submits that taken as a whole the judgments in *Lumba* and *Kambadzi* show that their Lordships contemplated the burden resting upon the Secretary of State at this stage. He submits that would also accord with principle because the evidence relating to what would have happened rests with the Secretary of State, not the detainee.

71. In my judgment it is implicit in the judgments in both *Lumba* and *Kambadzi* that their Lordships were not contemplating that a claimant would be required to prove a negative should the question of damages arise. It is not for him to prove that he would not have been detained, but rather for the Secretary of State to establish positively that she would have detained the claimant anyway, to avoid having to pay compensatory damages. True it is that in many cases the answer to the question will be obvious without the necessity to consider such niceties as where the burden of proof lies. In *Lumba* at para 253 Lord Kerr spoke of

> "… a distinction is clearly merited between those cases where it is plain that the detainees would have been released and those where it can be shown that they would have been lawfully detained, had the correct procedures been followed."

In *Kambadzi* at para 89 he put it in similar terms:

> "… if it can be shown that the claimant would not have been released if a proper review had been carried out, this must have an impact on the quantum of compensation…"

Although Lord Kerr spoke in the passive, he must have had in mind the obligation resting upon the defendant to avoid paying compensatory damages.

72. Lord Dyson dealt with the matter at paragraph 95 in *Lumba*:

> "The question here is simply whether, on the hypothesis under consideration, the victims of the false imprisonment have suffered any loss which should be compensated in more than nominal damages. Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused."

73. He went on to conclude that it was inevitable that the appellants in that case would have been detained anyway. Compensatory damages in false imprisonment cases (special damages apart) provide recompense for the time during which the claimant was unlawfully deprived of his liberty. In most such cases, wrongful arrest claims being the paradigm, the compensatory damages are largely dictated by the period in question. So the claimant does no more than prove that he was detained for a given period. It would to my mind produce a strange outcome if the claimant were to prove the detention and the defendant then failed show it was lawful, but the claimant was then obliged to establish that the defendant would not have detained him if the policy had been correctly applied. False imprisonment is actionable without proof of damage. The whole focus of the case advanced by the Secretary of State in *Lumba* was that she could prove that the appellants would have been detained despite any public law breach. In consequence it was submitted by the Secretary of State that the detention was lawful: see Lord Dyson at para 60. The majority rejected that contention but accepted that on the same basis (i.e proof by the Secretary of State) only nominal damages were available. It is correct that Lord Hope spoke of the appellants being unable to "point to any quantifiable loss or damage which requires to be compensated" because they would have been detained anyway (para176).

However, in *Kambadzi* at paras 53 – 57 he spoke of the Secretary of State seeking to prove that the appellant would have been detained anyway.

74. If Mr Eicke's submission is correct, the result would be to transform the tort of false imprisonment from being one actionable without proof of damage into one in which the claimant, in a large number of cases, would have to prove loss. I can see no warrant for such an approach which I conclude is incompatible with the approach of the Supreme Court in *Lumba*. If the Secretary of State wishes to say that a claimant would have been detained anyway, she must establish that proposition.

Torture

75. The 2001 Rules do not define the term "torture". None of the policy documents does so either. I have noted that the January 2013 Detention Rule 35 Process guidance now expressly ties the word "torture" in the policy documents to the UNCAT definition. The difference of approach to the meaning of the word played no part in the underlying decisions to detain in any of the cases before the court. There is no mention of it in any of the contemporary documents. However, the Secretary of State raises it as part of her causation argument. The uncontradicted evidence of David Rhys Jones of the Helen Bamber Foundation, on behalf of the claimants, is that in the many years of discussions between the Secretary of State's officials and Medical Justice, the Helen Bamber Foundation and Freedom from Torture relating to the policy and its application it was never suggested that the distinction now drawn played any part in decision making. There is no evidence that those making decisions about detention ever relied upon it, nor that medical practitioners had it in mind when performing their functions. The claimants therefore submit that in a search for what would have happened in any given case this argument is nothing to the point. I accept that submission.

76. A considerable deal of learning was deployed by counsel on this issue to trace the evolution of the definition of "torture" in the Strasbourg Court and its expansion into the realms of deliberate suffering inflicted by non-state actors, at least in circumstances where the state was unable or unwilling to provide protection. However, the answer to the question depends not on a legal analysis of the meaning of the word "torture" in different contexts but what it means in the Enforcement Instructions and Guidance. It is agreed that the court must interpret the policy. The understanding of the Secretary of State's officials over nearly two decades of the different iterations of the policy is a powerful guide to its meaning, as is the understanding of the interest groups with whom they were in constant discussion. These cases are concerned with the policy as it existed before the recent publication of the new Detention Rule 35 Process which incorporates the UNCAT definition of torture. There was no argument on the question of the impact of that new document for the future in the event that on its true construction the policy (at least before then) yields the definition contended for by the claimants.

77. The background to the policy, and the Secretary of State's dealing with the various charitable organisations whose object is to support victims of torture or other inhuman and degrading treatment, is more fully set out in the witness statement of Mr Rhys Jones. He explains that the remit of the various charities is wider than to support those who have been the victim of torture in the technical sense of the UNCAT definition. He refers to the UKBA Asylum Policy Instruction on "torture" and the

involvement of these organisations in the drafting of its latest version. The question of torture and other violence is clearly of considerable importance in considering the substance of asylum claims and other claims for humanitarian protection. In that instruction the word "torture" is defined as follows:

> "Torture can be taken to include, for example, rape or other serious forms of psychological, physical or sexual violence. [List is taken from Article 17 of the Reception Directive] The term torture has a very specific meaning in human rights law, as a particular severe form of ill-treatment. The use of the term 'torture' throughout this instruction is not generally intended to be understood in the legal sense unless it is clear from the content that this is the case. [Taken from the Torture Reporting Handbook produced by the University of Essex]"

78. The Instruction contains separate definitions of "ill-treatment" and "serious harm". In his witness statement Mr Rhys Jones says this:

> "23. The definitions of torture, ill-treatment and serious harm were not intended as treatises on the subjects, but rather as broad guidance for the case owners. The definitions were developed by me in collaboration with the UKBA official involved in the negotiations at that time. …
>
> 24. The definition of "torture" in the Asylum Policy Instruction is consistent with the Government's general approach to the meaning of torture in the asylum context. Section 1(5) of the Asylum and Immigration Act 1996 amended paragraph 5 of Schedule 2 to the Asylum and Immigration Appeals Act 1993 such that accelerated procedures will apply in certain circumstances but not (inter alia) *"if the evidence adduced in its support establishes a reasonable likelihood that the appellant has been tortured in the country or territory to which he is to be sent."* The Medical Foundation lobbied for this amendment which was tabled by the Government."

"Accelerated procedures" were introduced by the 1993 Act to deal with delays in the asylum system. There was no statutory definition of "torture" in the 1996 Act, just as there is no definition in the 2001 Rules or the policy. That is in contrast with the UNCAT definition in section 134 of the Criminal Justice Act 1988 which makes torture committed anywhere in the world a criminal offence justiciable in the United Kingdom. In a debate on the bill in 1996 the Minister of State, Baroness Blatch, indicated that she "had made clear that the term "torture" can indeed apply to any severe form of physical and indeed psychological abuse deliberately inflicted to cause suffering".

79. Mr Rhys Jones explains that the amendment and more generally the procedures to be followed in asylum cases where questions of torture arose were the subject of constant discussion between the Medical Foundation for the Care of Victims of Torture and the Home Office. It is a fair point made by Mr Eicke that Lady Blatch was not directly

addressing the question of the identity of the perpetrator of the severe abuse to which she referred in her remarks. Mr Rhys Jones states his belief that at least until the 2013 process document the Home Office had consistently been unconcerned about the identity of the perpetrator but had focused on the quality of the treatment inflicted upon the person who claimed to have been tortured. Mr Eicke submits that there may have been a misunderstanding between those involved over all these years, with the Home Office believing and intending that the word "torture" should bear its UNCAT meaning, but the various charities with which it was constantly dealing on this point believing that the identity of the perpetrator was irrelevant. He submits that there was no need to provide a definition before now. Be that as it may, there is no evidence from the Secretary of State that over the many years that her officials were dealing with the Medical Foundation for the Victims of Torture, the Helen Bamber Foundation or other charities in the field that they understood or applied the policy in the sense now contended for. There is no reason to suppose that Mr Rhys Jones' assessment to the contrary is wrong.

80. That conclusion does not determine the issue in favour of the claimants because it is for the court to interpret the policy whatever may have been its author's understanding or the understanding of those with whom the author was dealing, important factors though they are. However, when one considers the purpose of the policy, namely to protect those who are particularly vulnerable to the effects of detention, I can detect no reason of sufficient weight to depart from what I consider to have been the common understanding of the meaning of the word "torture" for these purposes. Mr Eicke submits that one of the factors that makes detention so damaging in cases involving torture is that victims of torture are likely to have been detained by their torturers. Such people are likely to have been officials of some sort in the country of origin. It is once again to be in official detention which is the critical feature.

81. There is some support for that view in the evidence of Professor Katona. In paragraph 3 of his statement he said:

> "In my clinical experience, people who have been subjected to detention and torture before coming to the UK and who are then placed in immigration detention find it particularly distressing to find themselves once again in a locked, prison-like environment; to hear or see the distress of other detainees (for example cell-mates who scream in their sleep as a result of nightmares); to interact with officers in uniforms (which may remind them of the of the clothes worn by their torturers); to see and hear doors being locked and unlocked repeatedly; and to be cut off from normal life. In these conditions they are at risk of experiencing involuntary and repeated reminders of their torture as re-traumatizations. Many torture victims who have subsequently been held in immigration detention in the UK have intrusive thoughts, nightmares and flashbacks related to their immigration detention that are as distressing (sometimes more distressing) than their re-experiencing of their past torture."

