Neutral Citation Number: [2016] EWHC 158 (Admin)

Case No: CO/690/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 2 February 2016

Before :

PHILIP MOTT QC
Sitting as a Deputy High Court Judge

- -

Between :

THE QUEEN (on the application of SARRAR SUBAHI IBRAHIM)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Raza Halim (instructed by **Duncan Lewis**) for the **Claimant**
Sasha Blackmore (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 20 January 2016

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Approved Judgment

Philip Mott QC :

1. The Claimant is a Sudanese national who, on 10 August 2015, was granted asylum in the UK. He challenges the lawfulness of an earlier period of detention on two alternative grounds:

   i) Between 19 August and 29 September 2014, as a breach of the Defendant's published policy not to detain those where there is independent evidence that they had been tortured, save in very exceptional circumstances.

   ii) Between 27 August and 29 September 2014 as a breach of the *Hardial Singh* principles, as removal was no longer imminent once these judicial review proceedings had been started.

The facts

2. The Claimant was born on 31 January 1982. On 22 April 2014 he and another man were encountered at Newport Pagnall services on the M1 motorway. They were soaking wet and said they had come to the UK in the back of a lorry. They were arrested and taken into police custody. The Claimant was then sent to Yarl's Wood Immigration Removal Centre.

3. On 24 April 2014 the Claimant was given an asylum screening interview. His account of his journey from Sudan to the UK was as follows:

> "30/9/2012 left Sudan and travelled to Turkey by lorry. Stayed 2 mths and 9 days. Travelled to Bulgaria by car. Stayed till 4/11/13. I was forced to give fingerprints. It was difficult to leave; the police caught me and beat me up. I travelled to Serbia by car, stayed 8 days. Travelled by car and caught in Hungary. 2 weeks in Hungary. Then to Italy by car, 8 days in Italy, then to France by train. 4 mths 10 days in France in Jungle in Calais. I was arrested by police and fingerprinted. Then lorry to UK. Arrived 22/4/14. Underneath a lorry for 5 hours."

4. In answer to questions on the screening interview form about his health, the Claimant said he did not have any medical conditions or disability. The basis of his claim for asylum was recorded as follows:

> "I will be arrested, tortured and killed. I have a problem with security police because of my ethnicity, they accused me of supporting the opposition military organisation in Sudan."

5. In relation to criminality, and whether he had ever been arrested or charged in any country, he said:

> "27/7/12 – because I was accused of supporting the opposition in Darfur. Held for 32 days, held in Jamaa Al Kabr in Bahri. Released with conditions not to seek medical treatments and provide them with information."

6. It appears from what he said about his travel to the UK that he had left Sudan about a month after his release on conditions, and presumably in breach of those conditions. Thus he said he would be liable to arrest and torture in the future if returned to Sudan. There was no allegation in his screening interview that he had been tortured in the past while held in Sudan.

7. The Claimant went on to state that he was married, but his wife was in Sudan. He had no children.

8. On 25 April 2014 the Claimant was granted temporary admission and released from detention with reporting conditions.

9. On the same day a formal request was made to Bulgaria to accept him under Article 18(1)(b) of the Dublin III Regulation. Bulgaria accepted responsibility on 30 April 2014.

10. Also on 30 April 2014 the Defendant wrote a letter refusing the Claimant's asylum claim in the UK and certifying it on third country grounds so that there was no right of appeal.

11. On 28 May 2014 the Claimant moved from Birmingham to Huddersfield, and continued reporting regularly after that move.

12. On 13 August 2014 the Claimant was detained when he reported, with a view to his swift removal to Bulgaria.

13. On arrival in detention on 13 August 2014 the Claimant was seen by a nurse who completed a Health Screening Questionnaire. The Claimant disclosed that he had Hepatitis B. In answer to the specific question "Have you ever been a victim of Torture?" the "Yes" box was ticked, with the words written alongside "in Sudan & Bulgaria". No further details were recorded, nor is it suggested that any were given on this occasion.

14. The Claimant was seen by a doctor on 19 August 2014. The doctor completed a report form under Rule 35 of the Detention Centre Rules 2001. Section 3 is headed "Nature of Report" and continues in the printed form as follows:

> "I hereby report in relation to the following section (please mark as appropriate) of Rule 35. Please tick all those that may be relevant, as some detainees may be affected by multiple issues.
>
> (1) This detainee's health is likely to be injuriously affected by continued detention or any conditions of detention.
>
> (2) I suspect this detainee may have suicidal intentions, and should be managed within the ACDT process.
>
> (3) I have concerns that this detainee may have been the victim of torture."

