Neutral Citation Number: [2015] EWHC 54 (Admin)

Case No: CO/3695/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL
(Handed down at Preston Law Courts
Openshaw Place, Ringway,
Preston, PR1 2LL)

Date: Friday 22nd January 2016

Before :

THE HONOURABLE MR JUSTICE KERR

Between :

GRZEGORZ MACHNIKOWSKI — **Claimant**

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Defendant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Martin Westgate QC and Catherine Meredith (instructed by **Leigh Day**) for the **Claimant**
Holly Stout (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 15 December 2015

Judgment
As Approved by the Court

Mr Justice Kerr:

1. I heard this judicial review application on 15 December 2015. It was made by permission of Blake J, who gave leave limited to the issues (a) whether the detention of the claimant had lasted too long and so become unlawful and (b) whether the defendant unlawfully failed to provide him with accommodation under section 4(1)(c) of the Immigration and Asylum Act 1999 ("the 1999 Act"). The claimant is a Polish national now aged 31, born in June 1984. He arrived in this country aged 22, in May 2007.

2. When Blake J gave permission in those terms, there was considerable urgency as the claimant was then still in custody. By the time the hearing before me took place he had (on 2 December 2015) been released and required to provide an address, which he has done. However, his present circumstances are difficult as his accommodation is short term and inconvenient to him and to the provider who has kindly provided a roof over his head.

3. Under European and domestic law relating to free movement and freedom to work, the claimant required five years' continuous residence in this country to acquire a permanent right of residence. He had various jobs but did not acquire such a right because custodial sentences do not count towards the period and indeed (it is common ground) the five year period starts afresh on each release from custody for a criminal offence.

4. Unfortunately, the claimant committed and was sentenced for 13 offences including common assault, having a bladed article in a public place, breaching a community order, theft, disorderly behaviour, making off without payment, using a vehicle uninsured, failing to surrender to custody, breach of a conditional discharge and affray.

5. The latter offence was the most serious. The sentencing judge said the claimant lost control and armed himself with a piece of wood in order to alarm and terrify those with whom he came into contact. For that offence he was sentenced to 12 months' imprisonment at Ipswich Crown Court on 20 September 2012, having earlier pleaded guilty at the first opportunity. He had served 155 days on remand in custody and was therefore soon eligible for release.

6. But he then had the misfortune to move seamlessly into immigration detention rather than being set at liberty. That was because the defendant decided in October 2012 to make a deportation order and to place the claimant in immigration detention pending deportation. His representations against that proposed course were unsuccessful and the deportation order was signed on 11 December 2012, when a bail application was rejected. He then languished in detention until last month when, as I have said, he was released.

7. The usual detention reviews have punctuated his time in immigration detention, taking place at approximately lunar monthly intervals. A recurrent feature of those reviews has been a perceived substantial risk of absconding and of re-offending, in view of his bad criminal record including an offence of failure to answer bail and breaches of court orders, as well as a concern that his offending has included violence.

He was assessed in October 2012 as posing a medium risk of serious harm to the public.

8. At the end of December 2012, removal directions were set since, although the claimant had appealed against his deportation order, the appeal was out of time. However, on 3 January 2013 the First-tier Tribunal ("FTT") granted him permission to appeal out of time. This meant the claimant was no longer regarded as "appeal rights exhausted"; as a result, the deportation order was regarded as invalid and was revoked on 8 January 2013.

9. Delay then ensued before the appeal was heard, first because the claimant changed solicitors and then because the new solicitors needed time to prepare. The appeal was not heard until 31 May 2013 and the decision, adverse to the claimant, was given on 12 June 2013.

10. He then successfully obtained permission to appeal to the Upper Tribunal, which was granted by Judge Parkes, a judge of the FTT, on 5 July 2013. The judge regarded as arguable the proposition that, because the claimant had lived in this country for more than five years, he was entitled to avoid deportation unless there were serious grounds of public policy or public security justifying deportation.

11. Unfortunately, it took over a year for the claimant's appeal to the Upper Tribunal to take place and judgment was then reserved for some five months. It is unnecessary to say much about this period of the claimant's detention because he has already, in a previous judicial review application, been refused leave to argue that his detention during it was unlawful. However, some points do deserve mention.

12. The first is that in the summer of 2013, the claimant refused to eat and drink at regular mealtimes, though he was observed eating and drinking at other times. The second is that in August 2013 it emerged that two inconsistent policy documents of the defendant relevant to the claimant's contested deportation, remained on the Home Office's website. This was an error.