However, Professor Katona was not suggesting that the features he identified in this paragraph were necessary indicia for torture or for serious adverse consequences if an individual were to be detained. In that regard there is evidence before the court from Helen Bamber, whose experience and expertise in the field is unrivalled. Her work in supporting the victims of torture began at the end of the war in Europe in 1945 when she was appointed to one of the first rehabilitation teams to enter the concentration camp of Bergen Belsen. Her evidence contains a section headed "Extreme Inter-personal violence as Torture" and another entitled "Identity of perpetrator". She gives a number of examples (which could be multiplied) of the former and explains why the identity of the perpetrator is of little consequence. Importantly, she concludes that there is no significant difference between the therapeutic needs of victims of torture in the UNCAT sense, or in the wider sense.

82. In the result the word "torture" in the detention policy means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based upon discrimination of any kind.

The Individual Cases

83. In all of these cases there has been disclosure of the documents evidencing the decisions on detention taken from time to time from which the basic facts of what occurred can be deduced. However, the question whether a detainee would anyway have been kept in detention absent any established breach of material public law duty calls for a factual determination. In these cases the Secretary of State has provided evidence from senior officials in the department who have reviewed the available material (itself not always complete) with a view to explaining what went on and to answering the question whether the detainees would have been released earlier in the absence of the suggested public law failings. The officials in question were not necessarily those who would have been making the relevant decisions. None of the evidence produced by the Secretary of State was the subject of cross-examination.

84. The court's task becomes one of evaluation, drawing inferences to the best extent possible on the written material with the assistance of submissions. In a number of the cases that have come before the courts since the Supreme Court gave its judgments in *Lumba* the question whether a detainee would anyway have remained in detention has been an easy one to determine on the agreed facts. That will not always be so, and is not so in all these cases. Counsel recognised the shortcomings of the process which calls for fact-finding in an area of controversy without cross-examination or evidence from the person who would have made the relevant decision.

85. I understand that there are many other cases of this nature likely to be litigated once the parameters of the jurisdiction are worked though in decided cases, at this level and on appeal. The question of how to deal with the evidential disputes in the individual cases will need further attention.

EO

86. This claimant is a Nigerian national who overstayed his leave, having arrived in the United Kingdom on 3 April 2008. He engaged in a sham marriage on 24 July 2010 using a counterfeit passport. He was arrested in February 2011 and initially detained using immigration powers. No criticism is advanced relating to this first short phase of immigration detention. In due course he was prosecuted, and remanded in custody. On 13 June 2011 he was convicted on his guilty plea at Inner London Crown Court. He was sentenced to 18 months imprisonment. The custodial part of his sentence came to an end on 3 November 2011. Thereafter he was detained under immigration powers initially in prison but on 14 November 2011 he arrived at Dover Immigration Removal Centre. In the course of his first immigration detention and during his detention in prison the claimant alleged that he had been beaten up in Nigeria. In May 2011, whilst detained in connection with the criminal proceedings, for the first time EO alleged that he had been tortured for political reasons connected with drug running.

87. On 27 June 2011 UKBA wrote to EO indicating that he was liable to deportation and invited him to submit evidence that he fell within one of the exceptions to automatic deportation. Shortly thereafter he indicated to a psychiatrist that he was 'not bothered' about being deported. However, on 10 August 2011 the claimant applied for asylum. In September he stated that he was in a relationship with a woman in the United Kingdom whose children were his step-children. The basis of OE's asylum claim was that he worked in Nigeria as a driver for a politician who was forced from office. The politician thought that OE was involved in some way in his removal from office. Thereafter he received threats. OE said that in October 2007 he was taken from a bar by four men claiming to be police officers. They drove him away in a police car and tortured him. There were further encounters with the same men. He was then forced to become involved in drug smuggling and again tortured. He was taken into the bush where his wife and children were shot dead in front of him. He was again tortured. Then EO was again threatened but with the aid of one of the gang who held him, he fled the country.

88. On his arrival at Dover EO was seen for a screening medical assessment by a nurse. She took a detailed medical history and he completed a screening questionnaire. The nurse noted that EO had scars on his scalp and abdomen and also that he claimed to have been tortured in Nigeria. In accordance with rule 34 of the 2001 Rules, EO was medically examined by Dr Tippu the following day. The face to face examination lasted four minutes but it is likely that the doctor had familiarised himself with EO's history beforehand. He saw him again a few minutes later, this time for seven minutes.

89. On 14 November 2011 a Rule 35 Report was started. I put it that way because the section signed by the claimant giving his authority for medical details relating to his 'special illness or condition' to be provided to UKBA is dated 14 November. The scars to his scalp and abdomen are identified on that form in a hand other than Dr Tippu's. On 15 November, Dr Tippu wrote this:

> "Allegation of torture in Nigeria in 2008-2009, was beaten and sustained injuries to nose and scalp
> Scars
> 1. Nose deformed due to possible fracture? Nasal bone.
> 2. 0.3 cm scar bridge of nose.

3. Multiple scar x 4 on scalp ranging from 5 cm to 1 cm.
4. Scar 1 cm on lower lip."

90. It is not altogether easy to read the handwriting. The form records that it was 'dealt with' on 16 November by an official at Dover, but it was not faxed to UKBA until 21 November. On 23 November the case worker responded. His response included,

> "Information contained within the report has been considered and the decision to detain you has been reviewed.
>
> Whilst a medical officer at Dover IRC has noted that you have alleged to have been a victim of torture in Nigeria. Although it has been noted that you have scars on your scalp and abdomen, no specific medical opinion or independent evidence that you have been tortured has been provided to indicate that you should be released from detention because of these injuries or because of any related physical or psychological condition. Furthermore, there is no record of a referral having been made to the Medical Foundation for the Care of Victims of Torture or of a full medico-legal assessment having been made of your torture claim and any resultant healthcare needs or requirements. You will need to produce evidence to support your allegation."

91. The claimant's detention was thereafter reviewed from time to time but no further evidence in connection with his torture claim was received until 4 April 2012. There was a good deal of contact between the claimant and doctors and nurses in the medical centre in the meantime. Amongst material forwarded by the claimant's solicitors in connection with his asylum and humanitarian claims was a detailed report prepared by Dr Toon at the request of Medical Justice. The material also included a witness statement from the claimant. Dr Toon's report was dated 7 February and followed an examination which had occurred on 25 January 2012.

92. Dr Toon recorded EO's account, which by this time included the belief that the people who had beaten him up in Nigeria were not in fact policemen and also that his concern about returning to Nigeria focussed on the drug dealing aspect of his history. Dr Toon confirmed that EO had a knee injury (of which there had been extensive discussion in the medical notes from both the prison and the immigration detention centre). That could have been caused as a result of an assault but was also of the type commonly caused by sport. Scars on the legs were highly consistent with kicking. Scars on the thighs could have been caused by cuts by a knife. The scar on the abdomen had the appearance of a wound deliberately inflicted; so too did some scars on his wrists, back of the right hand and left forearm. They were consistent with EO's description of how they were inflicted. The facial scarring was highly consistent with a violent assault. So too were the scars on EO's scalp. The right arm had scars of the sort left by cigarettes, which could be accidental or deliberate and also have other causes. Other scars were documented. Dr Toon's conclusion was carefully

explained. The scars he found were consistent with the history given by the claimant, which at times was vague. He said:

> " … it would be extremely unusual to see such extensive scarring in someone who has not been severely injured. Whilst there are credible alternative explanations for some of his marks – for example the facial scarring could be the result of acne, on the whole I would see the pattern of scars which he attributes to his beating as typical of the extremely violent assault he describes.…
>
> In contrast to his uncertainty about individual scars from the assault, he is very clear in his account of how the scars which he attributes to the juju man were made. The appearance of these scars is diagnostic of cuts deliberately inflicted, and the keloid formation is typical of scars in which irritant material has been placed.
>
> The psychological symptoms he describes are consistent with depression. His distress when describing the death of his wife and children was clear. …"

93. The evidence for the Secretary of State in EO's case has been given by Brian Finnegan, Assistant Director of the Criminal Casework Directorate. He accepts that there is no evidence in the paperwork that this report was ever considered. The April review proceeded without reference to Dr Toon's material. Detention was maintained from 17 April 2012. The next review was due on 17 May but in the meantime a successful bail application was made. The claimant was released from custody on 11 May 2012. For completeness, two further matters should be noted. On 4 January 2012 an Immigration Judge had refused bail, expressing deep scepticism about the basis upon which the claimant was asserting that he should remain in the United Kingdom. On 11 September 2012 all his grounds to resist deportation were dismissed by the Secretary of State with an in-country right of appeal.

94. The Secretary of State concedes that the delay of a few days in dealing with the Rule 35 report amounted to a public law failing which bore upon the decision to detain, and therefore that EO's detention was unlawful for two days. She further concedes that the report of Dr Toon should have been considered as part of the review of detention which culminated with a decision on 17 April. Therefore the claimant's detention was unlawful between 17 April and 11 May 2012.

95. EO contends that the Rule 35 report completed by Dr Tippu was not competent, and that the case worker should either have treated it as independent evidence of torture or sought further and better particulars. He suggests that the quality of the report eventually provided by Dr Toon is what the rule and policy required of the centre doctor at the outset. Mr Brown is also critical of the case worker's reference to the Medical Foundation and the request for the claimant himself to provide further evidence. He characterised that as an 'irrelevant consideration' for public law purposes which tainted all that followed.

