Neutral Citation Number: [2012] EWHC 2567 (QB)

Case No: TLQ/12/0252

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/09/2012

Before :

THE HONOURABLE MRS JUSTICE LANG DBE

- -

Between :

AAM **(a child acting by his litigation friend, Francesco Jeff)**	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -

- -

Christopher Buttler (instructed by **Steel & Shamash**) for the **Claimant**
Holly Stout (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing dates: 21, 22, 25 June and 26 July

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Judgment

Mrs Justice Lang:

1. The Claimant seeks damages for false imprisonment, and breach of the Human Rights Act 1998, in respect of his detention by the Defendant between 10 February and 25 March 2010, a total of 44 days.

2. The Defendant has conceded that the whole of the detention was unlawful because local immigration officers unlawfully applied a presumption that an asylum seeker who had arrived clandestinely by lorry should be detained, and furthermore there was no evidence that detention reviews had been conducted in accordance with the Defendant's policy. However, the Defendant contends that only nominal damages should be awarded, as detention was lawful and justifiable on other grounds. This judgment addresses liability only.

Facts

3. The Claimant is a national of Iran, of Kurdish ethnicity. He was born on 1 July 1994.

4. He left Iran at an unknown date, and arrived in the UK in February 2010. The finger print database revealed that, before he arrived in the UK, he was arrested and finger

printed at Calais, France on 18 December 2009 and Dunkirk on 24 December 2009. Apparently he did not claim asylum in France.

5. According to the Claimant's account, he arrived in the UK on the back of a lorry, at night, on or about 8 February 2010. He had no money and nowhere to go. Eventually, on the evening of 10 February, he went into a petrol station on the motorway, at Fradley, Staffordshire, asking for food. The shop assistant called the police who took him to Tamworth Police Station.

6. The Claimant told the police, using an interpreter, that he was 15 years old and that he came from Iran. He was detained in custody and seen by a doctor. The police notified the Social Services department of Staffordshire County Council ("the Council").

7. On the following day, 11 February, the Council sent Ms Joanne Barnard, a social worker, to conduct an age assessment of the Claimant at the police station. She was accompanied by a Kurdish interpreter and a colleague, Mr Rewel Gomez, a family support worker. His role was to provide support to Ms Barnard, but not to carry out the assessment with her, as he was not qualified to do so.

8. Ms Barnard used the standard pro forma template for age assessments, which required her to assess age under the headings of "Physical appearance, demeanour"; "Interaction of person during assessment"; "Social history and family composition"; "Developmental consideration"; "Education"; "Independent/self-care skills"; "Health and medical assessment" and "Information from documentation and other sources".

9. Under "Health and medical assessment" she stated:

> "[A] was seen by Doctor Siddigui at 23.15 p.m. last night whilst detained at Tamworth Police Station who advised of [A] having behaviour issues, being angry and concerns that [A] may self harm. [A] had leg surgery and also not long ago had a chest infection. Doctor Siddigui age assessment put [A] at 23-25 years of age."

10. Her conclusion was as follows:

> "[A] states that he is 15 years of age but the assessment completed taking into account his physical appearance which suggests that he is over the age of 18 (facial hair, complexion, aged, worn look etc.)
>
> "[A] has no documentation at all to provide us with an accurate date of birth. He has advised me that he is from a village in Iran called Torman.
>
> [A] stated that this was funded by his mother giving the family home to an agent who arranged [A] transport and route to the UK was via Iran – Turkey – UK via a lorry which took approx 20 days.

> [A] doesn't know any further details when asked he just said that it was very cold and that he was very hungry.
>
> [A] states that tried earlier this year to get into the UK and that he had been released after they took his finger prints.
>
> [A] knows no-one in the UK and is travelling alone.
>
> Based on the assessment, the client's age is 18 years+."

11. The assessment was signed by Ms Barnard. She also prepared a single sheet summary, stating that the Claimant had been assessed as "18 – 20 years". This recorded both she and Mr Gomez were "assessing workers" which conflicted with the full report, which only referred to Ms Barnard as the assessing worker.

12. I heard evidence from Ms Amanda Noons who is an Immigration Officer with the United Kingdom Border Agency (UKBA), working as part of the Local Immigration Team in Staffordshire. She has been an Immigration Office for 11 years and has dealt with a number of age disputed cases during that time.

13. Ms Noons' evidence was that, in line with usual practice and procedures, the police contact local social services in the first instance when they detain an asylum seeker who claims to be under the age of 18 years, Local Immigration Team Staffordshire has an agreement with Staffordshire Social Services that Social Services will conduct age assessments in all cases when an asylum seeker claims to be under 18 years old.

14. On 11 February 2010 Ms Noons received a telephone call from Staffordshire Police informing her that the Claimant had been taken into custody on the previous day; that he had been arrested by the Police on suspicion of illegal entry into the United Kingdom, and had been conveyed to Tamworth Police Station where he was being detained. During the custody booking in process the Claimant said he was aged 15 years and the police therefore notified social services.

15. On the afternoon of 11 February, Ms Noons received Ms Barnard's summary report by fax. Shortly afterwards, she received the full assessment by fax.

16. In cross-examination, Ms Noons said she had proceeded on the assumption that the age assessment was correct, and that it was "Merton compliant". It appeared to be in the correct form. Although she was aware of the requirement that assessments should be "Merton compliant", she did not know what criteria had to be met in order for an assessment to be "Merton compliant". She had never seen the Merton judgment. In her view, it was the local authority's job to ensure that the assessment was Merton-compliant and she did not scrutinise the assessment to satisfy herself that it was. She became aware subsequently that the local authority conceded it had not been Merton-compliant, and if she had known this at the time, she would not have relied upon it.

17. In re-examination, Ms Noons said she looked at the full age assessment report to satisfy herself that the relevant questions had been posed and answered and that the social worker had conducted a proper assessment. She did not consider issues such as whether an appropriate adult should have been present, or whether the assessment had been carried out by at least two trained social workers, because she was not aware of

the Merton criteria, and she did not consider it was her role to check whether the local authority had complied with the Merton criteria.

18. On 11 February, Ms Noons completed a "Screening Officer's Report Disputed Age Contention" in respect of the Claimant. She ticked the box to confirm that:

> "A full "Merton-compliant" (i.e. not that completed by Emergency Duty teams) social services assessment is available stating that they are 18 or over."

The report recorded that the Claimant maintained that he was 15 years old.

19. On 11 February, Ms Noons sent a pro forma letter to the Claimant stating "[y]ou have received a full "Merton-compliant" age assessment by Social Services stating that you are 18 years of age or over" and "in the absence of any credible evidence to the contrary, the Secretary of State did not accept you are a minor and you will be treated as an adult".

20. The IS Minute Sheet, completed by Ms Noons on 11 February 2010, provides a convenient summary of what happened next:

> "Subject was encountered by Staffs Police on 10/02/10 at a service station at Fradley, Staffs. He could not speak English, had no I.D, no money and appeared in a dishevelled and disoriented state. He was arrested on suspicion of illegal entry to the UK and taken to Tamworth Police Station. On booking in he claimed to be aged 15 years. Social Services were called to attend to conduct an age assessment. Joanne Barnard, Social worker, attended and conducted a Merton compliant assessment and deemed the subject to be over 18, between the ages of 18 and 20 years.
>
> Subject served papers as a de facto clandestine illegal entrant on authority of CIO Sean Flaherty. Also served with an IS97M.
>
> CIO authorised subject's detention pending referral to Oakington for the lorry drop process.
>
> I spoke to Roy at Oakington who has accepted the subject and will arrange a movement order for tomorrow."
>
> Full Merton Compliant age assessment received from Social Services and is on file.
>
> Actions:
>
> 24 hr det rev (to be conducted by Oakington)
>
> Send port file to Oakington by special delivery"

21. Ms Noons said that she obtained the authority of the Chief Immigration Officer, Mr Sean Flaherty to detain the Claimant, and Mr Flaherty also confirmed this. The basis upon which authority was sought, and given, is set out in the documents summarised below.

22. Once authority had been obtained, Ms Noons completed the following forms, all on 11 February.

23. *Form IS.151A: "Notice to a person liable to removal"* which informed the Claimant:

> "you are specifically considered a person who has entered the UK illegally by clandestine means with no ID, no travel document and having not sought leave to enter the UK. This is an offence under s.24(1)(a) of the Immigration Act 1971, as amended"
>
> "You are therefore a person who is liable to be detained under paragraph 16(2) of Schedule 2 to the Immigration Act 1971 pending a decision whether or not to give removal directions [and, where relevant, your removal in pursuance of such directions]"

24. *Form IS.91R: "Notice to detainee reasons for detention and bail rights"* which stated:

> "I am ordering your detention under powers contained in the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002.
>
> Detention is only used when there is no reasonable alternative available. It has been decided that you should remain in detention because
>
> (b) There is insufficient reliable information to decide on whether to grant you temporary admission or release
>
> This decision has been reached on the basis of the following factors:
>
> "1. You do not have enough close ties (eg family or friends) to make it likely that you will stay in one place."
>
> "5. You have used or attempted to use deception in a way that leads us to consider you may continue to deceive."
>
> "7. You have not produced satisfactory evidence of your identity, nationality or lawful basis to be in the UK.""

25. Because of the finding in the age assessment, Ms Noons did not take into account factor no. 9, namely, "You are a young person without the care of a parent or guardian".