15. Each of the numbered options was followed by a box where a tick mark could be inserted. In relation to the Claimant the doctor ticked box (2), but left boxes (1) and (3) blank.

16. Section 5 of the form is headed "Relevant clinical information", and is followed by printed instructions to the doctor as follows:

> "1. Please set out the clinical reasons leading to your conclusion at (1), (2) and/or (3) above. This should include relevant medical and psychiatric history; current concerns; and findings from a mental state examination and physical examination. Where relevant, a risk assessment of suicidal ideation/intent should also be conducted.
>
> 2. Please ensure that a body map is completed and attached in cases involving scarring or other physical marks."

17. There followed, in the Claimant's case, a manuscript record by the doctor of his findings:

> "Seen in this Health Care Centre. He alleges he caught hepatitis B in Bulgaria. However I put it to him that his GP put it to him that the condition was chronic and he says that he was aware of it in Sudan. So it is evident that he was Hepatitis B positive in Sudan. He is Hepatitis C negative at screening by the GP. Test dated 18.06.14.
>
> He says if he is sent to Bulgaria he will not go but will die in the UK. I have initiated an ACDT.
>
> He was asked about ill-treatment in Sudan but refused to talk about it. He only wanted to talk about catching Hepatitis B in Bulgaria – because he was starving in Bulgaria living on bread and dates. I explained this would not cause Hepatitis B.
>
> Difficult to assess but I felt that his threat to die in UK was credible."

18. The body map appears on the form, but there are no markings on it. The form discloses that a Health Care Assistant was with the doctor during the consultation, and he had the benefit of an interpreter.

19. On 21 August 2014 the UK Border Agency wrote to the Claimant about the Rule 35 report from the doctor. It summarised the findings of the doctor as set out above. The letter continued:

> "The doctor has produced the report on the basis that he suspects you may have suicidal intentions and should be managed within the ACDT process in the Detention Centre. However, the doctor has not set out any clinical reasons to suggest there is evidence to consider you to be a victim of

> torture. Therefore the Rule 35 report will not be treated as independent evidence of torture.
>
> As it is the intention of the Third Country Unit to return you to Bulgaria and not Sudan, your issues and concerns of any ill treatment there should be raised with the Bulgarian authorities on your arrival.
>
> It has been decided that your detention will be maintained."

20. Removal Directions were issued on 18 August, setting a date of 28 August 2014 for his removal. The Claimant was given a notice setting out reasons for his detention. Three relevant factors were identified:

> "Your removal from the United Kingdom is imminent.
>
> You have used or attempted to use deception in a way that leads us to consider you may continue to deceive.
>
> You have not produced satisfactory evidence of your identity, nationality or lawful basis to be in the UK."

21. On 26 August 2014 the Claimant instructed Duncan Lewis, his current solicitors. The following day, 27 August, they wrote a letter to the Defendant making fresh representations under Article 3 of the ECHR and issued a Judicial Review claim.

22. Both the fresh representations and the judicial review grounds assert that the Claimant had informed the Defendant on more than one occasion that he was a victim of torture. Beyond this, the challenge by both routes was to the decision to remove him to Bulgaria. It was asserted that there were systemic deficiencies in the treatment of asylum seekers in Bulgaria such that EU member states should halt all transfers of asylum seekers to Bulgaria. Alternatively, conditions were such as to make it a breach of Article 3 of the ECHR to return a vulnerable asylum seeker such as the Claimant to Bulgaria.

23. Neither the fresh representations nor the judicial review claim sought to challenge the detention of the Claimant in the UK as being in breach of the Defendant's policy on victims of torture. The judicial review claim was started in the Upper Tribunal, which had no jurisdiction to deal with unlawful detention claims.

24. That same day, 27 August 2014, there is an entry in the GCID records that the Claimant had "Refused to transfer this morning he said "that he has lots going on with immigration and was not going until it was sorted out"." This is the only suggestion of disruptive conduct during his time in detention.

25. The Claimant's solicitors wrote further on 3 September 2014 with a request for temporary admission. The basis of this request was that removal was no longer imminent as a result of the judicial review proceedings. The letter mentions again the Claimant's assertion that he was a victim of torture, but does not allege that the Defendant's policy made him thereby unsuitable for detention.