96. It is a matter of record that Dr Toon found many more scars than had been noted by Dr Tippu, and also that Dr Tippu did not make mention of the abdominal scar noted by the nurse the previous day. But in the light of the conclusions I have reached on the scope of the decision of *Lumba* in this type of case, none of the criticisms leads to the conclusion that the detention thereby became unlawful. The same is true of the failure by the case worker to ask for more information. I consider that he was entitled to conclude that the report from Dr Tippu did not amount to independent evidence of torture. It recorded an allegation of torture and noted a range of scars. It expressed no opinion about the likely causation of those scars or their consistency or otherwise with EO's account. Without more they did not provide independent evidence of torture. Their nature, as described, was non-specific. The case worker's reference to evidence from other sources, which it was open to EO to explore and indeed which he soon explored, did not amount to any public law failing. The absence of evidence, when the policy calls for the official to act when there is evidence, is not an irrelevant consideration. The letter dealing with the Rule 35 report is, when read fairly, doing no more than alerting the claimant to types of evidence which in this environment frequently provide the foundation for action. They provide independent evidence of torture. All that being so, the procedural failure accepted by the Secretary of State at the beginning of this process made no difference. EO would anyway have remained in detention.

97. Mr Finnegan takes two essential points relating to Dr Toon's report. First, he concludes that taken at its highest EO's account of how he sustained his injuries did not amount to 'torture' in the technical sense because those who inflicted them upon him were not state actors, nor was the treatment acquiesced in by the state. Secondly, serious credibility concerns relating to EO and his accounts lead to the conclusion that Dr Toon's evidence is not independent evidence of torture. In the absence of those points Mr Finnegan recognises that the report did amount to independent evidence of torture.

98. I have concluded that the word 'torture' in the 2001 Rules and policy documents governing this detention has a broader meaning than that found in UNCAT. This case perhaps illustrates the difficulty that a doctor or case worker might have should the technical approach be the correct one. The account of what occurred eventually included the claimant's belief that those who beat him up were not policemen, albeit that they represented to him that they were and drove him away in a police car. The beating was said to be connected with the claimant's association with a prominent politician and a political dispute. But then the motivation for the treatment meted out to him might also have been criminal, that is drug dealing. Unravelling state involvement or complicity in such circumstances might be difficult at the best of times, but virtually impossible at a short medical examination in a detention centre or necessarily fairly brief review by a case worker.

99. I have also concluded that issues of credibility of the detainee do not inform the question whether a medical report amounts to independent evidence of torture. Dr Toon's report was independent evidence of torture, and should have been recognised as such if it had been taken into account at all after its receipt.

100. In paragraph 74 and following of his witness statement Mr Finnegan deals with the question whether, in those circumstances, the claimant would anyway have been detained.

> "74. The question of whether the Claimant's circumstances were 'very exceptional' so as to render detention appropriate in any event is a finely balanced one. On the one hand there was the significant risk that the Claimant would abscond. The Claimant was an over-stayer who had gone underground for several years, only coming to the attention of the authorities on his arrest. He had shown a disregard for the immigration laws of the United Kingdom, culminating in his conviction for entering into a sham marriage (and using false documents to do so). In my view the history suggested that there was a significant risk that he would re-offend.[2] Finally … there were significant credibility concerns about the Claimant's account. If this was not taken into account in assessing whether the report was independent evidence of torture, I would have considered it in the balancing exercise to be carried out in assessing whether very exceptional circumstances justified detention.
>
> 75. However, I am also conscious that a decision in relation to the Claimant's asylum claim and deportation was awaited and was taking a considerable time to prepare … I note further that the Claimant posed a low risk of harm to the public. For these reasons, on balance, had I accepted that the Claimant had provided independent evidence that he was a victim of torture … my view is that I would have considered drafting a release referral at this point. That would have then gone to the Strategic Director of CCD for his consideration and final decision on whether or not the claimant should be released."

101. Mr Brown submits that the receipt of an independent medical report should be considered as swiftly as a Rule 35 report, i.e. within two days after its arrival. Therefore, EO does not accept that the relevant date when his detention became unlawful was, as the Secretary of State accepts, 17 April. On this latter point, I accept that on the facts of this case Dr Toon's report should have been considered as part of the review process which culminated on 17 April 2012. Medico-legal reports of this nature require a good deal more time to digest than a Rule 35 report. As in this case, they are frequently accompanied by submissions of a wider scope and other evidence. Case workers cannot be expected to drop everything to prioritise this work to the possible detriment of other detainees. Like most public servants, they are under considerable pressure. I note that in *AM* the Court of Appeal considered that a fortnight to have considered the report from Miss Krajl, and conclude that it amounted to independent evidence of torture was appropriate. Such a time frame might well be reasonable when the monthly review is not imminent; but what is reasonable depends upon the circumstances.

102. In the light of the very fair way in which Mr Finnegan has approached the question of what would have occurred if Dr Toon's report had been evaluated and recognised as independent evidence of torture, the Secretary of State is unable to show that the claimant would have been detained anyway. It follows that from 17 April 2012 (or

[2] The detention review documents show that the assessment was that there was a 'medium risk' of re-offending

the date following that review on which the claimant would in fact have been released) his detention was not only unlawful, but he is entitled to compensatory damages to cover the period before he was actually released on bail on 11 May 2012.

RA

103. During the hearing I was informed that RA's case has been compromised. It is therefore unnecessary to travel into any of the detail. It has a feature which, nevertheless, is worthy of mention. After RA arrived in the United Kingdom he was detained in a detention centre, and then in the weeks that followed transferred to two further detention centres. On each occasion the examination required by Rule 34 of the 2001 Rules was delayed. In consequence, the Secretary of State conceded in her pleadings and in argument that for three short periods the detention was unlawful. Similarly, two Rule 35 reports were not considered within the timeframe required by the policy. So the Secretary of State conceded two further periods of unlawful detention. The allegations of illegality were in fact more widespread. However, the facts of the case demonstrate the potential for detainees to move in and out of lawful detention on the basis of whether time limits identified in the policy are complied with, especially on the happenchance of moves from one detention centre to another. They show the relative complexity of the exercise of disentangling the consequences.

CE

104. CE's case is that she complained of being tortured when she visited the medical centre at Yarl's Wood immigration removal centre on 30 December 2011. That is over a month after she first arrived there. She complains that there were deficiencies in the Rule 35 process which resulted in her being detained unlawfully until she was released on 28 February 2012. Her case is factually complicated. It is necessary to set it out in some detail because CE's credibility (or lack of it) is an important factor in the Secretary of State's case that, whatever public law failings there may have been, they would have made no difference in this case.

105. CE is a Bolivian national born on 22 April 1981. She was arrested by police on 27 November 2011 on suspicion of offences including immigration offences. She claimed to be living with her Bolivian boyfriend and to have been in the United Kingdom for six months. She had entered illegally, probably via Ireland because there was an Irish entry stamp in her Bolivian passport which was later recovered. A man attended at the police station claiming to be her 'Spanish' boyfriend. She was detained and notified that she was liable to removal. CE was transferred to Yarl's Wood. She arrived in the early hours of the morning of 28 November. Later that morning a medical review was carried out by a nurse. CE indicated that she had not suffered any serious injury and had no mental health problems. When asked about operations, she indicated that she had breast implants. She was asked whether she had ever been the victim of torture outside the United Kingdom. She answered "no". A Rule 34 examination was then carried out within 24 hours. Nothing of significance was said by CE. She did complain of thinning hair. She was assessed as being fit to fly.

106. On 30 November 2011 CE asked that a ticket be obtained as soon as possible. She seemed anxious to return to Bolivia. Removal directions were set for 6 December.

However, on 5 December 2011 an application for permission to apply for judicial review was launched. By her claim, she asserted that she

> "with her partner had been a victim of persecution and murder attempt by a criminal band in Bolivia who wanted to force her to become drug trafficker but they refused and escape from Bolivia and came to the United Kingdom in order to save her life and liberty. However somehow they found out and on the 3 August 2009 criminals on the orders of they persecutors shot at them in London and her partner was wounded by having been shot in the right hip but was taken to hospital but survive this second murder attempt on them." (reproduced as written)

107. The removal directions were cancelled but on 8 December 2011 CE repeated her request to leave the country as soon as possible. She was sent the relevant form to sign, namely to confirm that she wished to withdraw her judicial review application. She refused to do so. On 12 December 2011, CE provided further particulars which maintained that she had seen an attack upon her partner in London on 3 August 2009. (There is a record of CE attempting to enter the United Kingdom on 12 September 2008, but she was refused leave to enter and removed back to Bolivia.) Her communication on 12 December included an application for leave to remain in the United Kingdom on the basis of a family life with her partner.

108. On 21 December that application was refused. Amongst the points made was that whilst the man she said was her partner had indeed been shot in August 2009, the perpetrator had been apprehended and charged later that year. There was no mention of any gang involvement in the attack. All her claims were rejected and certified under section 94 of the Nationality, Immigration and Asylum Act 2002 [“the 2002 Act”]. The intention was to remove her.

109. CE attended an appointment at the healthcare centre on 30 December 2011. The foundation of her torture-related claim rests upon what occurred during that appointment. The substance of the record shows that she said that she had breast implants put in both breasts in December 2010 but they were removed in February 2011. Further implants were inserted in June 2011. She complained of a painful scar below the left breast since then. A tender 7 cm scar beneath the left breast was noted. CE is recorded as telling the doctor that the implants inserted in December 2010 had drugs within them. CE said that in June 2011 the implants had been fitted in a cosmetic clinic in Bolivia.