26. Ms Noons did not authorise detention on ground (f), namely, that the Claimant's application could be decided quickly using the asylum fast track procedures. She explained in evidence that a decision whether someone or not is suitable for fast track detention is made by a specialist unit, and is primarily on the basis of the nationality of the applicant and whether he has documentation. In this particular case, Claimant was not assessed as suitable for fast track, because of his nationality, and his lack of documentation which meant that speedy processing of his asylum claim was unlikely to be possible. This decision was recorded in the General Case Information Database ('GCID'), on 11 February:

> "IRN [Iranian] male, undocumented, cannot be considered for DFT at this time. Please refer to NAM routing."

The acronym 'DFT' refers to 'Detained Fast Track'. The acronym 'NAM' refers to 'New Asylum Model', the name given to the standard procedure for managing asylum claims which are not fast tracked.

27. *Form IS.91: "Detention Authority"* which authorised his detention and "must be passed on to each successive custodian as appointed by the immigration service". The effect of service of this form on the police was to transfer the Claimant from police custody to immigration detention. The form included the following information:

> "Is this person claiming to be a minor but is believed to be an adult?
>
> Yes – he has been age assessed by Social Services as being aged between 18 and 20 years old.
>
> If Yes: the Detainee is to be treated as an adult for detention purposes."

28. *Form IS.91RA: "Risk Factors"* for detention. The Claimant's difficulty in walking, due to a disability, was recorded.

29. *Form IS.93E: "Detention Review"* which had been annotated on the top of the page by Ms Noons with the words "Detained for Screening" and read as follows:

> "<u>Summary & Reasons for Initial Detention</u>
>
> Subject was encountered by Staffs Police on 10/02/10 at a service station at Fradley, Staffs. He could not speak English, had no I.D, no money and appeared in a dishevelled and disoriented state. He was arrested on suspicion of illegal entry to the UK and taken to Tamworth Police Station. On booking in he claimed to be aged 15 years. Social Services were called to attend to conduct an age assessment. Joanne Barnard, Social worker, attended and conducted a Merton compliant assessment and deemed the subject to be over 18, between the ages of 18 and 20 years.

> Subject served papers as a de facto clandestine illegal entrant on authority of CIO Sean Flaherty. Also served with an IS97M.
>
> CIO Flaherty authorised subject's detention pending referral to Oakington for the lorry drop process.
>
> I spoke to Roy at Oakington who has accepted the subject and will arrange a movement order for tomorrow."

30. In her second witness statement, Ms Noons exhibited the "Midlands & East-Oakington Lorry Drop Process". Mr Flaherty explained that it had been adopted in November 2008 in the Midlands & East region as a more convenient way of processing asylum seekers who had entered the UK illegally by lorry and were dropped in the Midlands & East region. Instead of an immigration officer having to travel to a local Police Station to screen them, asylum seekers would be transported directly from the police station to Oakington Immigration Detention Centre ('IDC') and be screened there.

31. The Lorry Drop Process advised the police in the following terms:

> "From 1st November 2008 there is a better way of dealing with clandestine illegal entrants. Adult male and female illegal entrants who've just arrived in the UK and been dropped from lorries should be arrested and referred to the UK Border Agency. We will arrange for transport from Police custody to the Immigration Detention Centre at Oakington for their asylum claims to be processed."
>
> ….
>
> "If the suspect is clearly a minor refer to your local Social Services using your own existing procedures.
>
> Where the suspect appears to be an adult, we can accept the case after a Merton Complaint Age Assessment by your local Social Services has established their true age…."

32. The Lorry Drop Process gave the following advice to immigration officers:

> "What do you do?
>
> 1. Is your case an adult male or female asylum seeker, who recently arrived clandestinely?
> 2. Have you established an immigration offence?
> 3. Obtain CIO authority and serve IS151A and part 2
> 4. Serve IS91, IS91R and RA where needed
> 5. Create an IS93 clearly marked 'Detained for Screening' in addition to the specific facts of the case

> 6. Refer to Oakington Duty HEO from 08:00 to 20:00, after the case is accepted booked in with DEPMU as a **Midlands and East Asylum Screening** case
> 7. Out of hours book the bed with DEPMU and use the screening inbox for the referral to Oakington. You or your nominated contact will have a reply early the following morning.
> 8. For males ask for an Oakington Lorry Drop Bed, for females ask for a Yarlswood Lorry Drop bed but still refer both males and female to the Oakington Duty HEO
> 9. These beds are completely separate from our removals beds so do not refer through BEO
> 10. Fax or email copies of all papers to Oakington including the IS93.
> 11. Update CID and NOD*, include anything which may be useful to the asylum caseworker on the notes screen* and remember the lorry drop tick boxes!"

33. Mr Flaherty explained that "the Lorry Drop Process was a detained process" and that those accepted for the Lorry Drop Process would be detained for screening. When pressed, he explained that "detention was the default position" which meant that the assumption was that persons would be detained until their screening interview unless there were reasons why detention was not appropriate in a particular case. Immigration officers would still have to complete the Forms IS151A, IS91 and IS91R and consider the reasons for authorising detention. The difference between the Lorry Drop Procedure and standard procedure was that under the Lorry Drop Procedure, the default position was detention, not release.

34. Mr Flaherty confirmed in his oral evidence the contents of the GCID which recorded that initially the G4S transport crew refused to move the Claimant because he was on suicide watch at the police station and because he had not been photographed. Oakington IRC refused to accept the Claimant because he had been assessed as a suicide risk at the Police Station, and Oakington did not have suitable facilities for him. Oakington also refused to undertake the screening process in respect of the Claimant because he was not on site.

35. I note that the IS Minute Sheet dated 11 February 2010 (referred to above) anticipated that the 24 Detention Review would be conducted by Oakington. There is a completed but unsigned Detention Review form (IS.93E) purporting to be from Oakington which states:

> "Subject arrested by Staffordshire police. Subject claims he entered UK by lorry on 10.02.12. Claimed asylum the same day. Served as Illegal Entrant: EWL. Accepted for the Oakington Screening process. Subject claims to be a minor. Assessed as over 18 by Merton complaint age assessment. Subject to be dealt with as an adult for purposes of detention and asylum. Subject is fit and well, No mitigating circumstances precluding detention. No close ties in UK. Subject has wilfully evaded immigration controls to gain entry into UK, and little reliance could be placed on the subject

> adhering to any conditions of temporary release. Subject is due to be screened on 13.02.10. Detention to be maintained pending outcome of the Screening process."

36. I am informed by Counsel for the Defendant, although it is not confirmed in evidence, that this review was carried out by an immigration officer at Oakington. In the light of the challenge to the Lorry Drop Process, its relevance to these proceedings is in the final two sentences, referring to maintaining detention pending the outcome of screening, which was due to take place on 13.02.10.

37. The Claimant was eventually transferred to Colnbrook IRC on 13 February 2010. He was interviewed on arrival at Colnbrook and given a medical examination on 14 February. He said he was disabled but indicated that he had no other medical or mental health concerns. Subsequently he made two requests, in early March, to see medical staff concerning his mobility.

38. The GCID stated that Colnbrook had no officers available to complete screening and so the Claimant's case had to be "routed through NAM and allocated a caseworker to process his asylum claim".

39. The screening interview did not take place until 15 March 2010. Mr Anthony Hellier, an Assistant Immigration Officer attached to Eaton House Enforcement Office, who conducted the interview, made a witness statement but did not give oral evidence. At the interview, with an interpreter present, the Claimant insisted that his date of birth was 1 July 1994 and that he was 15. Mr Hellier was aware that an age assessment had been conducted and that he had been assessed as over 18. He did not see the age assessment report. The Claimant also expressed health concerns about his mobility and complained he had not yet been seen by a doctor. Mr Hellier passed on these concerns to the authorities.

40. The GCID recorded that on 15 March there was further confirmation that he was not suitable for detained fast track processing because of his nationality and lack of documentation. The case would be referred to NAM. On 22 March 2010, the GCID records that NAM could not allocate his case until he was released and no caseworker had been assigned as yet.

41. On 12 March 2010, Mr Francesco Jeff, an adviser at the Refugee Council, wrote to the Council's Social Services Department stating that he and other professionals strongly believed that the Claimant was the age he claimed to be i.e. 15. He said, although he may look older than 15, it was apparent from his behaviour and demeanour that he was not. He was concerned about his disabilities and physical health. He considered him to be "a vulnerable child" whose "long period in detention has had a seriously debilitating effect on him".

42. On 22 March 2010, the Council re-assessed the Claimant's age. On this occasion, two Social Workers carried out the assessment, including Ms Barnard who assessed him on the first occasion, and Ms Mandy Thomas. Mr Jeff attended to support the Claimant as an "appropriate adult". The assessment was very similar in content to the first one, but reached a different conclusion, namely that he was 17 years of age. It did not state the assessed date of birth, although it appears that the Council

subsequently estimated his date of birth as 1 July 1992 (see First-tier Tribunal determination, 8 December 2010, paragraph 25).

43. In consequence of the finding that the Claimant was a minor, an IS106 was served on Colnbrook requiring the unconditional release of the Claimant because he was a minor.

44. The Claimant's claim for asylum was refused by the Defendant in a letter dated 10 August 2010. In that letter, the Defendant found on the basis of a Social Services age assessment that he was aged 18, and his date of birth was 1 July 1992.