26. On 10 September 2014 there was a weekly detention review. It repeats the comment from the previous week that "it is expected JR Team will request expedition of the JR", and refers again to the Claimant's "disruptive behaviour in detention". A manuscript note from the officer authorising detention says:

> "Continued detention approved but I will expect to know the AOS due date by next detention review. Continued detention approved on the basis that we still intend to expedite the JR." [underlining added]

27. On 12 September 2014 the Claimant's solicitors sent a letter containing further Article 3 representations. This for the first time suggests that the Claimant was "mentally scarred to such an extent that he cannot bring himself to speak about the torture he has suffered", and complains that the Defendant has "neglected the issue of torture entirely". The letter goes on to quote extensively from a report entitled "Trapped in Europe's Quagmire: The Situation of Asylum Seekers and Refugees in Bulgaria" dated 14 July 2014.

28. On 16 September 2014 the Defendant wrote refusing temporary admission. In relation to the judicial review proceedings the letter says that it "is expected to be expedited and therefore removal, if still applicable, remains a realistic prospect on conclusion". In relation to the allegation of torture it referred back to the letter of 21 August 2014 and reiterated that there was no independent evidence of torture.

29. On 17 September 2014 the next weekly detention review is signed by a different officer authorising continued detention, without reference to the manuscript note of the previous week.

30. The following day, 18 September 2014, there is a GCID note that reads:

> "As TCU [Third Country Unit] have not served the HR [Human Rights] decision before the AOS deadline, I have informed Tsols that we will not be expediting this JR. TCU conclusions team informed. JR will now be subject to normal timescales. SGs [Summary Grounds of Defence] will be filed after HR decision is served."

31. On 20 September 2014 there was a monthly progress report provided in writing to the Claimant. It referred to the judicial review proceedings and said "We are currently awaiting the outcome of your Judicial Review".

32. On 22 September 2014 an email was sent by a Carly Spencer to Dan Smith, the Head of Detained Fast Track. It appears that Ms Spencer was a member of the Third Country Unit, referred to in the GCID note of 18 September. Her email refers to the judicial review proceedings and says "We are currently await[ing] the AOS date, it is expected JR Team will request expedition of the JR". The reply from Mr Smith authorises continued detention "whilst the application for Judicial Review is considered by the High Court".

33. On 24 September 2014 the next weekly detention review was signed off. The record notes the JR claim, and says "TCU are currently awaiting the AOS date, and we will

be looking to expedite the case". The authorising officer's note is "I propose to maintain detention, at least until we know if the case can be expedited or not" [underlining added].

34. Clearly not all members of the Third Country Unit, nor Detention Centre staff nor the Head of Detained Fast Track were aware of the decision on 18 September not to seek expedition of the judicial review proceedings, even six days after that decision had been made.

35. On 24 September 2014 the Claimant's solicitors made an application for bail, which was listed for 30 September.

36. It may be that this is what caused the information about the decision to abandon expedition to be disseminated to those who were deciding on continued detention. Whatever happened behind the scenes, on 29 September 2014 the Claimant was released.

The course of these proceedings

37. These proceedings were started in the Upper Tribunal on 27 August 2014 as a challenge to the decision to remove the Claimant to Bulgaria under the terms of the Dublin III Regulation.

38. The Grounds sought interim relief to stay the Claimant's removal to Bulgaria, but there was no application for interim relief to secure the Claimant's release from detention.

39. Summary Grounds of Defence were filed on 7 October 2014 resisting the claim.

40. Amended Grounds were served by the Claimant on 23 October 2014 adding a challenge to the decision letter of 6 October 2014 to refuse his human rights claim and to certify it as "clearly unfounded".

41. The Acknowledgement of Service was filed on 12 November 2014, having been inadvertently omitted when the Summary Grounds of Defence were filed the previous month.

42. Further Amended Grounds were served by the Claimant on 13 January 2015. These for the first time add a challenge to the lawfulness of the Claimant's detention as being in breach of the Defendant's published policy and contrary to the *Hardial Singh* principles.

43. On 3 February 2015 permission was granted to make the amendment, and the proceedings were transferred to the Administrative Court because of the claim of unlawful detention.

44. Undated Amended Summary Grounds of Defence followed, and then fresh Further Amended Grounds were served on 3 March 2015 adding a challenge to a further decision of the defendant of 5 February 2015.