110. An appointment was made for 3 January 2012 "to ask if she wishes to complete a Rule 35 in regards to the breast implants that were full of illegal drugs-subsequently removed in 2011." The inference is that CE did want such a report prepared because on 5 January she attended the healthcare centre and a report was completed. The report was prepared by a nurse but signed off by a doctor. It records a fuller account of historical events. In a short section entitled “Relevant Clinical Information”, CE is noted as stating that she was beaten by her mother and father. Drugs were put in breast implants which were removed in Chile. She said she was in fear of her life if she returned to Bolivia. She gave further information:

> "As a young girl I was beaten by my father and mother at home. I was 21 and had a boyfriend and we agreed that we needed to leave this environment. My boyfriend knew gang members. They agreed to get us out of the country. They told us that we needed to carry drugs for them. I refused and ran away. They later captured me, abducted me and took me to a house where I was raped and beaten repeatedly. I was there for two days. I then agreed and complied with them to carry drugs. My boyfriend was given 1500 USD. I did not inform the Bolivian police as I was in fear of my life. My boyfriend left with the money. I hid myself in a small place called Copacabana. I entered the UK via Spain and Dublin Ireland. If I returned to Bolivia I will be captured by the gang. The police in Bolivia are not aware of what I did. The drugs were removed in Chile in a place called Chuychuy by a surgeon with ? men present. I was very frightened and returned to my mother and told her what happened. I am in great fear for my life."

111. Scars were noted under both breasts. There was also a small scar on the right thumb, another above the left eye together with the scar on the right lower leg. That report, which did not indicate which of the sub-paragraphs of Rule 35 it related to, and did not express any opinion about the veracity of the account. It was forwarded to the UKBA, where it was received at 13.10 on 5 January 2012.

112. On 7 January 2012 CE now applied for leave to remain in the United Kingdom on human rights grounds. She claimed to have been the victim of a Bolivian drug trafficking armed gang, the same gang that had shot her partner in London. She was asked whether she wished to seek asylum and confirmed she did. The Rule 35 report was responded to on 11 January 2012. The Secretary of State accepts that was one day late for the purposes of her policy.

113. The official who responded to the Rule 35 report understood it to amount to a torture claim. The substance of his response was:

> "I am writing to you to acknowledge receipt of [the report] notifying us of a torture claim. Information contained within the report has been considered and the decision to detain you has been reviewed as per Detention Service Order 03/008. It is noted you last arrived in the UK on 28 June 2011 however you have only recently informed UKBA of your claim of torture and these circumstances once you were in detention and awaiting removal some 6 months later. Your Human Rights application submitted on 5 December was refused and certified on 21 December. Your judicial review lodged on 6 December 2011 … is currently outstanding.
>
> [He then summarised the material set out above from the rule 35 form.]
>
> The allegation of torture form (rule 35) merely repeats your accounts of ill-treatment as opposing to making a diagnostic

> finding about your injuries. It is noted the Doctor writing the report has not suggested that your detention is inappropriate and there has been no recommendation to release you.
>
> You were requested to confirm if you wished to claim Asylum and on 9 January 2011 you stated you did. We will therefore be making arrangements to complete a Screening Interview for you and your claim of ill-treatment will therefore be given full consideration in your Asylum claim."

Detention was maintained.

114. The Asylum screening interview was conducted on 18 January 2012. On this occasion CE said that she had travelled to the United Kingdom from Bolivia via Argentina, Madrid, Dublin, Belfast and thence to Scotland. All that had occurred in June 2011. She indicated that she had been fingerprinted in Spain in 2007. She had hidden in Spain between 2003 and 2007. She was in hiding from the gang which had raped her and injected her with drugs. She had reported the crime in Spain. CE told her interviewers that she was the victim of multiple rapes in Spain in 2007. She had a cracked bone in her back and a fissure above her anus. Her anus had been destroyed because of all the things put in it during the rapes. She had been forced into prostitution. She suffered from venereal diseases and herpes as a result of the rapes. She said she had scars in her mouth from a gun. She told her interviewers that she had never had a boyfriend but came to the United Kingdom because she needed a life away from rapes, beatings, drugs and prostitution. She explained that the drugs gang had links to the police. They were a Mexican drug cartel. They had found her in Spain. She clarified that she had been forced to take drugs hidden in her breasts on a train to Chile on two occasions. The drugs were put in without anaesthetic, and removed without anaesthetic.

115. CE's substantive asylum interview took place on 24 January 2012. Her account of events was much fuller. Since she had arrived in the United Kingdom, CE had been living with some friends of her parents. She had bumped into Rodrigo, her boyfriend in Bolivia back in 2002, in a restaurant. He had been living here for eight years. In 2002 the two of them had got caught up with the drugs gang. They were forced to work as drugs mules. They were locked up, threatened and abused. CE was badly beaten. It was during that encounter that she suffered the cut above her eye which left a small scar. They were kept in a room for about two days. They were then forced to swallow a large number of small balls of drugs. They set off on a bus to Chile, but got off long before the destination and purged themselves of the drugs. They then went into hiding for some months, staying with a relative of Rodrigo's. Eventually, CE returned to her parents' house. Arrangements were made for her to go to Spain. She went to Spain in 2003 and lived quietly there until 2007 when she was kidnapped, drugged and brutally raped both vaginally and anally. As a result she became pregnant and had an abortion. She was treated in Spain for three weeks in hospital. CE said that she did report what had occurred to the police in Spain but they took no interest. This short summary of what she alleges occurred in Spain, and believes to have been the work of the drugs gang with which she had been involved in Bolivia five years before, conveys little of the horrific nature of her account. At all events, she returned to Bolivia in November 2007. In company with her mother, she reported the events to the police there. They were not interested because of the involvement of the drugs

gang. In 2009 CE returned to the university studies she had abandoned in 2002. Then one night, she was kidnapped and bundled into a van. A gun was placed in her mouth which caused damage to her palate. For a year CE was forced to work as a prostitute. She was beaten and during this period forced to traffic drugs in her breasts. In October 2010 she elicited the sympathy of a client. In December he enabled her to escape and return to her mother. CE's mother ensured that she got proper medical treatment for the wounds under her breasts. They were infected. Proper implants were inserted. It was after that had happened that her mother made arrangements for CE to come to the United Kingdom via Ireland. It appears that obtaining a tourist visa to Ireland was a well tried mechanism of gaining illegal entry from Bolivia into the United Kingdom.

116. CE's account in interview did not explain how she came to try to enter the United Kingdom in September 2008. It did not repeat the suggestions that she was in the United Kingdom with Rodrigo (the earlier article 8 claim based upon a relationship with him seems to have been a construct) or that she had been here when he was shot, although that position had been maintained in her recent claim for judicial review.

117. Towards the end of January CE's case was transferred from the Non-Suspensive Appeal process to the Detained Fast Track process. That was because parts of her claim were considered to be arguable so that in the event of a negative response to the substance of her claim, she would have an in-country right of appeal. On 27 January CE's application for permission to apply for judicial review was refused. The judge certified it as totally without merit. On 31 January the asylum and human rights claims were refused. A notice of removal pursuant to section 10 of the Immigration and Asylum Act 1999 was served upon CE. The many inconsistencies in her accounts of what had occurred to her and the implausibility of her evidence as it ended up led the Secretary of State to discount it. A notice of detention was also served, the view being taken that CE was likely to abscond if given temporary admission. On 2 February CE appealed the refusal of her asylum claim. Four days later she made a fresh article 8 claim, this time relying on a claimed durable relationship with Pascal Jaufrinneau, an EEA national. This is the man who, less than a fortnight before, she had described as her mother's friend with whom she was living in London, along with his wife. He had completed CE's judicial review claim form identifying Rodrigo as her partner. On 8 February 2012 CE's detention was reviewed and maintained pending her fast track appeal. Two days later the Secretary of State refused her request for temporary admission on the basis of her claimed relationship with Mr Jaufrinneau. Her EEA claim would be determined before long and her asylum appeal would soon be heard.

118. On 16 February CE's appeal was refused by the Immigration Judge. He noted that whilst it was a fast track appeal, it was open to CE and her representatives to have an oral hearing. They chose not to. He went on to express surprise that CE and her advisers had not even put in a witness statement on her behalf or any evidence from Pascal or Rodrigo. It was they who asked for the appeal to be dealt with on the papers. The judge reviewed the various accounts given by CE over time of what was said to have occurred to her and recorded the Secretary of State's approach and conclusions relating to credibility. His conclusion was:

> "I have considered the appellant's account with the most anxious scrutiny. I make the following findings. I do not find the appellant to be a credible person. I find that the appellant

> has advocated her claim solely for the purpose of obtaining status in the United Kingdom. I find that she did not arrive in the United Kingdom on 20 June 2011 but had been in this country all along. I find that the appellant was not abducted by the Sinaloa drug cartel. She was not asked or made to traffic drugs for them. She was not ill-treated by them. She was not abducted and raped by them in Spain in 2007. She was not abducted by them in Bolivia in 2009. I find the appellant's account was a total fabrication. The appellant would not be at risk on return to Bolivia. She was of no adverse interest to the Sinaloa or anyone else."

119. CE had until 20 February 2012 to seek permission to appeal the refusal of her asylum appeal. A monthly progress report on 17 February maintained detention. On 23 February CE's EEA application was returned for want of appropriate documentation. CE sought permission to appeal the decision of the immigration judge but this was refused on 27 February. So it was that CE's attempts to overturn the decision of the Secretary of State came to an end. However, in the meantime a different process was operating in parallel.