45. On 30 September 2010, the Claimant's solicitors wrote a pre-action letter to the Council criticising the first age assessment on the following grounds:

a) "a cursory visual assessment and a brief interview which lasted no more than a matter of a few minutes";

b) "failed to provide [A] with any reasons for their decision thus denying him any opportunity to make representations in response to any adverse matters decided against him";

c) "rejected his claimed age [because] of his physical appearance and because of the fact he had no documents to prove his age. No account had been given to the fact that [A] had been through a horrendous journey immediately before the assessment and this may have had a significant effect of [on?] his physical appearance".

46. They criticised the second age assessment also, saying:

> "The Litigation Friend was present during this assessment and instructs that again the assessment took a matter of minutes. Other than agreeing that [A] was a minor under 18, no notification was given of a determination of [A's] precise age. …, [A]...was subsequently verbally informed that Staffordshie had assessed him to be 16 however, was then informed that Staffordshire had determined that he had turned 18. …The second assessment was purely based on an assessment of [A's] physical appearance and was neither Merton compliant nor lawful."

47. In a letter dated 14 October 2010 to the Claimant's solicitors, the Council accepted that the first assessment "did not comply in full with the Merton guidelines" and it added "we have long since ceased to rely upon it". However, it disputed that the second assessment was also in breach of the Merton guidelines. Having considered the case law and a paediatric report from Dr Birch, it revised its assessment, finding that the Claimant's date of birth was 1 July 1993, and that he was then 17 years and 3 months.

48. On 3 November 2010, the Claimant's solicitor sent a letter to the Council indicating its intention to challenge the assessment of 14 October 2010. In response, on 18 November 2010, the Council wrote stating:

> "although the Council stands by its own assessment, it is uneconomic to indulge in litigation… Accordingly Staffordshire County Council intends to treat your client as having been born on his currently claimed date of birth, namely 01.07.1994…we cannot state to any other party or body that we have positively assessed your client at his claimed age, merely that we are treating him as such."

49. On 8 December 2010, Immigration Judge Chambers, sitting in the First-tier Tribunal, dismissed his appeal against the Secretary of State's determination. He did not accept the truthfulness of the Claimant's account of events. He considered the evidence on the assessment of age in detail, and concluded "the appropriate finding in relation to the appellant's age is that suggested by Staffordshire County Council in their last letter to the appellant's solicitor" (paragraph 37).

50. On appeal to the Upper Tribunal, Immigration Judge Garratt held that Judge Chambers had found that that the Claimant's date of birth was 1 July 1994. Thus the Secretary of State had erred in failing to apply the policy on unaccompanied asylum seeking minors, and the appeal was allowed. In re-making the determination, both representatives agreed that the determination of the Immigration Judge in relation to the Claimant's age and date of birth on 1 July 1994 should stand (paragraph 13), and the decision was remitted back to the Secretary of State for re-consideration on that basis.

Statutory powers to detain

51. The Defendant had authority to detain the Claimant under statutory powers contained in:

a) Immigration Act 1971, Schedule 2, paragraphs 2 & 16; and

b) Nationality Immigration and Asylum Act 2002, section 62(2).

52. Schedule 2 to the Immigration Act 1971 makes administrative provisions for the control of persons on entry to the UK. Paragraphs 2 and 16 provide:

> "2. Examination by immigration officers and medical examination
>
> (1) An immigration officer may examine any persons who have arrived in the United Kingdom ... for the purpose of determining –
>
> (a) whether any of them is or is not a British citizen; and
>
> (b) whether, if he is not, he may or may not enter the United Kingdom without leave; and

(c) whether, if he may not –

(i) he has been given leave which is still in force,

(ii) he should be given leave and for what period or on what conditions (if any),

(iii) he should be refused leave."

"16 Detention of persons liable to examination or removal

(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.

(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending –

(a) a decision whether or not to give such directions;

(b) his removal pursuant to such directions."

53. In the circumstances of this case, the relevant power for the giving of removal directions is in Paragraph 10 of Schedule 2.

54. Section 62(2) of the Nationality Immigration and Asylum Act 2002 confers powers to detain under the authority of the Secretary of State.

"62. Detention by Secretary of State

(2) Where the Secretary of State is empowered under section 3A of that Act (powers of Secretary of State) to examine a person or to give or refuse a person leave to enter the United Kingdom, the person may be detained under the authority of the Secretary of State pending –

(a) the person's examination by the Secretary of State,

(b) the Secretary of State's decision to give or refuse the person leave to enter,

(c) a decision by the Secretary of State whether to give directions in respect of the person under paragraph 8 or 9 of Schedule 2 to that Act (removal)."

55. In this case, the relevant power referred to s.62(2) above, is contained in the Immigration (Leave to Enter) Order 2001, made under section 3A of the Immigration Act 1971, which applies to those who have made a claim for asylum. Article 2(1) and (2)(a) provide for a person who has made a claim for asylum to be given leave to enter. Article 3 applies certain powers in Schedule 2 to the Immigration Act 1971 to the Secretary of State, including paragraph 2 of Schedule 2 (above).

56. The statutory powers make no distinction between the detention of adults and the detention of children. However, the Defendant's policies do make significant distinctions between adults and children, thus giving effect to s.55 Borders, Citizenship and Immigration Act 2009 and Strasbourg case law under Article 5 ECHR.

False imprisonment and immigration detention

57. The tort of false imprisonment is committed when a claimant is directly and intentionally imprisoned by a defendant, without lawful justification.

58. The burden of showing that there is lawful justification for the detention lies on the Defendant: see *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 per Lord Dyson at [65], referring to *R v Deputy Governor of Parkhurst Prison, ex parte Hague* [1992] 1 AC 162.

59. The tort is actionable *per se* regardless of whether the claimant suffers any harm.

60. The claimant does not have to prove fault on the part of the defendant; it is a tort of strict liability.

61. In *R v Governor of Brockhill Prison ex p. Evans (No. 2)* [2001] 2 AC 19, the House of Lords found that the Governor had falsely imprisoned the applicant, by detaining her after her correct release date, even though, in calculating her date of release, he had complied with the law and Home Office guidance at the time. Lord Hope said, at 35B-F:

> "It is no answer to a claim based on a tort of strict liability to say that the governor took reasonable care or that he acted in good faith when he made the calculation....The justification had to be found in the terms of the statute.... for the Governor to escape liability on the basis that he was acting honestly or on reasonable grounds analogous to those which apply to arresting police officer would reduce the protection currently provided by the tort ...The defence of justification must be based upon a rigorous application of the principle that the liberty of the subject can be interfered with only upon grounds which a court will uphold as lawful."

62. The conclusion that "the justification had to be found in the terms of the statute" distinguishes the position of the Prison Governor in *ex parte Evans* from other public bodies who are afforded a greater degree of statutory protection against claims of wrongful detention, presumably as a matter of policy.

63. For example, a hospital trust acts lawfully in admitting a mental patient on the basis of a statutory application which "appears to be duly made", even though subsequently it is found to be invalid. In *R (M) v Hackney London Borough Council* [2011] 1 WLR 2873, although the approved mental health professional's application to admit the claimant to a mental hospital was unlawful, nonetheless the hospital trust was held to have acted lawfully in admitting the claimant, on the basis of what appeared to be a valid application, because of the terms of section 6(3) of the Mental Health Act 1983:

> "Any application for the admission of a patient…which appears to be duly made and to be founded on the necessary medical recommendations may be acted upon without further proof of the signature or qualification of the person by whom the application or any such medical recommendation is made or given or of any matter of fact or opinion stated in it."

64. Another example is the police power of arrest if an officer "has reasonable grounds for suspecting" that a person has committed an arrestable offence, even if he has not. In *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597, where innocent claimants were arrested by the police on suspicion of shoplifting as a result of an allegation made by a store detective. The police officers were not liable because their conduct was lawful by reason of section 24(6) Police and Criminal Evidence Act 1984, which gave power to a constable to arrest a person without a warrant if he had reasonable grounds for suspecting that an arrestable offence been committed and that the person was guilty of it.

65. The same or similar statutory powers were the basis of the police cases referred to in *D v Home Office* [2006] 1 WLR 1003, where Brooke LJ said at [61]:

> "61. So far as a constable's power of arrest is concerned, it has long been settled that he will not be liable in trespass to the person so long as he can show that he did honestly suspect the matter on which he was entitled to rely, and that his grounds for suspicion were objectively reasonable. It has recently been held that if his discretionary decision to effect an arrest is called into question, its lawfulness will be judged on ordinary *Wednesbury* principles...not only in proceedings for judicial review but also in actions for false imprisonment: see *Mohammed-Holgate v Duke* [1984] AC 437, 443 and *Paul v Chief Constable of Humberside Police* [2004] EWCA Civ 308 at [30]."

66. The Defendant submitted that an immigration officer who was exercising the power of detention was in an analogous position to that of a police officer having reasonable grounds on which to arrest, or the hospital trust admitting the patient on the basis of an application which appeared to be in order.

67. I do not consider that it is permissible to extend the powers of an immigration officer to detain in this way in the absence of express provision. In reaching that conclusion, I rely upon the well-established common law principle that "the right to liberty is of fundamental importance and that the courts should strictly and narrowly construe general statutory powers whose exercise restricts fundamental common law rights

and/or constitutes the commission of a tort": per Lord Dyson in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, at [53].

68. In *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2011] 2 WLR 671, the Supreme Court held, by a majority, that breach of a public law duty on the part of a person authorising detention is capable of rendering that detention unlawful and the fact that the detainee would have been detained lawfully in any event did not affect the Secretary of State's liability for false imprisonment. The fact that the detainee would have been lawfully detained was relevant to damages rather than liability; and, since the appellants in that case had suffered no loss, they were entitled to no more than nominal damages of £1.