45. Permission was refused on paper by Hayden J on 17 March 2015, certifying it to be totally without merit.

46. The Claimant sought permission to appeal to the Court of Appeal. This was considered by Sullivan LJ on paper on 3 July 2015, when he granted permission to apply for judicial review and returned the case to the Administrative Court for hearing.

47. By that time there had been developments in relation to other challenges to returns to Bulgaria. For no doubt sensible reasons the parties agreed a consent order on 6 August 2015. The Defendant agreed to withdraw her decision of 6 October 2014 certifying the Claimant's asylum and human rights claims, and to make a fresh decision. She also agreed not to pursue Third Country removal to Bulgaria. That left the issue of unlawful detention alone to be decided by this court. That order was sealed by the court on 7 September 2015.

48. On 10 August 2015 the Claimant was granted asylum in the UK, with leave to remain until 9 August 2020.

49. On 9 November 2015 the Defendant served Detailed Grounds of Defence dealing only with the claim for unlawful detention.

The law

50. There is no dispute about the applicable law in this case. No new principles of law are involved. I can therefore set out the legal framework shortly, as an indication that I have the correct principles in mind rather than as a primary consideration and interpretation of those principles.

51. The Defendant has the power to detain an illegal entrant pending administrative removal from the UK. That power comes from the Immigration Act 1971.

52. The power to detain in such circumstances is subject to limitations. The starting point is the decision of Woolf J in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704. The currently accepted restatement is that of Dyson LJ in *R (I) v SSHD* [2003] INLR 197, at paragraphs [46] to [48], confirmed by the Supreme Court in *R (Lumba) v SSHD* [2012] 1 AC 245.

53. The four key principles, as they apply to this case, are:

    i) The Secretary of State must intend to remove the person and can only use the power to detain for that purpose;

    ii) The person can only be detained for a period that is reasonable in all the circumstances;

    iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect removal within a reasonable period, she should not seek to exercise the power of detention;

    iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.

54. The Claimant in his second ground relies on the third limb of these *Hardial Singh* principles.

55. In addition to the general public law principles, the Defendant has a published policy in relation to torture victims. Her Enforcement Instructions and Guidance, Chapter 55, sets out at paragraph 55.10 that:

> "The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or in prisons:
>
> - …
>
> - Those where there is independent evidence that they have been tortured."

56. "Independent evidence" of torture is not the same as proof of the same (see *R (AM) v SSHD* [2012] EWCA Civ 521, at paragraphs [29] to [31], and *R (EO) v SSHD* [2013] EWHC 1236 (Admin), at paragraphs [65] to [69]). But it does require "something beyond the say so of the person concerned"

57. My attention was drawn to the decision of Davis J in *R (D and K) v SSHD* [2006] EWHC 980 (Admin). Although this pre-dates the Supreme Court decision in *Lumba*, and deals with an earlier version of the Detention Centre Rules and practice, it points to an important feature which is accepted as still relevant (see particularly paragraph [53]). The need for "independent evidence" of torture does not place the burden of providing it on the detainee. The Defendant has a duty to conduct medical examinations as provided by the Rules, which may well lead to a report capable of amounting to independent evidence of torture.

58. I accept that, by analogy with the decision of the Court of Appeal in *R (Das) v SSHD* [2014] 1 WLR 3538, the Defendant is under a public law obligation to take reasonable steps to give practical effect to the policy of not detaining those who have been tortured.

59. It is not argued on behalf of this Claimant that the policy set out in EIG paragraph 55.10, or the rules and practice designed to implement it, are either unlawful or insufficient to comply with that public law obligation.

60. I turn therefore to the rules and practice. The Detention Centre Rules 2001, by rule 34, requires every detained person to be given a physical and mental examination by a medical practitioner within 24 hours of admission. Rule 35(3) requires the medical practitioner to "report to the manager on the case of any detained person who he is concerned may have been the victim of torture".

61. The Defendant issued Detention Services Order 17/2012 setting out further practical requirements for medical practitioners and others concerned with Rule 35 cases. In relation to concerns about torture, it states (emphasis original, underlining added):

> "20. If the medical practitioner is concerned that a detainee may have been a victim of torture, he/she must always submit a Rule 35(3) report. <u>Rule 35 places medical practitioners at the centre of the process and fundamentally it is for the medical practitioner to decide if he/she has concerns in a professional</u>

capacity that a detainee may have been the victim of torture. The medical practitioner should **always** state clearly the reasons why he/she has concerns arising from the medical examination – specifically the medical evidence which causes these concerns, including **all** physical and mental indicators.