120. On 14 February 2012, CE was referred to the Poppy Project, an organisation which delivers support and accommodation to female victims of trafficking. It is unnecessary to set out the full detail of the arrangements put in place for dealing with suspected victims of trafficking, save to say that there is a referral process to a Competent Authority. If that Authority concludes that there are reasonable grounds for considering that the person concerned was a potential victim of trafficking, she will be released. On 16 and 17 February CE had a meeting with a support worker from the Poppy Project. She gave an account of events which appears broadly consistent with that she had given in her full asylum interview. On 20 February 2012 the caseworker indicated that a full assessment would be provided by 27 February and asked that in the meantime no steps be taken. The Poppy Project arranged for CE to be seen by Dr Bingham, a trainee general practitioner, on 25 February 2012. CE provided a detailed account of events to Dr Bingham. Dr Bingham took a very full medical history and carried out both a physical and mental state examination. She concluded that the scars under the right breast were diagnostic of repeated procedures to the breast. She considered that the scars on the right hand were highly consistent with the knife wounds described by CE. Scarring on the palate was highly consistent with CE's account of blunt trauma. Overall, Dr Bingham concluded that her physical and mental state examination was typical of her history. Dr Bingham's report was provided to the Secretary of State on 27 February 2012. The following day the Competent Authority issued its decision that there were reasonable grounds for considering that CE was a potential victim of trafficking. That same day, CE was released and the Poppy Project agreed to house her. That being the position, Dr Bingham's report was not considered in connection with the torture policy.

121. Mr Brown submits that the report made by CE on 30 December 2011 amounted to an allegation of torture. He suggests on her behalf that the delay in producing a Rule 35 report until 5 January 2012 amounted to a breach of Rule 34 which implicitly suggests that an examination must be carried out within 24 hours of any such suggestion.

122. I do not accept those submissions. It overstates the position to suggest that the report made by CE on 30 December amounted to an allegation of torture. Furthermore, neither the 2001 rules nor the Secretary of State's policy require a medical examination to follow within 24 hours for the purpose of deciding whether a Rule 35 report should be completed. The Rule 34 examination is required to take place when a detainee arrives at a detention centre for the first time to ensure that any medical needs are established and catered for quickly. It does not follow that if an issue arises after that has occurred, it must be responded to by a further medical examination within 24 hours. In this case, as the Secretary of State accepts, the response to the Rule 35 report produced on 5 January was a day late. That would result in a claim for compensatory damages only if CE would have been released, when it was considered. The Secretary of State's policy did not require the caseworker to seek further and better particulars from the doctor. The fact that the substance of the form was completed by a nurse and the report countersigned by a doctor does not result in subsequent detention becoming unlawful. The fact that the caseworker said in his response that the report had been written by a doctor (as opposed to submitted by a doctor) is immaterial. The reference to there being no recommendation for release is not an irrelevant consideration; the converse would be highly relevant and may well form part of a doctor's report under all three limbs of Rule 35. Even if it were an irrelevant consideration, there would not be an adequate connection between that failing and the decision to detain.

123. Unless CE can establish that the Rule 35 report should have been accepted by the caseworker as independent evidence that she had been tortured, the detention that followed was not unlawful. Even if she can, compensatory damages would be denied to her if the Secretary of State can establish that she could and would have been detained in any event.

124. The substance of the information conveyed in the Rule 35 report is set out in paragraph 110 above. It contained a number of separate statements from CE;

i) That she had been beaten by her parents and wanted to leave them;

ii) That a gang agreed to help her and her boyfriend, but they would be required to traffic drugs;

iii) CE refused and was captured and beaten, before agreeing;

iv) CE hid, and then came to the UK via Spain and Ireland;

v) Drugs were put in her breasts and then removed in Chile.

125. The additional information contained in the note of CE's visit to the healthcare centre on 30 December, namely that implants were inserted in December 2010, removed in February 2011 and then that cosmetic implants were inserted in June 2011 in a clinic in Bolivia, was not repeated in the Rule 35 report. The body map showed three areas of scarring, other than to the breasts. It is true that the report made no attempt to attribute those scars to any particular type of injury. The body map showed scars under both breasts. The scars under each breast provided cogent evidence that a surgical procedure of some sort had been carried out. Whilst the descriptions were inevitably fairly sketchy in the Rule 35 report, so far as CE's breasts were concerned

the details amounted to an allegation that breast implants filled with drugs had been inserted and subsequently removed in Chile by a surgeon under the eyes of a number of men. The scarring under both breasts recorded in the form, as well as the other scars on this young woman, provided some support for her account. In criminal trials it is common for expert witnesses to be asked whether an objective finding is consistent, and if so to what degree, with an account given by a witness. If the objective finding is consistent with an account, it provides some independent support for it. I consider that the Rule 35 report did provide some independent support for the account given by CE of what had occurred to her. It was independent evidence that she had been subjected to the traumas she described. The allegation was an unusual one. The scars demonstrated that the breasts had been operated on. It did not 'merely repeat [CE's] account of ill-treatment' as the case worker's letter suggested. He was right to observe that it 'did not make any diagnostic finding about [CE's] injuries' but that was not the test under the policy. Independent evidence of torture may be provided which falls far short of a diagnostic certainty.

126. I have observed that the evidence does not suggest that case workers in early 2012 were drawing a distinction between torture in the UNCAT sense or in the wider sense. I have also concluded that the policy at that time used the word 'torture' in the broader sense. It follows that I consider that the Rule 35 report should have been recognised as independent evidence of torture for the purposes of the Secretary of State's policy and that the case worker misdirected himself in looking for 'diagnostic' evidence. The failure to regard it as such was a public law failure which bore upon and was relevant to continued detention. The detention of CE became unlawful from the date on which the Rule 35 report should have been considered and acted upon, that is 10 January 2012.

127. The next question is whether the Secretary of State has shown on balance of probability that CE would have been detained anyway, in the prevailing circumstances because of the existence of very exceptional circumstances. It is the evidence of Mr Fisher that very exceptional circumstances existed even if the Rule 35 report should have been recognised as independent evidence of torture, and that CE would have been detained. He advances three reasons:

i) CE lacked all credibility such that little or no weight could be placed on her account;

ii) There was a high risk of absconding because CE had twice entered the United Kingdom without leave. She had no real ties here which would result in her remaining in contact;

iii) CE was removable at short notice, particularly after 20 January when her case was placed in the fast track.

128. It is, to my mind, important to bear in mind that the decision whether to grant CE temporary admission (no doubt with the possibility of strict conditions) should have been taken on 10 January. Much of the history of events summarised above (and set out in more detail in Mr Fisher's statement) relates to later events. There were, at the material time, doubts about CE's credibility. She had asked to return to Bolivia and then made an article 8 claim based upon her relationship with Rodrigo. She had made a judicial review claim, which was not well particularised. Then on 7 January

2012 CE made her human rights claim based upon involvement with the drugs gang, which included the assertion that her boyfriend had been shot in London in August 2009. Whilst it is correct to observe that the way in which CE developed her account, changed horses so far as an article 8 claim was concerned, and contradicted herself led to the understandable conclusion that she was making everything up, those events followed 10 January[3]. On 9 January CE confirmed that she wished to make an asylum application.

129. An objective assessment of the state of CE's credibility on 10 January would not, in my judgment, have led to the conclusion that it was shot through or that she lacked 'all credibility'.

130. It cannot be doubted that CE presented a risk of absconding. The evidence suggested that she had been turned away in September 2008, but (if she was telling the truth) was here in August 2009 when Rodrigo was shot. There was room for doubt about whether she left the United Kingdom and then returned in June 2011, but at all events her article 8 claim, followed by judicial review and then an asylum claim suggested that she was determined to stay, if possible. In the context of the diet of cases in the Tribunals and Administrative Court the risk of absconding presents in this case as relatively routine. I should add that CE's case is not one concerning a convicted criminal and so there is no suggestion that her release would pose a threat or risk to the public, or of offending.

131. I do not accept that at 10 January 2012 the case worker could or would have proceeded upon the assumption that CE was removable in a 'very short space of time', as Mr Fisher puts it. That would be to prejudge the asylum claim that has been made a few days before. Very swift removal could only be achieved if the claim were to be refused quickly and certified under section 94 of the 2002 Act. Absent refusal and certification, as the chronology in this case itself shows, the legal process (assuming that the claim was not accepted) would be likely to take about six weeks if the appeal mechanisms were utilised.

132. I am unpersuaded on the material before me that CE would have been detained after the Rule 35 report had been recognised as independent evidence that she had been tortured. The caseworker who considered the Rule 35 report has not provided any evidence of how he would have considered the question of detention in these circumstances. Whether Mr Fisher would have been the recipient of any recommendation from the case worker on its way up the chain is unclear. But on balance of probabilities, on the proper application of the policy, CE should have been released as soon after 10 January as the administrative arrangements could be put in place. She is entitled to compensatory damages for the period from then until her release on 28 February.

OE

133. OE is a Nigerian national who arrived in the United Kingdom in June 1993 but whose presence was unknown to the authorities until 2008. In March that year he was

[3] Much more recent evidence from Lucy Kralj concluded that CE suffers from "a very severe and complex form of PTSD and Major Depressive Disorder with marked symptoms of dissociation. She is one of the most vulnerable clients I have assessed over the course of the past decade of professional, clinical work with survivors of severe trauma." She went on to speak of her vulnerable psychological state.

convicted of possession of an improperly obtained identification card and sentenced to 12 months' imprisonment. He completed the custodial part of his sentence on 29 July 2008 and thereafter was detained under immigration powers, pending deportation. He remained in immigration detention until 1 April 2011, when he was released. He was in poor physical shape having before then gone on hunger strike. However, in January 2009 a medical report was prepared by Dr Playforth which provided independent evidence of torture. That report was never considered by the Secretary of State as it should have been.

134. On 30 March 2011 OE submitted an asylum claim based upon his claimed homosexuality. In January 2012 it was refused and certified under section 94 of the 2002 Act. OE had been required to report to a police station as a condition of temporary admission. He reported as required on 17 January 2012 and was taken into custody with a view to deportation and detained at Morton Hall immigration removal centre. OE went on hunger strike. His condition soon deteriorated so that by 24 January, in the opinion of Dr Goldwyn who examined him privately, he was not fit to fly. The Secretary of State did not accept that and attempted to remove him on 26 January 2012. An order from the High Court made less than an hour before departure prevented removal. OE was taken to Harmondsworth immigration removal centre. He tried to harm himself and was transferred to Hillingdon Hospital for five days, before being returned to Harmondsworth. He was released on 24 February after a further deterioration in his condition, having in fact lost a bail application that same day.