69. Lord Dyson, in considering the power to detain under Schedule 3 to the Immigration Act 1971, identified the basis upon which a detention decision could be held to be unlawful, and the consequences of such a finding, at [66]:

> "A purported authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2AC 147 established that both species of error render an executive act *ultra vires*, unlawful and a nullity. In the present context, there is in principle no difference between (i) a detention which is unlawful because there was no statutory power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law. For example, if the decision to detain is unreasonable in the *Wednesbury* sense, it is unlawful and a nullity. The importance of *Anisminic* is that it established that there was a single category of errors of law, all of which rendered a decision *ultra vires*: see *Boddington v British Transport Police* [1999] 2 AC 143, 158D-E."

70. Lord Dyson went on to explain, at [68], that "It is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment...the breach of public law must bear on and be relevant to the decision to detain".

71. In *Kambadzi v Secretary of State for the Home Department* [2011] UKSC 23, where the Supreme Court held that the Claimant had been unlawfully detained during periods in which no detention reviews were carried out, giving rise to a claim in tort for false imprisonment, Lord Hope said at [41] and [42]

> "41. …a failure by the executive to adhere to its published policy without good reason can amount to an abuse of power which renders the detention itself unlawful. I use this expression to describe a breach of public law which bears directly on the discretionary power that the executive is purporting to exercise.
>
> 42. …applying the test proposed by Lord Dyson in *Lumba*, it was an error which bore on and was relevant to the decision to

> detain throughout the period when the reviews should have been carried out."

72. Lady Hale said at [69]:

> "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 the *Lumba* case para 207)."

73. The Court confirmed that a material public law error will render administrative detention unlawful. The damages recoverable in respect of such a breach would be nominal, however, if detention was otherwise legally justifiable.

74. Statutory powers to detain have to be exercised in accordance with the Defendant's published policies on detention which are to be found in Chapter 55 of the Enforcement Instructions and Guidance ("EIG"), headed "*Detention and Temporary Release*". As paragraph 55.1.1 explains:

> "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."

75. Paragraph 55.1.1. explains that there is a "presumption in favour of temporary admission or release, and that, wherever possible, alternatives to detention are used". Detention will most usually be appropriate:

a) to effect removal;

b) initially to establish a person's identity of basis of claim;

c) where there is reason to believe that a person will fail to comply with any conditions attached to the grant of temporary admission or release.

76. However, asylum applicants may be detained under the fast track process for assessing straightforward asylum applications (originally known as the Oakington criteria).

77. Paragraph 55.1.3 states that "Detention must be used sparingly, and for the shortest period necessary."

78. The presumption in favour of release is set out in paragraph 55.3:

> "55.3 Decision to detain (excluding pre-decision fast track and CCD cases)

> 1. There is a presumption in favour of temporary admission or temporary release – there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.
>
> 2. All reasonable alternatives to detention must be considered before detention is authorised.
>
> 3. Each case must be considered on its individual merits, including consideration of the duty to have regard to the need to safeguard and promote the welfare of any children involved."

79. Paragraph 55.3.1. provides that all relevant factors must be taken into account when considering the need for initial or continued detention, and that once detention has been authorised, it must be kept under close review to ensure that it continues to be justified. Relevant factors include the following:

> "• What is the likelihood of the person being removed and, if so, after what timescale?
>
> • Is there any evidence of previous absconding?
>
> • Is there any evidence of a previous failure to comply with conditions of temporary release or bail?
>
> • Has the subject taken part in a determined attempt to breach the immigration laws? (e.g. entry in breach of a deportation order, attempted or actual clandestine entry)
>
> • Is there a previous history of complying with the requirements of immigration control? (e.g. by applying for a visa, further leave, etc)
>
> • What are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? If the dependant is a child or vulnerable adult, do they depend heavily on public welfare services for their daily care needs in lieu of support from the detainee? Does the person have a settled address/employment?
>
> • What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which afford incentive to keep in touch?
>
> • Is there a risk of offending or harm to the public (this requires consideration of the likelihood of harm and the seriousness of the harm if the person does offend)?
>
> • Is the subject under 18?;

- Does the subject have a history of torture?; and

- Does the subject have a history of physical or mental ill health?"

80. Paragraph 55.8 provides that continued detention must be reviewed, as a minimum at the intervals set out in the Table, which for the purposes of this case were 24 hours, 7 days, 14 days, 21 days and 28 days. At each review, "robust and formally documented consideration should be given…information relevant to the decision to detain." Where detention "involves or impacts on children under the age of 18", reviewing officers "must demonstrably have regard to the need to safeguard and promote the welfare of children".

81. In this case the Claimant submitted that the detention was unlawful because of a failure to follow the policy, citing *R (AM) v Secretary of State for the Home Department* [2012] EWCA Civ 521, per Rix LJ at [25] – [27]:

> "25 In this connection the Secretary of State has published policy guidance (the Guidance), which, although it has the quality of policy rather than law, can, where that policy has not been applied, render the Secretary of State liable for the tort of false imprisonment. Thus the Secretary of State is obliged to follow policy absent good reason not to do so and, where the breaches bear directly upon detention may, by vitiating authority for detention, sound in damages for false imprisonment: see *Lumba* and *R (Kambadzi) v SSHD* [2011] UKSC 23; [2011] 1 WLR 1299. Causation goes to damages not liability (*ibid*)."

82. In considering the meaning of the Defendant's policy, I have had regard to the guidance given in *R (Anam) v Secretary of State for the Home Department* [2009] EWHC 2496 (Admin). Cranston J. confirmed that it was for the court to decide the meaning of a policy objectively. He said, at [49]:

> "49. The meaning of a policy such as that contained in the Enforcement Instructions and Guidance is an objective matter: *R (on the application of Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72. In that case the Court of Appeal considered how such schemes should be interpreted and referred to Lord Steyn's speech in *In Re McFarland* [2005] UKHL 17; [2004] 1 WLR 1289. Lord Steyn's speech also goes to the point that persons are entitled to rely on the language of a policy statement.
>
> > "[24]…In my view, however, in respect of the many kinds of "soft laws" with which we are now familiar, one must bear in mind that citizens are led to believe that the carefully drafted and considered statements truly represent government policy which will be observed in decision-making unless there is good reason to depart from it. It is an integral part of the working of a mature process of public

> administration. Such policy statements are an important source of individual rights and corresponding duties. In a fair and effective public law system such policy statements must be interpreted objectively in accordance with the language employed by the Minister. The citizen is entitled to rely on the language of the statement, seen as always in its proper context. The very reason for making the statement is to give guidance to the public. The decision-maker, here a Minister, may depart from the policy but until he has done so, the citizen is entitled to ask in a court of law whether he fairly comes within the language of the publicly announced policy."

> 50. ...The upshot in *Raissi* was that the Court of Appeal decided that the meaning of a policy was a "hard-edged question" which fell to be determined objectively by the courts and not by the minister responsible for administering the scheme."

Detention of a child

83. In this case, the Defendant submitted that there was lawful authority for the Claimant's detention under the broad statutory powers in the Immigration Act 1971 and the Nationality Immigration and Asylum Act 2002. These provisions do not distinguish between the detention of adults and the detention of children.

84. However, the Defendant's published policy serves to narrow the broad statutory powers and treats children as a special case. EIG paragraph 55.9.3 provides:

> "Unaccompanied children must not be detained other than in the circumstances below:
>
> As a general principle, unaccompanied children (i.e. persons under the age of 18) must only ever be detained in the most exceptional circumstances…They should normally only be detained for the shortest possible time ….
>
> In those exceptional circumstances where there are no relatives or appropriate adults to take responsibility for the child and alternative arrangement need to be made for their safety a period of very short term detention will also usually be appropriate to prevent them absconding (i.e. going missing) pending the arrangement of a care placement. Again, this includes age dispute cases where the person concerned is being treated as a child.
>
> Detention of unaccompanied children must take account of the duty to have regard to the need to safeguard and promote their welfare; this must be demonstrable in line with the statutory guidance issued by the Secretary of State under section 55 of the 2009 Act…

> Unaccompanied children may only be detained in a place of safety as defined in the Children and Young Persons Act 1933...
>
> Where an individual detained as an adult is subsequently accepted as being aged under 18, they should be released from detention as soon as appropriate arrangements can be made for their transfer into local authority care.
>
> In all cases, the decision making process must be informed by the duty to have regard to the need to safeguard and promote the welfare of children."

85. Paragraph 55.10 provides:

> "The following are normally considered suitable for detention in only very exceptional circumstances...
>
> - unaccompanied children and young persons under the age of 18 (but see 55.9.3 above)"

86. Paragraph 55.8, on detention reviews, states that where detention "involves or impacts on children under the age of 18", reviewing officers "must demonstrably have regard to the need to safeguard and promote the welfare of children".

87. Immigration officers are required by law to apply the published policy, unless there is good reason to depart from it. The reason it was not applied in the Claimant's case was that the immigration officers believed he was an adult, in the light of the age assessment by Staffordshire County Council which stated he was over 18 years of age. The Claimant contended that this error could not save the Defendant from a finding of unlawful detention and false imprisonment.