13. An outdated policy document, which should have been removed but had not been, would if applied to the claimant have given him an expectation of not being deported, because his prison sentence for affray was for under two years. The more recent policy document, which was current and had been applied to the claimant, pointed to deportation of EEA nationals sentenced to 12 months or more for offences of violence among other offences.

14. Then in the latter part of 2013, the claimant was involved in two alleged misconduct issues and, in consequence of the second, transferred to a different location. Meanwhile, the Upper Tribunal had adjourned his appeal to await the decision of the Court of Justice of the European Union in *Onuekwere v. SSHD* (Case C-378/12), in which judgment was subsequently given on 16 January 2014.

15. That decision was expected to determine whether periods in prison count towards acquisition of permanent residence rights for EEA nationals. The decision had been expected in November 2013. When it was given in January 2014, it became clear that the claimant's time in prison for criminal offences prevented the five year period from

running and restarted the "clock" on release. The decision does not in terms apply also to immigration detention.

16. By the time the claimant's appeal to the Upper Tribunal finally took place on 21 July 2014 the claimant's then solicitors had (in May 2014) obtained a psychiatric report about him, which supported the view that there was a medium risk of re-offending if he were released, although the risk of serious harm to others was said to be low.

17. After the appeal had taken place but before judgment, the claimant applied on 8 October 2014 for permission to bring judicial review proceedings challenging the lawfulness of his detention on *Hardial Singh* grounds. That application for permission was refused by His Honour Judge Behrens, sitting as a judge of the High Court on 5 December 2014. The judge, refusing leave, commented:

> … there is a significant risk of re-offending and of absconding. The appeal process in relation to the lawfulness of the deportation order has not been exhausted. I agree that in those circumstances the reasonable period for detention set out in Hardial Singh and later authorities has not arguably been exceeded and will at least cover the point when the UT delivers it judgment. I express no view about future detention.

18. I interrupt the narrative to record that the parties addressed me on the impact of that order refusing leave. Ms Stout submitted that, while the formal doctrine of *res judicata* does not apply to judicial review proceedings, in practice a further challenge to the legality of detention up to the date of the Upper Tribunal's decision is barred because to bring one would be an abuse of process.

19. Ms Stout referred me to the Court of Appeal's endorsement of that proposition by Professor Wade in the then current edition of his *Administrative Law* (5th edition, 1982) at page 246, by the Divisional Court in *R v. Secretary of State for the Environment ex parte London Borough of Hackney* [1983] 1 WLR 524 at 539 (May LJ giving the judgment of the court). In the same case, the Court of Appeal upheld that view: see [1984] 1 WLR 592 per Dunn LJ at 602A-B.

20. Mr Westgate QC, for the claimant, did not strongly argue that I should find the detention unlawful as from a date prior to the Upper Tribunal's decision on his appeal. But he reminded me that this does not make the period of detention down to that date irrelevant; on the contrary it is part of the history relevant to whether the detention became unlawful subsequently. He therefore took me in some detail to the events up to December 2014 as well as thereafter.

21. On this point, I agree with both parties' observations. Ms Stout is right that it would be an abuse of process to revisit the conclusion of Judge Behrens that the detention up to December 2014 was lawful. But Mr Westgate is right that this does not mean events prior to December 2014 are irrelevant. They contribute to the overall history and, in particular, to the duration of the detention overall which I have to consider. The question is whether the detention has become unlawful since 12 December 2014, in the light of events both before and after that date.

22. In 2015, the defendant's agents tried to keep track of the twists and turns of the legal process, but were not always up to speed with the latest developments. After the Upper Tribunal's decision was issued on 12 December 2014, the defendant (to whom I refer in *Carltona* terms, to embrace her agents) thought the claimant had reached the end of the road and had become "appeal rights exhausted". The claimant's appeal had wholly failed and further appeals are rare because of the stiff test a prospective appellant must meet. The way appeared clear for his removal to Poland.

23. However, he had, on 22 December 2014, applied for permission to appeal. The defendant did not know about this at the time. When in January 2015 the claimant applied for accommodation under section 4 of the 1999 Act, the defendant refused on the ground that she lacked power to grant his wish, since to refuse it would not breach his rights under either the European Convention or the EU Treaties. On 9 February 2015 the defendant signed a fresh deportation order which was served on the claimant the next day.

24. She then got wind of the application for permission to appeal, as early as 11 February 2015 according to a case record sheet entry of that date. An attempt was made to make enquiries to follow this up. However, it came to nothing; the following month on 16 March 2015, the Upper Tribunal (according to a further case note entry) wrongly told the defendant that the application for permission to appeal was no longer live and "the case was closed". The defendant concluded that there is "no barrier" and that further removal directions could be set. A few days later they were set for 30 April 2015.