135. The errors identified in argument by Mr Brown may be summarised in this way:

i) Between 29 July and 9 September 2008 OE was detained pursuant to the 'secret policy' which has been condemned in *Lumba*.

ii) The Secretary of State cannot show that Rule 34 examinations were conducted promptly on five occasions between December 2008 and May 2010 as OE moved between removal centres.

iii) Dr Playforth's report of 12 January 2009 was never considered, even after 23 June 2009 when the Asylum and Immigration Tribunal found that the claimant's account of torture was reasonably likely to be true.

iv) On 21 August 2009 the Criminal Casework Directorate blocked the release of OE on the mistaken basis that OE had been convicted of a drugs offence.

v) The Rule 34 examination and Rule 35 report completed on 18 January 2012 were not fit for purpose.

vi) The case worker who considered the report failed to apply the policy.

vii) No Rule 34 examination was carried out when OE went to Harmondsworth on 23 January 2012.

viii) The whole of the second period in detention violated article 3 ECHR because detaining OE whilst he was on hunger strike and in a parlous medical condition amounted to inhuman and degrading treatment.

136. The way in which this last point developed in argument travelled well beyond the pleaded case. The Article 3 claim was dealt with in a single sentence in the grounds:

> "The Defendant's treatment of the Claimant, in particular the forcible attempt at removal on 26 January 2012 whilst the Claimant was acutely unwell, amounted to inhuman and degrading treatment."

Mr Eicke objects, with justification in my view, that the general attack upon much of the second period of detention because of OE's medical deterioration following his going on hunger strike emerged only in a single paragraph in a 94 page skeleton argument before being elaborated upon at length in oral argument. Mr Eicke submits that OE should not be permitted to go outside his pleaded case, which was concerned with the attempted removal on 26 January. Further, complaints about OE's medical treatment during the second period of detention have already been the subject of judicial review proceedings. Permission was refused and the claim certified as being totally without merit. The Secretary of State had responded in detail to that claim, in particular to all the complaints concerning the way in which OE was cared for. There was no attempt to renew the application for permission. As Mr Eicke put it in argument:

> "It is entirely inappropriate – if not an abuse of process – to attempt to reintroduce the earlier claim at the close of day three of a three day judicial review claim in circumstances where (i) OE's representatives must have been fully aware that the earlier claim for judicial review had addressed such matters; (ii) that permission to bring that claim had been refused; (iii) the claim had been certified as being totally without merit; and (iv) no attempt had been made to renew that application."

137. Those submissions are soundly made. An application to amend the pleadings was not persisted in and would, in any event have been refused. In those circumstances OE must confine himself to his pleaded case. I was provided with and watched a DVD capturing part of what occurred on 26 January and have statements from those involved in OE's attempted removal. There is no statement from OE himself dealing with the issue.

138. Before turning to the substantive issues that arise in OE's case, I deal briefly with the second argument advanced on his behalf, namely that the Secretary of State cannot prove that OE was examined promptly pursuant to Rule 34 of the 2001 Rules on a total of five occasions. The evidence of Megan Smart, the Director of the Criminal Casework Directorate, is that OE's medical records relating to his first period of detention have been lost. They should have gone with him from prison and then from site to site within the immigration estate. There is no positive evidence from OE that he was not examined as he moved about the immigration estate. The absence of records does not, without more, allow the conclusion to be drawn that there was a failure to comply with the 2001 Rules.

139. Dr Playforth's report dated 9 January 2009 was provided to the Secretary of State in the course of preparation for OE's appeals against the refusal of his asylum claim on 6 December 2008. Ms Smart's evidence is that it arrived with the Secretary of State

shortly before the hearing fixed for 26 March 2009. Mr Eicke accepts that the failure to consider the report amounted to a material breach of the Secretary of State's policy with the consequence that from the date by which it should have been considered, OE's detention became unlawful. He submits that a reasonable time by which to consider it was 20 April, because that is the date of the next detention review. In my view, a fortnight provides ample time in the context of this case. The detention thus became unlawful on or about 9 April 2009.

140. Ms Smart contends that the evidence of Dr Playforth did not provide independent evidence that OE had been tortured because the perpetrators of what he said occurred to him were Muslim men, who abused him because he was Christian, rather than state actors. She fairly accepted that if the narrow view of torture was not taken, then his report did indeed provide that independent evidence. I repeat that there is no evidence that case workers were, in 2009, approaching the definition of torture in the narrow way suggested by the Secretary of State and, in any event, that the policy imported the wider meaning (see paragraph 82 above).

141. There is no evidence that Dr Playforth's report was ever considered in the detention reviews that followed. Even the reasons of the Tribunal for rejecting the appeal (albeit accepting OE's evidence of what had occurred in Nigeria) were not considered. The Tribunal concluded that even if all OE said was true, the lapse of time meant that he was not at risk on return. Nonetheless, Ms Smart contends that had the report been considered, and had it been recognised as independent evidence of torture, detention would nonetheless have been maintained because there were very exceptional circumstances for doing so. She identified four reasons:

i) There was a significant risk that OE would abscond. He had been in the United Kingdom unlawfully for 16 years, apparently working. He had no apparent ties here.

ii) There was a risk of reoffending evidenced by his single conviction in the light of a 'flagrant disregard' of immigration laws;

iii) Removal was imminent once the appeal was out of the way and documents had been obtained from the Nigerian High Commission. There was no reason to suppose a problem over documents (although later OE's refusal to co-operate became an issue).

iv) The alleged torture had occurred 16 years before.

142. OE continued to pursue all available legal avenues, including an application to the High Court under section 103A of the 2002 Act. Monthly reviews continued in ignorance of the report from Dr Playforth and the factual findings of the Tribunal. Then on 19 August 2009 OE's detention was reviewed. Its context was the application to the High Court which if unsuccessful should have cleared the way for removal. The Nigerian High Commission had agreed to issue travel documents. Applying the ordinary approach to questions of detention (so no question of very exceptional circumstances) the caseworker's conclusion was that the risk of re-offending and absconding outweighed the presumption in favour of release. But the following day the Assistant Director proposed release due to the length of time that OE had by then been in custody. He referred to fact that the High Court review would

be likely to take another two months. At the next level, the Deputy Director recognised that the decision was a balanced one. She noted 'a low risk of harm' and agreed that he should be referred for release. The caseworker drafted the referral but it was not sent because those concerned changed their minds when they learned that OE has been 'convicted of a drug related offence'. He had in fact been acquitted of a cannabis related offence. But for that mistake he would have been released applying the ordinary approach to detention in August 2009.

143. Two issues arise from this unhappy sequence of events. First, OE argues that it is clear that he was on cusp of release. In public law terms those making the decision took into account an irrelevant factor (a conviction he did not have), alternatively made an error of fact which impugns their decision. Secondly, he submits that if in August he was about to be released in the ordinary course of events it is rather difficult for the Secretary of State to establish that four months before there were very exceptional reasons for maintaining detention in the face of independent evidence of torture.

144. The Secretary of State responds to the first point by saying that the error had been corrected by November 2009, after which detention was maintained. So this particular public law failing (which the Secretary of State accepts) ceased by then to have any bearing. So the recommendation seen in the papers may not have been acted upon even in August 2009. But there is a significant difference in what was later occurring in November 2009 and afterwards during the first period of detention. At those reviews the recommendation passing up the line was to maintain detention, largely on the basis that as the legal process was completed, removal was likely to follow soon. Throughout 2010 and early 2011 attempts to remove OE failed principally because of his lack of cooperation. Mr Eicke also submits that because detention was maintained from November 2009 it can be inferred that even if Dr Playforth's report had been considered, OE would have been detained even applying the torture policy. I do not accept these arguments. The inescapable conclusion is that in the absence of the mistake in August 2009 OE would probably have been released without any reference to the torture policy.

145. The Secretary of State relies upon the factors identified by Ms Smart to suggest that before 20 August 2009 OE would probably have been detained even if Dr Playforth's report had been recognised as independent evidence of torture. Looking at those factors (see paragraph 141), there is nothing in the material available which suggests that the risk of OE re-offending was any more than in all cases involving an offence of dishonesty of this sort. Indeed, it might be thought that his presence in the United Kingdom for 16 years without offending pointed against, rather than towards, a high risk of reoffending. In August 2009, as I have noted, the Deputy Director suggested that there was a low risk of harm. There was undoubtedly a risk of absconding if one assumes that OE would take steps to remain in the United Kingdom even in the face of a defeat in the legal processes available to him. But that tells against the conclusion that removal was 'imminent'. OE's appeal to the Tribunal was due to be heard imminently but the reality of the position was that the decision of the Tribunal would follow after some time. In his case, as we know, the appeal was heard on 26 March, the decision was prepared on 12 June and promulgated on 23 June 2009. At that time the legal process enabled further applications, including to the High Court. Regrettably all that took time, as those later involved in reviewing OE's case

identified. I do not accept that OE's removal was imminent. The antiquity of the allegations of torture was a factor and perhaps an unusual one in the context of this policy.

146. The reasons advanced by the Secretary of State do not appear to me to support the suggestion that there would have been very exceptional reasons to maintain detention had Dr Playforth's report been recognised as providing the necessary independent evidence of torture. In the face of the decision made in August (albeit reversed on a mistaken basis) on the ordinary criteria I do not accept that that Secretary of State has established that OE would have been detained after about 9 April absent the material error in failing to consider the report.