Grounds of challenge to the legality of detention

(1) Age Assessment

88. The Claimant alleged there had been a breach of the policy set out in paragraph 55.9.3.1. for determining whether or not a person is under 18:

> "UK Border Agency will accept an individual as under 18 (including those who have previously claimed to be an adult) unless one or more of the following criteria apply:
>
> - there is credible and clear documentary evidence that they are 18 years of age or over;
> - a full "Merton-compliant" age assessment by Social Services is available stating that they are 18 years of age or over;
> - their physical appearance/demeanour **very** strongly indicates that they are **significantly** over 18 years of

> age and no other credible evidence exists to the contrary."

89. The Claimant submitted that the immigration officers acted in breach of paragraph 55.9.3.1 because the age assessment was incorrect – the Claimant was not aged 18 years or over – and it was not Merton-compliant. An age assessment which was incorrect and/or not Merton-compliant was invalid and a nullity, whether or not it had formally been quashed by the court. A "full "Merton-compliant" age assessment by Social Services" stating that the Claimant is "18 years of age or over" was not in existence when the immigration officers made their decision and therefore the criterion for refusing to accept that the Claimant was under 18, as set out in paragraph 55.9.3.1 was not met.

90. The Claimant placed reliance upon the concession made by the Defendant in *R (J) v Secretary of State for the Home Department* CO/10822/2008 to the effect that the claimant's detention founded upon an incorrect local authority age assessment constituted false imprisonment. However, that concession does not bind the Defendant in this case.

91. The assessment was carried out by the Council under s.20(1) Children Act 1989, to determine whether the Claimant was a "child in need" who required accommodation. In *R (A) v Croydon London Borough Council & Ors* [2009] UKSC 8; [2009] 1 WLR 2557, the Supreme Court held that, where a local authority assessed a person's age for the purposes of s.20(1) Children Act 1989, the question whether that person was, or was not, a child depended entirely on the objective fact of a person's age, to be determined by the court. It was not a question which could be decided by scrutinising the decision-making process, applying traditional public law tests of fair process and *Wednesbury* reasonableness. Although Lady Hale reached this conclusion on the basis of the wording of the 1989 Act, she also referred, at [29] to [32] to the submission that whether a person was a child was a question of jurisdictional or precedent fact, concluding "*if ever there were a jurisdictional fact, it might be thought, this is it*", at [32].

92. It is common ground that the assessor erred in concluding that the Claimant was over 18. The FTT and UT have determined that the Claimant's date of birth is 1 July 1994 and so he was aged 15 when the age assessment was carried out on 11 February 2010. Applying the decision in *A*, on this ground alone, the assessment was invalid.

93. I accept the Claimant's submission that the assessment was not Merton-compliant. In my view, it is significant that this was accepted without reservation by the Council in its letter of 14 October 2010. The term Merton-compliant is shorthand for the minimum standards of fair procedure for the carrying out of age assessments by local authorities, which have evolved out of child social work good practice and common law principles of fairness.

94. The Merton-compliant standards of good practice and fairness which the assessment failed to meet in this case are, in my view, as follows:

    a) There was no appropriate adult present. See *R (NA) v Croydon LBC* [2009] EWHC 2357 (Admin); *R (AS) v London Borough of Croydon* [2011] EWHC 2091 (Admin); *R (J) v Secretary of State for the Home Department* [2011]

EWHC 3073 (Admin); *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59.

b) The assessment was conducted by one social worker, not two. See *R (J) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin); *A v London Borough of Croydon* [2009] EWHC 939 (Admin); *R(B) v London Borough of Merton* [2003] EWHC 1689 (Admin); *R(A) v London Borough of Camden* [2010] EWHC 2882 (Admin).

c) The Claimant was not given an opportunity to comment on the social worker's adverse findings. See *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59; *R(B) v London Borough of Merton* [2003] EWHC 1689 (Admin); *R(J) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin).

95. In my judgment, the failure to comply with the Merton standards rendered the assessment so unfair as to be unlawful in the circumstances of this case. The Claimant had recently arrived in the UK; he knew no-one and had no support; he had been arrested when begging for food; he had been held in a police cell overnight; he spoke no English; had no formal education; and was visibly "worn and tired" and "unkempt". Whatever the rights or wrongs of his entry into the UK, he was plainly vulnerable, and he was the type of applicant that the Merton standards were designed to protect. The assessor clearly did not believe him when he said he was 15 and gave his date of birth as 1 July 1994.

96. It seems to me significant that, at the second assessment, when he had the benefit of an appropriate adult and a second social worker, the outcome was different.

97. There were further criticisms of the age assessment which I do not accept. The Claimant correctly submitted that the age assessment should not be based on appearance alone because it is notoriously unreliable: *R(B) v London Borough of Merton* [2003] EWHC 1689 (Admin); *R(U) v London Borough of Croydon* [2011] EWHC 3312 (Admin). However, on the evidence before me, I was not convinced that the assessment had been made purely on the basis of physical appearance. Nor was I convinced that it was cursory, as alleged by the Claimant. I was invited to infer these shortcomings from the absence of any detailed reasons suggesting otherwise. The reasons were indeed very sparse. However, the reasons were very similar in the second age assessment, which decided he was a child, and so I was not satisfied that the sparse reasons indicated a failure to assess all the factors fairly.

98. Based on the description of the Claimant's condition and responses in the age assessment report, and his own witness statement in which he described the assessment, I did not consider that there was sufficient evidence that he was unfit to be interviewed. I note that he had been assessed by a doctor, and that he made no complaint about the assessment in his witness statement.

99. In the light of the inaccuracy and procedural shortcomings of the age assessment, I consider that the Claimant could have successfully challenged the validity of the age assessment in legal proceedings, against the Defendant and the Council during his detention. Neither the Defendant nor the court would have continued to detain him on the basis of an age assessment which had been held to be invalid.

100. The question is, should the outcome be different when the court is considering detention retrospectively rather than prospectively?

101. The Claimant's starting point was that, following *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, any error of law, whether jurisdictional or not, renders a decision unlawful and therefore a nullity. This principle was confirmed most recently in *Lumba*, per Lord Dyson at [66].

102. In *Boddington v British Transport Police* [1999] 2 AC 155, Lord Irvine described the legal effect of an unlawful decision in the following terms, at 155:

> "Subordinate legislation, or an administrative act, is sometimes said to be presumed lawful until it has been pronounced to be unlawful. This does not, however, entail that such legislation or act is valid until quashed prospectively. That would be a conclusion inconsistent with the authorities to which I have referred. In my judgment, the true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognised as never having had any legal effect at all."

103. Where a second decision has been made in reliance upon an earlier decision, which is subsequently pronounced unlawful, it may create a "domino effect" if the unlawfulness is held to be retrospective. In *Boddington*, Lord Steyn said:

> "…I accept the reality that an unlawful byelaw is a fact and that it may in certain circumstances have legal consequences. The best explanation that I have seen is by Dr Forsyth who summarised the position as follows in "*The Metaphysics of Nullity – Invalidity, Conceptual Reasoning and the Rule of Law*," at p.159:
>
> > "it has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. *The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act*. And that is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void." (Emphasis supplied.)
>
> "This seems to me a more accurate summary of the law as it has developed than the sweeping proposition in *Bugg's* case. And Dr Forsyth's explanation is entirely in keeping with the analysis of the formal validity of the enforcement notice in *Reg.*

> *v Wicks* which was sufficient to determine the guilt of the defendant."

104. Both parties invited me to rely on Dr Forsyth's analysis earlier in the same article, at p.146 - 150, as the correct approach:

> "**[At p. 146]**….It is sometimes supposed that if an act is found to be void, then everything that flows from that act must also be void. The inconvenience and injustice that can readily flow from such attempted unscrambling of thoroughly scrambled eggs, is what drives some to believe that unlawful acts are not void.
>
> But the law is not omnipotent; it cannot set everything right. Unlawful activity may (and does) have effects which cannot be rectified. Innocent third parties will have done all sorts of things that cannot be reversed or which it would be gravely unjust to reverse. For good or ill it is often impossible to return to the *status quo ante*. The law cannot wash away all signs of illegality.
>
> Thus it is inevitable that there will be occasions on which an administrative act will be void, yet it will have legal consequences. Two important, though intimately linked, questions remain. What is the explanation for this state of affairs in terms of theory (rather than in terms of practical necessity) and how may it be determined, as a matter of law rather than judicial discretion, on what occasions void acts will have legal consequences?
>
> The theoretical basis, is, it is submitted, to be found in Hans Kelsen's Pure Theory of Law. This theory, it will be recalled, is built upon the distinction between the *Sein* (the Is) and the *Sollen* (the Ought), between the realm of things that are, i.e. facts or natural phenomena, and the realm of norms, including therein law. Now an administrative act, the writing of a decision letter in a planning appeal, say, is a fact. The piece of paper on which the letter is written coupled with the mental processes of the decision-maker that led up to it, are events from the realm of things that are, the *Sein*. But the meaning of that act – that certain development is permitted – is an element of the realm of norms, the *Sollen*.
>
> Now a void act – say a decision letter written for an improper purpose – is not an act in *law* but it is and remains an act in *fact* – an event from the *Sein*. And events from the *Sein* often have an effect, directly or indirectly, in the realm of the *Sollen*. As Schiemann LJ said in *Percy v. Hall*, 'Manifestly in daily life the [ultra vires and void] enactment will have had an effect in the sense that people have regulated their conduct in the light of

> it.' Where that conduct has legal consequences, that is, effects in the realm of *Sollen*, those consequences flow from the legally non-existent unlawful act.
>
> Put more precisely, the factual existence of a void act may serve as the basis for other decisions. For instance, an invalid administrative act (a particular *seins* phenomenon) may, notwithstanding its non-existence in the *Sollen*, serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.
>
> **[At p.149]** In such cases the invalidity of the first act does involve the unravelling of later acts which rely on the first act's validity. However, the voidness of the first act does not determine whether the second act is valid. That depends upon the legal powers of the later actor. If the validity of the first act is a jurisdictional requirement for the valid exercise of the second actor's powers, then, if the first act is invalid, so is the second. Sometimes it will not be – the tax demand did not need to be valid for the money to be validly paid – and sometimes it will be – a valid tax demand could not be made unless the regulations had been properly made."