21. The medical practitioner has no obligation to report an allegation from a detainee if this allegation does not cause the medical practitioner him/herself to be concerned, in the context of the overall medical examination, that the person may be a victim of torture. However, if an allegation does cause the medical practitioner to be concerned, then he/she should report it. The medical practitioner should set out clearly if their concern derives from an allegation with no or limited medical evidence in support.

22. Where there is medical evidence in support of an allegation, the medical practitioner must set out clearly all physical and mental indicators in support of his/her professional concerns. He/she should record any mental or physical health problems that are relevant to the torture allegation.

23. Where possible, the medical practitioner should say why he/she considers that the person's account is consistent with the medical evidence. This means that the medical practitioner should ask to see any scars and record what he/she sees, including on a body map and, where possible, assess whether it is in his/her view medically consistent with the attribution claimed by the detainee. The medical practitioner should consider whether the injury, health problem or other indicator may have other possible explanations which do not relate to torture. The medical practitioner must identify any medical evidence which may be contrary to the account given by the detained person.

24. To help decide whether there is cause for concern, it may also be helpful to ask detainees about:

- When the torture allegedly took place;
- How the injuries/mental health issues arose;
- How the torture is currently affecting them.

25. A Rule 35 report is a mechanism for a medical practitioner to refer on concerns, rather than an expert medico-legal report and so there is no need for medical practitioners to apply the terms or methodology set out in the Istanbul Protocol. Medical practitioners are not required to apply the Istanbul Protocol or apply probability levels or assess relative likelihoods of different causes but if they have a view, they should express it."

62. The Detention Services Order also contains provisions about what to do if the Rule 35 report has insufficient content to understand the medical concern. Those provisions apply if the relevant box is ticked but not explained. The Order further annexes the form of report which was used in this case.

63. The "Detention Rule 35 Process" instructions are directed to those who receive the Rule 35 reports from doctors. It makes it clear that merely ticking the box to indicate concerns by the doctor will not necessarily constitute independent evidence of torture. Three examples are given as follows:

> - A report which simply repeats an allegation of torture will not be independent evidence of torture;
>
> - A report which raises a concern of torture with little reasoning or support or which mentions nothing more than common injuries or scarring for which there are other obvious causes is unlikely to constitute independent evidence of torture;
>
> - A report which details clear physical or mental evidence of injuries which would normally only arise as a result of torture (e.g., numerous scars with the appearance of cigarette burns to legs; marks with the appearance of whipping scars), and which records a credible account of torture, is likely to constitute independent evidence of torture.

64. These instructions also give advice about what to do if the Rule 35 report contains too little information to allow a considered response.

The issues – breach of policy in relation to torture victims

65. On behalf of the Claimant, Mr Halim makes a single submission on his first ground. He says that the blank box on the Rule 35 report in relation to concerns about torture, coupled with the record that the Claimant refused to talk about ill-treatment in Sudan, means that the doctor was unable to come to any conclusion about Rule 35(3). As a result the report was incomplete, and did not satisfy Rule 35. The duty to make such inquiries was therefore not extinguished and the Defendant should have sought further information from that doctor or another doctor. Had such information been sought, he argues, the result would have been as is set out in a report from Professor Katona of the Helen Bamber Foundation dated 19 November 2014, and that would have led to the Claimant's immediate release from detention.

66. I asked Mr Halim whether he had any alternative submission, in the event that I did not accept his interpretation of the Rule 35 report. He declined to put forward any. He specifically declined to argue that the EIG Chapter 55, the Detention Centre Rules 2001, the Detention Services Order 17/2012, or the Detention Rule 35 Process instructions were unlawful or insufficient to comply with the public law duty on the Defendant. He specifically declined to argue that the Rule 35 report in this case was negligently prepared or that, if it was, the Defendant was to be held liable for that

(such a submission would of course have been contrary to the decision of Burnett J in *EO*).

67. Miss Blackmore, for the Defendant, submitted that the blank box simply meant that the doctor had no concerns about torture. Therefore the Rule 35 process had been completed and there was no independent evidence of torture. In those circumstances the policy in paragraph 55.10 was not engaged, and no release on those grounds fell to be considered.