147. The question then arises for what period OE is entitled to compensatory damages. He was released on 1 April 2011. But the evidence before the court makes it clear that he could and would have been taken back into custody on or about 23 March 2010 in anticipation of removal and been detained until the end of March 2011, when he was released having gone on hunger strike.

148. The legal process continued until OE exhausted all his rights of appeal on 22 January 2010. A deportation order was made on 15 March 2010 and removal directions set for 31 March 2010. Had OE been at liberty he would have been taken into detention about a week before then. On 18 March OE raised an article 8 claim based upon the suggestion that he had a child. That was preposterous. He had abandoned that claim before the Tribunal and produced a letter from the mother confirming he was not the father of her child. There were subsequent family court proceedings in which DNA evidence confirmed that position. On 31 March 2010 OE physically disrupted his removal. Removal Directions were reset for 15 April but OE obtained an interim order preventing removal on the basis of his claim to be the father of the child. It was not until 24 November that the family court proceedings confirmed the true position. The application for permission to apply for judicial review was then swiftly refused as being totally without merit with renewal as no bar to removal. A bail application was refused on 13 December 2010. The Tribunal Judge cited OE's campaign to thwart removal as the reason. The only barrier to removal was obtaining a travel document. OE was refusing to cooperate in that.

149. OE started his hunger strike on 18 March 2011. His release was ordered because he was not fit to be detained. In March 2011 he raised a new claim, namely that he was homosexual and could not be returned to Nigeria on that account. Those fresh representations were rejected in January 2012.

150. I am satisfied that having gone back into custody in March 2010 the claimant could and would have been detained until 1 April 2011. His conduct demonstrated that he was absolutely determined to thwart his removal. His conduct demonstrated a cynical manipulation of the immigration and legal process.

151. On the basis of *Lumba* the period for which OE is entitled to compensatory damages extends to 23 March 2010.

152. By the time that OE was taken back into custody in 17 January 2012 he had exhausted all legal avenues. He was detained with a view to removal on a charter flight to Nigeria on 26 January. Although Mr Brown's initial submission was that he should

never have been detained, he was constrained to accept that detention for the purpose of removal was lawful. Chapter 60 of the Enforcement Instructions and Guidance suggests that those being removed on charter flights must be given a minimum of five working days notice of removal. That is to enable representations to be made and legal action to be taken because the simple act of lodging a claim for judicial review does not result in deferral of removal directions. OE was detained two days in advance of the minimum five day notice period because (a) he reported on 17 January and those on temporary admission are normally detained when they report; (b) his next date for reporting was 24 January which would not provide adequate notice of removal; (c) a travel document was required; and (d) a telephone appointment had been made with the Nigerian High Commission for 17 or 18 January (OE had refused to co-operate in the past in getting travel documents).

153. Dr Playforth's report was still not in the mind of those dealing with OE. A Rule 35 report was produced on 18 January, recording that OE claimed to have been beaten up in Nigeria, that his father had been killed and noting a number of scars. When the report was considered by the case worker, no consideration was given to whether it amounted to independent evidence of torture. It is unnecessary to determine whether the brief contents of that report did amount to independent evidence of torture because Dr Playforth's report was sitting unnoticed in the paper, which was. Nonetheless, it is clear that despite there being independent evidence of torture OE could and would have been detained because the inevitable view was that very exceptional reasons existed to maintain detention. The risk of absconding, in particular, had become extremely high given the refusal of OE's application to revoke his deportation order. The events that unfolded amply proved that to be so. Not only did OE go on hunger strike in an attempt to thwart removal but he physically resisted the officers transporting him on 26 January. He had also pretended to be a national of the Ivory Coast. He was absolutely determined not to go. OE had been transferred to Harmondsworth on 23 January and placed in the healthcare unit. His move was precipitated by his hunger strike. It was decided that he should be in a removal centre with suitable medical facilities. He was under the constant care of the health care professionals. A complaint is made that there was no Rule 34 examination. The Secretary of State does not have access to the medical notes of OE so precisely who saw OE and when is unclear. However, a formal rule 34 examination would have been formulaic, indeed pointless, in circumstances where the whole purpose of the move to Harmondsworth was to safeguard OE's medical position. If one was not carried out, I conclude that it was reasonable not to do so.

154. On 28 January OE was found with a cable around his neck and two days later was visited by Dr Goldwyn. On 31 January she produced a letter suggesting that OE was not fit to fly. The claim for judicial review was lodged on the same day. On 1 February the Secretary of State sought to transfer OE to hospital, but he refused. He agreed the next day and received treatment which soon appears to have reversed the worst of the effects of the harm he was inflicting upon himself. On 7 February he was discharged back to Harmondsworth, and was taking a food replacement drink and fluids. On 10 February OE was examined on behalf of Medical Justice by Dr Mounty, a consultant psychiatrist. He was by then refusing liquid food replacement but taking fluids. He was readmitted to Hillingdon Hospital on 12 February. Dr Mounty produced a report dated 14 February, although it was not provided to the Secretary of State until 20 February. She concluded that OE was suffering from chronic PTSD,

psychotic depression and was suicidal. Detention and the threat of removal had exacerbated his poor mental state.

155. On 20 February OE applied for immigration bail. The Secretary of State opposed the application on the grounds that OE was seeking to avoid removal but alternatively submitted that any grant of bail should be subject to a residence requirement and weekly reporting. On the same day the Secretary of State again sought to transfer OE to hospital, but he refused. On 23 February the staff at Harmonsdworth notified the Secretary of State that his condition had deteriorated. They considered that he was no longer fit to be detained. On 24 February he was released, with appropriate medical care being arranged. In the meantime the bail process was proceeding in the Tribunal. The immigration Judge refused bail. He noted the poor immigration history, OE's failure in the legal process, his change of story, his attempt to change his stated nationality and his attempts to frustrate the removal process. He referred to the medical reports. His conclusion was that before bail could be contemplated there would need to be appropriate sureties.

156. There is a danger in a case of this sort of an over-refined analysis of the events as they unfolded between 26 January and 24 February. OE's detention on 17 January was in accordance with the policy governing removals. The Secretary of State was determined to remove OE to Nigeria; he was equally determined to do all in his power to stop her, by harming himself, physical resistance and further legal proceedings. I accept the evidence of the Secretary of State and the arguments advanced by Mr Eicke that in the four weeks that followed the failed removal attempt there were very exceptional reasons to maintain detention in an effort to remove him. Even if there had been any focus on the independent evidence of torture, he could and would have been detained. There was a constant focus on his medical condition (in a parallel Rule 35 context) and detention was considered appropriate until his condition deteriorated to such an extent that those with responsibility for his care considered that he should be released. OE won his immediate battle with the Secretary of State. The failure to recognise that there was independent evidence of torture, and only then reach the inevitable conclusion that the circumstances very exceptionally justified detention, rendered this period of detention technically unlawful. That is the conclusion I am driven to if my understanding of *Lumba* is correct. But no compensatory damages are payable for this period.

157. The article 3 claim amounts to little more than an appeal to the court to view the DVD and conclude that what is shown inexorably leads to the conclusion that OE's article 3 rights have been violated, coupled with an invitation to conclude that OE was unfit to fly.

158. The healthcare manager, who is a registered nurse, completed a form on 26 January certifying OE as fit to fly. Carl Blackford, the GEO Manager at Harmondsworth, confirms that he was told by the nurse in attendance when the attempted removal took place, that a doctor had earlier confirmed him fit to fly. Witness statements have been provided by five additional members of staff who were involved in the attempted removal of OE. Use of force incident forms were completed shortly after the events. The effect of their evidence is that such force as was used on OE was reasonably necessary to enforce a lawful deportation order. The underlying problem was that he was unwilling to co-operate and resisted. It is unnecessary to descend into a detailed description of what occurred. It is for OE to establish a breach of

article 3. There is no evidence from OE himself on this issue. The evidence of those involved in the attempted removal is uncontradicted. The DVD makes disturbing viewing. It shows a struggle. OE is restrained, then dressed, cuffed and carried to waiting transport. But it does not undermine the account of the GEO employees. This part of the claim is not made out.

RAN

159. RAN is a Sri Lankan national who came to the United Kingdom on a student visa on 26 January 2010. She was found to be working on 28 October 2010 and detained. She was to be removed to Sri Lanka on 1 November but made an application for permission to apply for judicial review of the removal directions (which application was refused as being totally without merit in February 2011). In the meantime RAN indicated that she would make an asylum claim. She was released from detention on 8 November 2010 but failed to attend the interview. Following her failure in the judicial review proceedings RAN was next due to report on 6 April 2011. The plan was to detain her for removal but she failed to attend. She was next encountered on 24 April attempting to leave the United Kingdom using a Swiss identify card which did not belong to her. On 3 May 2011 she was convicted of possession of a false instrument and sentenced to 12 months' imprisonment.

160. RAN then made a claim for asylum. A screening interview was conducted on 24 June 2011 and a full interview on 13 September. On 27 October the asylum claim was rejected by the Secretary of State and a deportation order was made. Her claim included an allegation that she had been kidnapped by the Tamil Tigers but later went to the Army, who tortured her when she refused to sign a confession. The Secretary of State considered that her whole claim lacked credibility, not least because when she was first encountered she said she had no reason to fear returning to Sri Lanka. The conclusion was that the asylum claim was made solely to frustrate removal.

161. No complaint is made in connection with RAN's detention between 25 October 2011 (when she completed the custodial part of her sentence) and 12 January 2012. During that period she had moved to Yarl's Wood and explicitly stated that she had never been tortured. Nonetheless, she had appealed the refusal of asylum. That appeal was heard on 26 January 2012 and dismissed in a determination promulgated on 31 January.