105. Applying this analysis, the issue between the parties was whether the validity of the age assessment was a jurisdictional requirement for the valid exercise of the immigration officer's power to assess age under EIG paragraph 55.9.3.1.

106. The Claimant submitted that the age assessment was a jurisdictional fact and so, applying Dr Forsyth's analysis referred to by Lord Steyn in *Boddington*, once it was established that the age assessment was invalid, it inevitably followed that the immigration officer's assessment under the second criterion in paragraph 55.9.3.1 was also invalid.

107. The Defendant submitted that, on a proper interpretation of the policy, an immigration officer was required to make an independent evaluation and exercise his judgment, when deciding whether or not the criteria in paragraph 55.9.3.1. are met. Although the wording might appear to impose a pre-condition that a Merton-compliant age assessment has been carried out, the policy should not be construed strictly as if it was a statute. Having regard to the other criteria set out in the paragraph, which plainly are evaluative in nature, and taking into account the purpose of this section of the policy, and the related Age Assessment guidance issued by UKBA, it is clear that the immigration officer is expected to carry out an evaluation of the age assessment and satisfy himself both that it is Merton-compliant and that its conclusion on age is reliable. As with any other judgment based upon evidence, there remains a risk that it will turn out to be factually incorrect, as in this case.

108. I accept the Defendant's submissions. On my interpretation of the policy, under paragraph 55.9.3.1, the immigration officer is required to make an evaluation of the

evidence, and form a judgment, applying one or more of the three criteria. This is the case even under criterion 2, where there has been a local authority assessment, as is apparent from the UKBA guidance on 'Age Assessment', which requires officers to consider whether or not the age assessment is reliable and Merton-compliant:

> "5.2 Case owners should give considerable weight to the findings of age made by local authorities, recognising the particular expertise they have through working with children. In cases where the local authority's assessment is the only source of information about the applicant's age their assessment will normally be accepted as decisive evidence.
>
> Nevertheless, case owners should carefully consider the findings of the local authority and discuss the matter with them in appropriate circumstances, such as where the findings are unclear; or do not seem to be supported by evidence; or it appears that the case is finely balanced and the applicant has not been given the benefit of the doubt; or that it appears the general principles set out in the Merton judgment were not adhered to."

109. In *R (J) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin) Coulson J. found that the age assessment in that case was patently inadequate and not Merton-compliant. He held that the immigration officer had "an independent obligation … to consider that assessment and to reach her own conclusion as to whether or not it was Merton compliant" (at [31]). The conclusion that it was Merton-compliant was "an unreasonable and irrational conclusion" (at [32]).

110. In my judgment, the approach taken by Coulson J. was correct in law. On an objective interpretation of the policy, the immigration officer is required to evaluate the evidence and form a judgment under the criteria in paragraph 55.9.3.1. In doing so, he is subject to the supervisory jurisdiction of the court on traditional public law grounds. The fact that, in this case, the local authority's age assessment was not Merton-compliant did not, of itself, invalidate the immigration officer's decision. Whether or not there was in existence a Merton-compliant age assessment was not an objective fact on which there could only be one correct answer (as in the case of *A).* The immigration officer had to make a judgment on whether or not the age assessment was Merton-compliant and this was a question upon which views might well differ. In this context, I do not consider it can be described as a jurisdictional fact.

111. In relation to age, the requirement in paragraph 55.9.3.1. is that "a full "Merton-compliant" age assessment by Social Services is available stating that they are 18 years of age or over". The criterion does not specify that the person is in fact 18 years of age or over. The conclusion on age in the age assessment is not an objective jurisdictional fact which forms the basis of the immigration officer's powers. In the same way as I have described above, in relation to compliance with the Merton standards, it is for the immigration officer to go on to satisfy himself, in accordance with the 'Age Assessment' guidance, that there is reliable evidence that the person is 18 years or over and therefore should not be treated as a child.

112. My conclusions on the interpretation of paragraph 55.9.3.1 do not prevent a claimant from challenging an immigration officer's decision to detain on the basis of an age assessment which is not Merton-compliant or has assessed age incorrectly, on traditional public law grounds.

113. In this case, Ms Noons said in evidence that she did not see it as her role to check whether or not the assessment was Merton-compliant. Indeed, she candidly admitted that she did not know what the Merton criteria were, and I concluded that she did not have the requisite training to decide whether or not the assessment was Merton-compliant. I accept the Claimant's submissions that, on the evidence, Ms Noon's decision to detain was unlawful because she failed to ask herself the right questions or take reasonable steps to acquaint herself with the information needed to make her decision. She did not follow the EIG policy and UKBA Guidance which I have referred to above. It was clear from the face of the assessment that there was no appropriate adult present; that it had been signed by only social worker; and that there were no comments by the Claimant on the social worker's adverse findings. This should have prompted Ms Noons to make further enquiries of the local authority. If she had done so, it could have become apparent at a much earlier stage that the local authority assessment was not Merton compliant, as was subsequently conceded by the local authority.

114. The Claimant's challenge to the failure to apply the policy on children when deciding to detain the Claimant was also based upon s.55 Borders, Citizenship and Immigration Act 2009, which I turn to next.

(2) Section 55, Borders, Citizenship and Immigration Act 2009

115. The statutory powers to detain make no distinction between adults and children.

116. However, section 55, Borders, Citizenship and Immigration Act 2009, which came into force on 2 November 2009, imposes specific duties in relation to children, which apply to the immigration detention of children.

117. S.55 provides, so far as is material:

> **"55 Duty regarding the welfare of children**
>
> (1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to

> immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).
>
> ....
>
> (6) In this section—
>
> "children" means persons who are under the age of 18;

118. Counsel for the Defendant submitted that the s.55 duty was fully discharged by the drawing up of a policy in relation to the detention of children, which was then applied to the Claimant. However, for the four reasons set out below, I have concluded that the UKBA and individual immigration officers must also "have regard to the need to safeguard and promote the welfare of children" when making decisions about detention in individual cases. For ease of reference, I will describe this as the "welfare of children principle".

119. First, because immigration officers are performing a function within the meaning of subsection (2), and therefore, by virtue of subsection (1), that function must be discharged in accordance with the welfare of children principle. The Secretary of State is not merely required to "promote" the welfare of children principle by issuing policy and guidance; she is also required to "ensure" that the functions are discharged by immigration officers in accordance with that principle. If her policy does not ensure that result when applied to individual cases, there will be a breach of the s.55 duty.

120. Applying that principle to the issue in this case, if the policy in EIG section 55, in particular paragraph 55.9.3.1., authorises an immigration officer to make a decision based upon a "reasonable belief" that a person is an adult, and thereby allows for the possibility that the immigration officer might be mistaken, and the person might in fact be a child, then the Defendant's policy does not "ensure" that the welfare principle is complied with, as required by s.55. The effect will be that functions will be exercised in respect of a child without applying the welfare of children principle.

121. Alternatively, if the Defendant's policy only authorises an immigration officer to treat a person as an adult when, as a matter of fact, he is an adult, then the Defendant has complied with s.55. If the immigration officer makes a mistake and concludes that a person is an adult when in fact he is a child, the immigration officer will have acted in breach of the policy, and the decision must be quashed and re-taken on a correct basis. The effect will be that the functions can only lawfully be exercised in respect of a child if the welfare of children principle is applied.

122. Secondly, because subsection (3) requires those who exercise functions under the Immigration Acts to have regard to the Guidance issued by the Secretary of State. The

current Guidance is "*Every child matters: change for children",* statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children" issued under section 55 in November 2009.

123. Relevant extracts from the Guidance are set out below:

> "**Introduction**
>
> "6. This guidance is issued under section 55 (3) and 55 (5) which requires any person exercising immigration, asylum, nationality and customs functions to have regard to the guidance given to them for the purpose by the Secretary of State. **This means they must take this guidance into account and, if they decide to depart from it, have clear reasons for doing so."**
>
> "**Part 2**
>
> "2.3. The duty does not create any new functions, nor does it override any existing functions, rather it requires them to be carried out in a way that takes into account the need to safeguard and promote the welfare of children."
>
> **"Making arrangements to safeguard and promote welfare in the UK Border Agency"**
>
> "2.6. The UK Border Agency acknowledges the status and importance of the following: the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the EU Reception Conditions Directive, the Council of Europe Convention on Action Against Trafficking in Human Beings, and the UN Convention on the Rights of the Child. The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies."
>
> "2.7. The UK Border Agency must also act according to the following principles:
>
> • Every child matters even if they are someone subject to immigration control.
>
> • In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children.

…..."

"Work with individual children

2.18. This guidance cannot cover all the different situations in which the UK Border Agency comes in to contact with children. Staff need to be ready to use their judgement in how to apply the duty in particular situations and to refer to the detailed operational guidance which applies to their specific area of work. In general, staff should seek to be as responsive as they reasonably can be to the needs of the children with whom they deal, whilst still carrying out their core functions.