68. This issue revolves around the proper interpretation of the blank box on the Rule 35 form. I am satisfied that in this case it means that the doctor had no concerns that this detainee may have been a victim of torture, or at least that the Defendant was entitled rationally to interpret it in that way without needing to make further inquiry. I come to this conclusion for a number of reasons:

i) The importance of considering whether to tick the box must have been apparent to any doctor carrying out this work. It is explicitly required by Rule 35. It is stressed in the Detention Services Order, which places the doctor at the centre of the process and makes it abundantly clear that he or she is only required to exercise a professional judgment to decide whether he or she has concerns. It is not an expert medico-legal report, and the requirements of the Istanbul Protocol do not apply.

ii) The question raised is not whether the detainee is a victim of torture, to which the answer may be Yes, No, or I Don't Know. The question is whether the doctor has concerns. That is a question about the state of the doctor's mind, subjectively, not about any objective truth or evidence. That question, strictly speaking, only admits of the answers Yes or No.

iii) That binary nature of the question is underlined by the low threshold to be applied. It is only if the doctor has "concerns". The doctor is encouraged to delve, and to provide evidence in various forms if it is available. Such evidence may be vital in the determination of whether there is independent evidence of torture. But it is perfectly clear that the doctor can tick the box based on a professional instinct, having examined the detainee, just as a judge or jury may assess the credibility of a witness from his demeanour.

iv) The record of this doctor's findings makes it clear that he understood the difference between that professional instinct, justifying the ticking of the box, and the existence of objective evidence or proof. In relation to Question 2 about suicidal intentions, the box has been ticked, indicating "I suspect this detainee may have suicidal intentions". The narrative acknowledges that this is difficult to assess (there is no specific mental illness, no history of suicide attempts) but the doctor felt able to tick the box based on a professional feeling that the threat was credible.

v) By contrast, the absence of any comment in the narrative about the possibility of torture, save to record that the Claimant refused to talk about it, implies that the doctor had no equivalent difficulty in making an assessment, but had no concerns that the Claimant might have been the victim of torture.

vi) The doctor had no obligation to report an allegation by the Claimant that he had been tortured (see the Detention Services Order paragraph 21). He has not done so, as no allegation was made to him. He has simply recorded that he asked the Claimant about the allegation of ill-treatment in Sudan which had previously been made to a nurse, and the Claimant refused to talk about it. The inclusion of that information does not suggest that the doctor had simply omitted to tick the box about concerns over torture (and Mr Halim did not submit there was any such mistake). In any event, the reference is part of the narrative which is relevant to the assessment of the Claimant's suicide risk.

vii) The narrative does not suggest that the Claimant could not bring himself to speak about ill-treatment in Sudan (as his solicitors suggested in their letter of 12 September 2014). The indications in the doctor's note are that the Claimant considered his treatment in Sudan as much less important than his treatment in Bulgaria. In other words, it was a conscious refusal to talk, not a mental inability to cope with detailing the trauma. At least, the Defendant was entitled to assume that the doctor would have been alive to the different possibilities, and to have taken his or her assessment into account in ticking the box or leaving it blank.

69. In the light of this finding, the Claimant's first ground must fail. For completeness, I should consider what might have happened if the Rule 35 report had been interpreted as the Claimant now submits, and further inquiries undertaken.

70. The first point to make is that the existence of concerns, or a belief that the detainee is telling the truth, is not by itself enough to invoke the policy in paragraph 55.10, and to lead to release from detention. Something more than the detainee's say so, something amounting to independent evidence, is required.

71. It is notable that nothing appears to have been said by the Claimant to his own solicitors which might provide independent evidence of torture, or a claim for unlawful detention would have been made at an earlier stage. I acknowledge that such an inference carries little weight at the start of these proceedings, as they were launched as a matter of urgency to prevent removal to Bulgaria, but there was a later, more considered, letter on 3 September 2014. Even in the letter of 12 September 2014, which asserts for the first time that the Claimant could not bring himself to speak about his torture, no further details are provided which could amount to independent evidence.

72. I therefore very much doubt whether anything amounting to independent evidence of torture would have been uncovered prior to the Claimant's actual release, even if further inquiries had been undertaken.