162. On 12 January RAN was seen in the healthcare centre following receipt of a letter from Medical Justice. It stated that RAN had reported being subjected to torture by the army in Sri Lanka in 2007, including being hung up by her thumbs and having pins pushed under her nails. The letter asked whether "this could be addressed in her next healthcare appointment". RAN gave a detailed account of the events, essentially repeating what she had said to the Secretary of State and was to say to the Tribunal. That account was reproduced in the Rule 35 report filled in on 12 January. The account concluded with this:

> "States she has no scars from injuries she claims to have received from the torture."

The continuous medical record completed the same day confirmed that no body map was submitted with the Rule 35 report because there were no scars. The report and

that note were completed by a nurse. The report was reviewed by a general practitioner and signed by him (before being sent to UKBA) on 13 January 2012. In a statement prepared in these proceedings RAN questions whether she was asked about scarring, although she does not suggest that she volunteered at the time that she had any scars. The interview with the nurse was conducted with the help of an interpreter on the telephone, she suggests. There may be room for misunderstanding. But there is no reason to suppose that the record is not other than as the nurse concerned understood it to be, particularly as it provides the explanation why there was no body map.

163. The Secretary of State accepts that the Rule 35 report was not considered within the timescale required by her policy. That would have been by 17 January which, as it happens, would have coincided with RAN's monthly detention review. It was not considered until 19 January, and so the Secretary of State concedes that RAN's detention was unlawful for two days. She submits, however, that RAN could and would have been detained anyway because the report did not contain any independent evidence of torture. The response of the caseworker was to maintain detention on the basis that the Rule 35 report repeated the claims which the Secretary of State had recently rejected on credibility grounds. It is clear, in my judgment, that the Rule 35 report did no more than repeat the claim advanced by RAN. In the face of an assertion on her part that she had no scars it is unsurprising that it provided no independent evidence that she had been tortured. There was no reason for the caseworker to have sought further and better particulars. It is clear that the delayed consideration of the report made no difference to RAN's detention.

164. Following the dismissal of RAN's appeal, she obtained a medical report from Dr Beeks, a general practitioner. She visited Yarl's Wood and saw RAN for about an hour. Her report is dated 2 March 2012 and was received by the Secretary of State on 16 March. Dr Beeks recorded RAN's account of ill-treatment. That included a significant development. For the first time she stated that a metal bar and wooden stick had been used to beat her knees. That caused bleeding and ulceration. Dr Beeks recorded a number of tiny black lines under the nails of the left middle finger and thumb and the right middle and little fingers. There were some small scars on the knees. Dr Beeks recorded RAN's description of flashbacks and interruption of sleep which she concluded provided evidence of PTSD. She described the black lines under the nails as highly consistent with RAN's account, and those on the knees as consistent.

165. The Secretary of State concedes that her policy obliged UKBA to consider Dr Beeks' report within a reasonable time. It was overlooked until June 2012. Mr Eicke submits that it should have been considered within the timescale of the next detention review, namely the middle of April. So the Secretary of State concedes a period of unlawful detention as a result. However, there is no reason why the medical report could not have been considered within a fortnight of its receipt, namely by the end of March 2012. That provided a reasonable time to do so. It follows that RAN's detention became unlawful from the beginning of April 2012.

166. The report of Dr Beeks was considered in detail on 7 June 2012 by an official in the Criminal Case Directorate in connection with the substance of her claims for asylum and humanitarian protection, rather than detention. When the report was considered by the case worker at the next detention review (mis-dated 28 May rather than June)

she concluded that little weight could be attached to it in the light of the findings of the Tribunal which had concluded

> "We have not found the appellant to be a credible witness. We do not believe anything she says that forms part of her claim for asylum. We find her account to be fabricated."

The determination had been promulgated on 31 January 2012. The case worker concluded that Dr Beeks' report did not amount to independent evidence of torture because of the adverse credibility findings. She noted that UKBA intended to obtain its own medical assessment.

167. Dr Beeks' report was not before the Tribunal. RAN's legal advisers had sought to adjourn the hearing of the appeal to obtain medical evidence. That request was refused, and understandably so, because RAN had had plenty of time to get her house in order for the appeal. Christopher Middleton, a Deputy Director in the Criminal Casework Directorate, frankly accepts in his statement that the caseworker should have concluded that the report *did* amount to independent evidence of torture, notwithstanding the adverse credibility findings. However, the case worker had gone on to consider whether there were very exceptional circumstances to maintain detention. She concluded that, even if it were accepted that Dr Beeks' report amounted to independent evidence of torture, there were very exceptional reasons for maintaining detention. Her reasons were:

i) The nature of her offence (i.e. using a false document) suggests a propensity to deceive;

ii) RAN breached her conditions by working;

iii) She earlier stated she had no fear of returning to Sri Lanka;

iv) After being found working, RAN failed to comply with restrictions and absconded;

v) RAN attempted to leave the United Kingdom on a false document;

vi) RAN did not claim asylum on arrival. Asylum and torture claims followed her conviction;

vii) The Tribunal had made adverse credibility findings and there were limited barriers to removal.

168. The case worker went on to note the bail history, including a refusal of bail by the Tribunal on 21 May, principally because there were substantial grounds for believing RAN would not comply with restrictions.

169. The case worker's conclusion was supported as the review went up the chain. There was a very high risk of absconding, as demonstrated from past conduct. There was a very high risk of reoffending and adverse credibility findings.

170. The Secretary of State submits that the careful evaluation of these factors is entirely sustainable on public law grounds. The decision makers were entitled on the

information available to them to conclude that there were very exceptional reasons for maintaining detention. In my judgment that submission is correct. RAN's case is a stark one. RAN had absconded when on temporary release and then tried to leave the country on a false document. There was every reason to suppose that if she were released she would disappear. That was perhaps the decisive factor. But additionally there were legitimate fears regarding reoffending, the unequivocal adverse credibility findings and the undoubted fact that she appeared to be coming to the end of the line so far as resisting removal was concerned. In those circumstances, I accept that the Secretary of State has established on balance of probability that RAN could and would have been detained anyway had the report from Dr Beeks been considered earlier and been recognised as independent evidence of torture. Nominal, rather than compensatory, damages are payable for the period of delay before Dr Beeks' report was considered in the context of the detention policy.

171. Detention was reviewed and maintained on the same basis in the ensuing months. On 28 August RAN was examined by Dr Mason, a specialist in accident and emergency medicine, and by Dr Seneviratne, a consultant psychiatrist. Their reports followed on 7 and 10 September respectively. Dr Mason was unable to find any of the marks under RAN's fingernails which had been described by Dr Beeks. He confirmed that there were scars on the knees which he thought highly consistent with having been the result of RAN being beaten. Dr Senevirate diagnosed PTSD and depression. An ad-hoc review was undertaken. The case worker accepted that these reports provided independent evidence of torture but considered that there were very exceptional reasons to maintain detention, for essentially the same reasons as had been given before. In the meantime RAN's application to revoke her deportation order had been considered, and a decision made to refuse the application and certify it as clearly unfounded. But that decision had not been provided to her. As a result of a consideration of the new medical evidence, and in the light of all that was known, the view that her application was clearly unfounded was reversed. That would mean that RAN would have an in-country right of appeal. Mr Middleton explains what resulted:

> "It was not, however, possible to serve the decision on the Claimant at this point owing to a more general issue in respect of returns to Sri Lanka. The decision that the Claimant would at least be given an in-country right of appeal was treated as a change in circumstances which required the Claimant's detention to be reviewed. It was assumed that the Claimant would exercise her right of appeal in respect of an adverse decision, and accordingly it was concluded that removal could no longer be said to be imminent. Further, a forthcoming appeal was likely to encourage the Claimant to comply with reporting restrictions until the date of that appeal, and therefore the risk of absconding prior to that appeal was reduced. Accordingly, it could not longer be said that there were 'very exceptional circumstances' such that detention should be maintained. Steps were therefore taken to release the Claimant, and she was released on 11 October 2012."

172. No separate submission was developed in RAN's case that, if the Secretary of State was correct in her submission relating to the period up to the review at the end of

June, the detention thereafter again became unlawful or that compensatory damages would be payable. The submission was that the detention was continuously unlawful until release on 11 October because there was a continuing public law failure to recognise Dr Beeks' report as constituting independent evidence of torture. However, after the June review that failure did not bear upon and was not relevant to detention. That is because detention was considered on the hypothetical premise that her report did amount to independent evidence of torture.

173. The conclusion in the case of RAN is that whilst there were two periods of unlawful detention, neither attracts compensatory damages.

CONCLUSION

174. In summary, the result of applying the *Lumba* approach to each of the cases (excluding RA) is as follows:

i) EO was unlawfully detained from 17 April 2012 (or as soon after as he would have been released if the correct approach had been taken on that day) until he was released on bail on 11 May 2012. He is entitled to compensatory damages during that period.

ii) CE was unlawfully detained from 10 January 2012 (or as soon after as she would have been released if the correct approach had been taken on that day) until she was released on 28 February. She is entitled to compensatory damages for that period.

iii) OE was unlawfully detained between 29 July and 9 September 2008 but is not entitled to compensatory damages for that period. From 9 April 2009 until his release on 1 April 2011 he was unlawfully detained. He is entitled to compensatory damages from 9 April 2009 until 23 March 2010. He was again unlawfully detained from 17 January 2012 until his release on 24 February but is not entitled to compensatory damages.

iv) RAN was unlawfully detained for a day in January 2012 and from the beginning of April 2012 until 28 June 2012, but is not entitled to compensatory damages.

175. I would be grateful if counsel would draw up an order to reflect these conclusions and invite submissions in writing on any ancillary matters which cannot be agreed.