2.19. It may be helpful to set out here, by way of example, some of the key policy commitments which apply at different stages of the process:

• Special care must be taken when dealing with unaccompanied asylum seeking children, for instance by checking with them that they understand the process for making and resolving their asylum claim, and ensuring that the physical settings in which their applications are dealt with are as child-friendly as possible to ensure that the child feels safe and protected.

• When unaccompanied or separated children are being escorted from their normal place of residence to a port where removal will take place, they must be subject to detention procedures in the sense of being served with formal notice whilst the supervised escort is taking place.

Other than in these situations, unaccompanied or separated children must be detained only in the most exceptional circumstances whilst other arrangements for their care and safety are made.

• During any period of detention, reasonable steps should be taken to ensure that a child is able to continue his or her education, maintain contact with friends, and practise his or her religion.

….."

124. It is apparent that the Guidance requires immigration officers to have regard to the welfare of children principle when carrying out their functions, including the way in which they treat individual children, and in making decisions in relation to them. Particularly relevant here is the guidance in paragraph 2.19 that unaccompanied children should only be detained "in the most exceptional circumstances whilst other arrangements for their care and safety are made". This reflects Article 37 of the United Nations Convention on the Rights of the Child ("UNCRC").

125. Thirdly, the Supreme Court has held that s.55 was enacted to reflect the lifting of the UK's reservation to the UNCRC and its effect is that regard must be given to the need to safeguard and promote the welfare of children when making decisions in individual cases. In *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 A.C. 166, Baroness Hale said, at [23] - [25]:

> "23 For our purposes the most relevant national and international obligation of the United Kingdom is contained in article 3.1 of the UNCRC : "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".
>
> 24. Miss Carss-Frisk acknowledges that this duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be "in accordance with the law" for the purpose of article 8.2. Both the Secretary of State and the tribunal will therefore have to address this in their decisions.
>
> 25. Further, it is clear from the recent jurisprudence that the Strasbourg court will expect national authorities to apply article 3.1 of UNCRC and treat the best interests of a child as "a primary consideration". Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration". ... However, questions with respect to the upbringing of a child must be distinguished from other decisions which may affect them. The UNHCR, in its Guidelines on Determining the Best Interests of the Child (May 2008), explains the matter neatly, at para 1.1:
>
> > 'The term 'best interests' broadly describes the well-being of a child … The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interests of the

> child, but stipulates that: the best interests must be the determining factor for specific actions, notably adoption (article 21) and separation of a child from parents against their will: article 9; the best interests must be a primary (but not the sole) consideration for all other actions affecting children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies see: article 3.' "

126. Fourthly, because of the consistent way in which s.55 has been understood and applied since it came into force, it has been generally accepted that decision-makers must have regard to the need to safeguard and promote the welfare of children when individual decisions are made, and a failure to do so has led to successful challenges in legal proceedings. See e.g. *R (TS) v Secretary of State for the Home Department & Anor* [2010] EWHC 2614 (Admin); *R (Suppiah)* & ors v *Secretary of State for the Home Department & Anor* [2011] EWHC 2 Admin; *R (Asefa) v Secretary of State for the Home Department* [2012] EWHC 56 (Admin); *R (on the application of Tinizaray) v Secretary of State for the Home Department* [2011] EWHC 1850 (Admin); *R (on the application of ABC (Afghanistan) v Secretary of State for the Home Department* [2011] EWHC 2937 (Admin).

127. Therefore, in my judgment, in deciding whether or not to detain the Claimant, the immigration officers were required to have regard to the need to safeguard and promote his welfare as a child, in order to comply with the Defendant's policy and the Guidance, which are intended to give effect to a binding international law obligation. In public law terms, it was also a relevant consideration which the decision-maker had to take into account.

128. Unfortunately, the immigration officers did not have regard to the Claimant's status as a child, and the need to safeguard and promote his welfare as a child, when they made the decision to detain him, because they were under the mistaken belief that he was not a child.

129. However, he was in fact a child, within the meaning of the definition of "child" in ss (6), and it is not possible to interpret this definition as if Parliament had included the words "appears to be a child" or "is reasonably believed to be a child". Applying the analysis adopted by the House of Lords in *R (A) v Croydon London Borough Council & Ors* [2009] UKSC 8; [2009] 1 WLR 2557, per Lady Hale at [27]:

> " …the question whether a person is a "child" is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision-makers."

130. My conclusion is that, by failing to have regard to the need to safeguard and promote his welfare as a child, the immigration officers erred in law, rendering

the decision to detain unlawful.

(3) Article 5 ECHR

131. By s.6(1) of the Human Rights Act 1998, it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Plainly the decision to detain in this case was made by a public authority and this Court, in determining the legality of the decision to detain, is also a public authority within the meaning of s.6(1), and must apply the Convention.

132. Article 5 ECHR provides, in so far as is material:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

133. In *Saadi v United Kingdom* (2008) 47 EHRR 17, the ECtHR held:

> "67. It is well-established in the Court's case-law under the sub-paragraphs of Article 5(1) that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) – (f) be lawful. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5(1) requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness...
>
> 74. To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country" (see *Amuur § 43)*; and the length of detention should not exceed that reasonably required for the purpose pursued."

134. It follows that, where as in this case it has been established that detention is unlawful under national law, it will also constitute a breach of Article 5, because of the

requirement in Article 5(1) that deprivation of liberty must be "in accordance with a procedure prescribed by law".

135. Article 5 has to be read in harmony with the general principles of international law, which includes the United Nations Convention on the Rights of the Child: see *Neulinger v Switzerland* [2011] 2 FCR 110. This was accepted "without qualification" by the Defendant in *R (Suppiah)* & ors v *Secretary of State for the Home Department & Anor* [2011] EWHC 2 Admin, per Wyn Williams J. at [168].

136. The UNCRC provides, so far as is material:

> "Article 1
>
> For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."
>
> "Article 3
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being …. "
>
> "Article 37
>
> State parties shall ensure that:
>
> (a) ...
>
> (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.
>
> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interests not to do so ...
>
> (d) ..."

137. There have been a number of decisions in the ECtHR where immigration detention of a child has been held to contravene the UNCHR and amount to a breach of Article

5(1), because it failed to meet the requirements of Articles 3 and 37 of the UNCRC, even though the detention was otherwise lawful, in both domestic law and under Article 5.

138. In *Mayeka & Mitunga v Belgium* (App. No. 13178/03); *Kanagaratnam v Belgium* (App. No. 15297/09) and *Muskhadzhiyeva v Belgium* (App. No. 41442/07), the ECtHR held that there was a breach of Article 5(1) because children were detained in centres intended for adults.

139. In *Rahimi v Greece* (App. No. 8687/08), the detention of an unaccompanied child breached Article 5(1) where the State had failed to address the best interests of the child and had not considered an alternative to detention.

140. In *Popov v France* (App. No. 39472/07), the ECtHR found a violation of Article 5(1) because the authorities had not sought any alternative solution for the child, other than administrative detention.

141. The definition of a "child" in Article 1 is clear and unequivocal. In this case, the Claimant was a child, within the meaning of Article 1, as he was "a human being below the age of eighteen years". I have not been able to find any legal basis for the Defendant's submission that there has been no breach of Article 5 or the UNCRC because the immigration officers believed him to be an adult. I do not consider that Article 1 can be construed as if it included the words "appears to be a child" or "is reasonably believed to be a child". I have not been referred to any *travaux preparatoires*, but in seeking to apply an autonomous and international interpretation, I consider that the obligations in the UNCRC are intended to be applied to all children, without qualification. This places the onus on the State to ensure that the Convention rights are effectively secured.

142. In this case, it is established on the evidence that the Defendant, when detaining the Claimant:

a) failed to have regard to his best interests as a child, contrary to Article 3 UNCRC;

b) detained him with adults and failed to consider an alternative to detention, contrary to Article 37 UNCRC.

143. Therefore I conclude that the Claimant's detention was in breach of Article 5(1) ECHR, and hence unlawful under s.6(1) HRA 1998.

(4) Detention in breach of policy and *Hardial Singh* principles

144. The Claimant applied to amend his Particulars of Claim in the light of the evidence given by the immigration officers in this case, adding three new grounds:

a) the Defendant's officials unlawfully applied a presumption that an asylum seeker who had arrived clandestinely by lorry should be detained pending a screening interview, contrary to the published policy in the EIG, and not recorded in any published guidance;

b) having detained the Claimant pursuant to the unpublished presumption and/or pursuant to the lorry drop process guidance for the purpose of carrying out a screening interview, the Defendant failed to carry out detention reviews in accordance with her published guidance at intervals of 7, 14, 21 and 28 days of detention;

c) having detained the Claimant pursuant to the unpublished presumption and/or pursuant to the lorry drop process guidance for the purpose of carrying out a screening interview, the Defendant's delay in carrying out the screening interview (32 days) was unreasonable.

145. After hearing Mr Flaherty and Ms Noons give their evidence, the Defendant formally conceded that the individual immigration officers responsible for taking the decision to detain in this case wrongly applied a presumption in favour of detention in breach of Chapter 55.3 EIG. The Defendant further conceded that the whole of the Claimant's detention was unlawful and in breach of Article 5 ECHR. The Defendant did not concede that the lorry drop procedure itself required a presumption in favour of detention; merely that it had been wrongly interpreted by her officials.