73. In these circumstances I do not need to analyse Professor Katona's report to decide whether it amounts to independent evidence of torture. It may do, but I note the following:

i) It is aimed at assessing the Claimant's current mental state, suicide risk and treatment needs.

ii) It reaches a diagnosis of post-traumatic stress disorder ("PTSD") based on the DSM5 criteria set out in his Appendix 1. There are eight different criteria. Professor Katona found six relevant clinical features. Of these, only one related to past experiences, and this aggregates the reported experiences in Sudan and Bulgaria.

iii) That one feature was a stressor involving an exposure to death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence. The report sets out in detail the alleged treatment in Sudan and Bulgaria. On the face of it, and subject to any expert opinion to the contrary, either experience would have been sufficient to qualify as the stressor criterion. If this is right, it was not crucial to the diagnosis of PTSD that the Claimant's allegations of torture in Sudan were true, nor does the diagnosis amount to independent evidence of such torture.

iv) It is very doubtful whether the alleged treatment in Bulgaria, unpleasant as it sounds, could amount to "torture" as that word is used in the detention policy (see *EO* at paragraph [82]).

74. For completeness I should also note Mr Halim's submission that the grant of asylum to the Claimant on 10 August 2015 necessarily involves an acceptance that he was a victim of torture. I do not accept this. No reasons were given for the grant of asylum, as is standard practice. There are other possible explanations, one of which comes from the Claimant's own case in his asylum screening interview. There he made no allegations of torture, but said he could not return to Sudan because of his ethnicity. That is sometimes accepted to be the case, in this area on the border between Arab and African tribes, with conflicts between Christian and Muslim religions. It is not for me to speculate in deciding what was the reason for granting asylum. It is sufficient to say that I do not accept it must have been because of an acceptance of allegations of past torture.

75. In any event, the issue in this case is whether there was, or ought to have been, independent evidence of torture sufficient to invoke the Defendant's policy, not whether the Claimant has in fact been a victim of torture.

The issues – Hardial Singh

76. I turn to consider whether the Defendant can justify the Claimant's continued detention after the start of these proceedings on 27 August 2014.

77. In doing so I must assume that my conclusion on the first ground is correct. If it were not, this second ground would become academic as it only covers a part of the same period of detention.

78. That means that the Claimant was not to be treated as a victim of torture, but as someone who was making allegations of ill-treatment and torture, and had a suspected suicide risk. The suicide risk could be safely managed in detention with additional safeguards which were in place.

79. Since this ground of claim only starts with the issue of the judicial review proceedings, it follows that the earlier detention is conceded to have been lawful

(subject only to the arguments on the first ground). It was, in other words, an appropriate case for the use of detention to assist an imminent removal.

80. The mere fact of starting judicial review proceedings cannot in every case lead to automatic release. Mr Halim had difficulty in accepting this as a concession, but I am satisfied that it must be so.

81. The issuing of proceedings must, however, be a factor to be taken into account in considering the reasonableness of continued detention. For one thing, it will affect the speed with which the detainee can be removed, even if the judicial review fails. That may alter the balance of reasonableness when set against other factors, such as the risk of absconding.

82. On the other hand, some judicial review applications are now dealt with expeditiously, and permission may be refused without the option of renewal to an oral hearing.

83. In the end the question of whether removal can be effected within a reasonable time is very case-specific. There is no doubt here that the Defendant intended to remove the Claimant, and to do so as swiftly as possible. In essence, therefore, the reasonableness of continued detention depends principally on two factors; an assessment of the obstacle constituted by the judicial review proceedings, and the risk of absconding if the Claimant were to be released. I shall deal with each of these in turn.

84. The initial claim in judicial review proceedings was that it was unsafe to return the Claimant (or anyone else) to Bulgaria. Mr Halim is involved in a number of other cases raising the same point in which permission has been granted and a substantive hearing has been listed for early March 2016. He informed me that, as far as he was aware, this was the first case to raise the point. I must therefore look at the position as it would have appeared to the Defendant in August 2014.

85. On the one hand the hurdle for the Claimant was likely to be a high one, involving proof of a systemic failure in the country concerned. The experience of challenges to returns to Greece and Italy would have suggested to the Defendant that there were reasonable prospects of successfully defending the judicial review, and that it could have been dealt with on an expedited basis.

86. On the other hand there was a very critical report from the UNHCR, which might have made the claim stronger than those relating to other countries.

87. It is apparent from the manuscript note to the detention review on 10 September 2014 that a distinction was being drawn between a case which could be expedited to a permission decision and one which could not. That was a distinction repeated in the detention review on 24 September 2014, ironically well after the decision was made that expedition could not be sought in respect of this claim.

88. In my judgment that was a reasonable distinction to draw. The Defendant's legal advisers needed some time to evaluate the claim and respond to it. The court process allowed 21 days for an acknowledgement of service, which would have been up to 18 September 2014. In the absence of some other feature making it clear that the delay caused by the judicial review proceedings was going to be substantial, waiting to see

if the case could be expedited was a reasonable response if there were other reasons to justify continued detention.

89. Mr Halim submits that this cannot be regarded as a good reason in this case because no application for expedition was ever made by the Defendant. The answer to that is that there is an established quota of expedition cases, both in this court and in the Upper Tribunal, and a formal application is not required in every case.

90. In order to obtain a slot in that quota, however, the Defendant must file an acknowledgement of service in time. What is clear in this case is that the acknowledgement of service could not be filed until a response had been provided to the human rights claim. Right up to 18 September 2014 it was hoped that the two could be coordinated. In the end that was not possible, and the response to the human rights claim came on 6 October 2014, with the Summary Grounds of Defence in these proceedings following the next day.

91. Mr Halim submits that in any event there was no risk of absconding, and therefore detention was unreasonable even with a short delay in removal. He points to the fact that the Claimant was initially released in April 2014, and reported regularly despite being served with a decision rejecting and certifying his asylum claim and thereafter moving to a different part of the country.

92. In my judgment that omits several salient features of the case.

    i) This was a Claimant who had travelled widely, and was adept at moving from one country to another illegally when he did not like where he was.

    ii) Although he clearly wished to stay in the UK, the position had been reached by 27 August 2014 when he had been arrested and was on the point of being forcibly removed to Bulgaria.

    iii) He had said to the doctor that there was no way in which he would willingly go back to Bulgaria, and would rather die in the UK. A rather less dramatic way of avoiding being returned to Bulgaria, if he were released from detention, would have been to abscond.

    iv) He had no identification papers (although he had been fingerprinted in more than one country). He had no family or other ties in the UK.

93. Taking all the features together, I am satisfied that the decision to continue detention was reasonable under the *Hardial Singh* provisions for a short period after the issue of judicial review proceedings, in the hope and expectation that they could be expedited and, if permission were refused, removal could take place shortly.

94. I add as an aside (and I place no particular weight on this) that the Claimant's experienced solicitors, advised by Mr Halim, did not think to make an application for interim relief to obtain the Claimant's release from detention.

95. The position changes, it seems to me, on 18 September 2014 when it was accepted that the consideration of permission to apply for judicial review could not be expedited, and the proceedings would be subject to normal timescales. It is apparent

to me from the manuscript note on the detention review log for 10 September, and the reasons for authorising continued detention on 24 September 2014, that detention would not have been maintained if it had been known that the judicial review proceedings were not going to be expedited.

96. That decision (or acceptance) on 18 September 2014 should have been immediately communicated to the detention centre. It clearly was not. It would not have been reasonable to wait for the next weekly review. As the time for serving an acknowledgement of service was running out, there should have been a contingent plan for release on conditions. That release should have taken place by the following day, 19 September 2014.

97. I am encouraged in this assessment of what should have happened by what did happen in the case of *R (SN) v SSHD* [2014] EWHC 1974 (Admin). I need not go into the facts of that case, but it became apparent on 7 October 2010 that it was no longer reasonable to maintain detention and the Claimant was released the following day.

98. Miss Blackmore objected to the development of this argument by Mr Halim in reply, on the ground that it was not pleaded fully in the Grounds and she might have sought to adduce evidence. I agree that it was not specifically highlighted on paper or in the primary submissions for the Claimant, but it was a matter which appeared clearly from the Defendant's own records and was raised by me with Miss Blackmore during her submissions. Indeed, she sought to rely on the emails to and from the Head of Detained Fast Track, on 22 September 2014, to show that the matter was being carefully considered throughout. In the end it is for the Defendant to justify detention throughout the period under challenge on *Hardial Singh* grounds, and to decide what evidence is required to do so.

99. Accordingly I find that the Claimant was unlawfully detained between 19 September and 29 September 2014, and will make a declaration to that effect.

100. The Claimant has a claim for damages, as yet unquantified. I will give the parties time to agree these if possible. If not, they should be transferred to a Master or to the County Court for assessment.

101. The parties may be able to agree any costs orders. If not, I will decide them on written submissions.

102. I will invite the parties to agree a form of order which gives effect to my decision.