146. The Defendant also conceded that the detention was unlawful because of failure to carry out detention reviews in accordance with the policy. She was unable to establish that detention reviews had been carried out at intervals of 7, 14 and 21 days as required under EIG paragraph 55.8.

147. However, the Defendant went on to submit that this unlawfulness only gave rise to an entitlement to nominal damages, because, if the decision had been taken lawfully, he would have been detained in any event. The Claimant did not accept this proposition, and therefore I was asked to determine all the issues which remained in dispute between the parties.

148. The Claimant submitted that the period of detention pending initial screening (32 days) was unreasonably long, resulting in a breach of:

a) the requirement in EIG paragraph 55.1.3 which states that detention must be used for the shortest period necessary;

b) *Hardial Singh* principles;

c) Article 5 ECHR.

149. The power to detain is subject to the limitations set out in *R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB), [1984] 1 WLR 704, where Woolf J said:

> "7. Although the power which is given to the Secretary of State in paragraph 2 [of Schedule 3 to the 1971 Act] to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other

> purpose. Secondly, as the power is given in order to enable to machinery of deportation to be carried out, I regard the power of detention as being implicitly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention ….
>
> 8. In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time …"

150. In *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2011] 2 WLR 671, Lord Dyson said, at [22] and [24]:

> "22. It is common ground that my statement in R (I) v Secretary of State for the Home Department [2003] INLR 196, para 46 correctly encapsulates the principles as follows: i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; ii) the deportee may 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 deportation within that reasonable period, he should not seek to exercise the power of detention; iv) the Secretary of State should act with the reasonable diligence and expedition to effect removal.
>
> 24. As to the second principle, in my view this too is properly derived from Hardial Singh. Woolf J. said that (i) the power of detention is limited to a period reasonably necessary for the purpose (as I would say) of facilitating deportation; (ii) what is reasonable depends on the circumstances of the particular case; and (iii) the power to detain ceases when it is apparent that deportation will not be possible "within a reasonable period". It is clear at least from (iii) that Woolf J. was not saying that a person can be detained indefinitely provided that the Secretary of State is doing all she reasonably can to effect the deportation."

151. In this case, the Claimant submitted that the purpose of detention was to enable the screening interview to be conducted in an administratively convenient manner, avoiding the need for an officer to visit the police station. The period of detention for this purpose was excessive. He relied upon the oral evidence of Mr Flaherty and Ms Noons, and Form IS.91R "*Notice to Detainee Reasons for Detention and Bail Rights*", which stated:

> "It has been decided that you should remain in detention because
>
> (b) There is insufficient reliable information to decide on whether to grant you temporary admission or release."

The other boxes in this section of the form were not ticked, meaning that they did not apply in this case.

152. The EIG at paragraph 55.6.3 states:

> "Form IS91R Reasons for Detention
>
> This form is in three parts and must be served on every detained person, including each child, at the time of their initial detention. The IO/person acting on behalf of the Secretary of State must complete all three sections of the form. The IO/person acting on behalf of the Secretary of State must specify the power under which a person has been detained, the reasons for detention and the basis on which the decision to detain was made. In addition there must be a properly evidenced and fully justified explanation of the reasoning behind the decision to detain placed on file in all detention cases. This should complement the IS 91R form, though it is separate from it. The detainee must also be informed of his bail rights and the IO/person acting on behalf of the Secretary of State must sign, both at the bottom of the form and overleaf, to confirm the notice has been explained to the detainee (using an interpreter where necessary) and that he has been informed of his bail rights.
>
> It should be noted that the reasons for detention given could be subject to judicial review. It is therefore important to ensure they are always **justified and correctly stated**. A copy of the form must be retained on the caseworking file. If any of the reasons for detention given on the form IS91R change, it will be necessary to prepare and serve a new version of the form.
>
> It is important that the detainee understands the contents of the IS91R. If he does not understand English, officers should ensure that the form's contents are interpreted. Failure to do so could lead to successful challenge under the Human Rights Act (Article 5(2) of the ECHR refers).
>
> The six possible reasons for detention are set out on form IS91R and are listed below. The IO/ person acting on behalf of the Secretary of State must tick all the reasons that apply to the particular case:
>
> • You are likely to abscond if given temporary admission or release

• There is insufficient reliable information to decide on whether to grant you temporary admission or release

• Your removal from the United Kingdom is imminent

• You need to be detained whilst alternative arrangements are made for your care

• Your release is not considered conducive to the public good

• I am satisfied that your application may be decided quickly using the fast track asylum procedures

….

Fourteen factors are listed, which will form the basis of the reasons for the decision to detain. The IO/person acting on behalf of the Secretary of State must tick all those that apply to the particular case:

• You do not have enough close ties (e.g. family or friends) to make it likely that you will stay in one place

• You have previously failed to comply with conditions of your stay, temporary admission or release

• You have previously absconded or escaped

• On initial consideration, it appears that your application may be one which can be decided quickly

• You have used or attempted to use deception in a way that leads us to consider that you may continue to deceive

• You have failed to give satisfactory or reliable answers to an Immigration Officer's enquiries

• You have not produced satisfactory evidence of your identity, nationality or lawful basis to be in the United Kingdom

• You have previously failed, or refused to leave the United Kingdom when required to do so

• You are a young person without the care of a parent or guardian

• Your health gives serious cause for concern on grounds of your own wellbeing and/or public health or safety

• You are excluded from the United Kingdom at the personal direction of the Secretary of State

> • You are detained for reasons of national security, the reasons are/will be set out in another letter
>
> • Your previous unacceptable character, conduct or associations
>
> • I consider this reasonably necessary in order to take your fingerprints because you have failed to provide them voluntarily."

153. In the Claimant's case, the factors which formed the basis of the decision to detain were as follows:

> "1. You do not have enough close ties (eg family or friends) to make it likely that you will stay in one place."
>
> "5. You have used or attempted to use deception in a way that leads us to consider you may continue to deceive."
>
> "7. You have not produced satisfactory evidence of your identity, nationality or lawful basis to be in the UK."

154. The Claimant also relied on Form IS.93E, a 24 hour detention review apparently prepared by an officer at Oakington IRC on 12 February, which stated that detention was to be maintained pending outcome of the Screening process.

155. In my judgment, in considering the legality of this period of detention, the court should consider all the reasons which led to the decision to detain at the time. Form IS.91R and the guidance in EIG paragraph 55.6.3 provide immigration officers with a useful structured decision-making tool, but it is unduly artificial and formulaic to determine the legality of the detention on the basis of the way in which the form was completed.

156. The Defendant had a statutory power to detain the Claimant pending examination and to decide whether leave to enter the UK should be granted, or refused, in which case removal directions would be given: Immigration Act 1971, Schedule 2; National Immigration and Asylum Act 2002, s.62(2).

157. The local immigration officers were notified by the police that the Claimant had been arrested for the offence of illegally entering the UK, having entered the UK by lorry, and that he was seeking asylum. In the light of this information, they were under a duty to set in train the process for deciding whether leave to enter the UK should be granted or refused, and whether he should be removed. In my view, the Claimant was being detained for the purpose of obtaining sufficient information to complete this process. The screening interview was a step in this process; it was not an end in itself. The reasons why he was detained, as opposed to being granted temporary admission, were because he did not have sufficient family or other ties to make it likely that he would remain in one place, and he had "wilfully evaded immigration controls to gain entry into the UK, and little reliance could be placed upon [him] adhering to any conditions of temporary release" (Form IS.92E dated 12.2.10).

158. The evidence of Ms Alison Griffett, a manager in UKBA, referred to a study of 173 asylum cases nationwide showing that the average gap between referral and screening was 6 days. At Oakington, under the lorry drop process, the target was to arrange all asylum interviews within 7 days of referral, and it was frequently achieved within 2 to 3 days.

159. It seems likely that if the Claimant had gone to Oakington as originally planned, he would have had his initial screening interview within 7 days. However, he was not accepted at Oakington because he had been assessed as a suicide risk, and was taken to Colnbrook instead. However, his file had been sent to Oakington and was not transferred to Colnbrook until 11 March 2010. Although interviewing officers are not stationed at Colnbrook, an initial screening interview was set up within 4 days of the file's arrival at Colnbrook, on 15 March 2010. Completion of the screening interview did not result in his release, thus confirming that he was not being detained solely for the purpose of conducting the screening interview.

160. I accept that there was administrative delay in conducting the Claimant's initial screening interview. But in my view his detention was not unlawful, applying *Hardial Singh* principles. The purpose for which he was being detained was to obtain the necessary information to decide whether leave to enter should be granted or refused. The period of detention was reasonably necessary to achieve that purpose, taking into account the particular circumstances of his case, namely, that he was not eligible for the fast track process nor for Oakington. In my view, the Defendant acted with reasonable diligence and expedition. I do not consider that the delay in transferring the file, and the failure to meet the benchmark for conducting a screening interview, were sufficiently serious failings so as to justify a finding that detention was unlawful on *Hardial Singh* grounds. For the same reasons, the length of detention did not breach Article 5, as it did not "exceed that reasonably required for the purpose pursued" (*Saadi*, at [74]) nor did it breach paragraph EIG 55.1.3.

Conclusion

161. For the reasons set out above, the Claimant's detention was unlawful, and therefore he was falsely imprisoned for a period of 44 days.

162. The Claimant's detention was also in breach of Article 5 ECHR and the Human Rights Act 1998.