25. Undaunted, the claimant refused to sign them when they were served on him on 30 March 2015 and reapplied for accommodation under section 4 of the 1999 Act the same day. The next day, case record sheet entries indicate that a firm of solicitors had sent a fax notifying the defendant that the "appeal is still pending"; yet, a different firm appeared to be the claimant's representative at the time. The defendant therefore responded declining to acknowledge the existence of a possible appeal and kept the removal directions in place.

26. On 10 April 2015 the defendant was formally notified of the pending permission application, which was before the Upper Tribunal. The claimant's solicitors requested cancellation of the removal directions. On 14 April 2015 the Upper Tribunal (Judge Storey) granted permission to appeal on the point that the Home Office website had at material times had two inconsistent policies, erroneously and simultaneously. The issue for the Court of Appeal would be whether that gave the claimant some form of right or expectation that the old policy and not the new one, would be applied in his case.

27. The same day, the defendant in a detention review decided to make enquiries to ascertain the timescale for the appeal in order to consider the claimant's possible release and any accommodation that might be available to him if released. The defendant then cancelled the removal directions set for a fortnight later. In the last week of April the claimant again applied for accommodation under section 4 of the 1999 Act. This was his third such application.

28. While that request was awaiting an answer, a detention review record of 8 May 2015 noted that a date for the appeal was awaited. The reviewer continued:

> The issues around self harm appear to have been resolved, but the case owner must monitor this closely.
>
> He is considered to pose a high risk of re-offending and medium risk of harm to the public, his absconder risk is also high given his lack of compliance with restrictions previously.

29. The decision was to keep him in detention for a further 28 days "while the appeal is heard". On 15 May, according to a case record sheet, the claimant was "involved with another detainee, inciting others not to be locked behind their doors… ." On 28 May his solicitors pressed for a response to his application for accommodation to which he could be released.

30. A further review took place on 4 and 5 June 2015. The reviewer noted that no date for the appeal was set and recommended that the position regarding bail accommodation should be checked and an attempt made to "see whether the appeal can be expedited and a hearing date set". The claimant's continuing risk of harm was noted but, it was said, that had to be balanced against the lengthening detention period.

31. The reviewer recommended that if no date had been set for the appeal by the time of the next review, and accommodation were available, he should be released with an electronic tag and strict reporting restrictions. Meanwhile, he should be kept in detention.

32. That recommendation was rejected by the authorising officer who on 5 June 2015 saw:

> … little prospect of success in this latest appeal. He has an alternative remedy which is to comply with removal and seek to have the deportation order revoked from abroad. I am clear that he is driving the length of detention by pursuing, seemingly, without merit appeals.

33. So the claimant's continued detention was authorised for 28 further days. The defendant would "do everything we can to expedite that appeal so we can move to removal". But the "risk of harm and absconding outweigh the presumption to liberty [sic]".

34. By 3 July 2015, the next detention review date, a date for the hearing of the appeal was no closer. On 23 June the claimant had renewed his application for permission to appeal to the Court of Appeal on all grounds, not just the ground permitted by the Upper Tribunal. The authorising officer set out the convoluted procedural history at some length and repeated the concerns about the claimant's poor criminal history, risk to the public if released and risk of absconding.

35. He or she also noted that he claimed to have a partner and sister in the United Kingdom, but these were not willing to stand as surety and did not attend a bail

hearing that had taken place. Violent incidents in detention had also been a problem. The tone had hardened. The recommendation was accepted.

36. However, the next review on 31 July 2015 struck a different note. The reviewing officer still considered that the presumption of liberty was outweighed by the factors already mentioned (criminal history, risk to the public, risk of reconviction, past lack of cooperation and altercations while in detention) and recommended a further 28 days' detention.

37. But the authorising officer took the claimant's part and concluded that his "removal was not achievable within a realistic timeframe and we should consider release". A further 28 days' detention was approved only "on the basis that a release referral is submitted".

38. On 5 August 2015 the claimant made the present application. The next day his solicitors wrote a letter before claim challenging the defendant's failure to provide accommodation or respond to his request for it. On 18 August the defendant applied to the Court of Appeal to have the appeal expedited. The next day Lewis J heard an application for interim relief in this case, but it was withdrawn on Lewis J granting permission to amend the claim.

39. The amendment added an allegation of unlawful withholding of accommodation in the exercise of the defendant's power under section 4 of the 1999 Act. Thus, the claimant was asserting that he was entitled to be released and that the defendant must facilitate his release by providing accommodation. The defendant, on the other hand, denied that she had power to provide accommodation but, as from 19 August 2015, was prepared to release the claimant subject to a condition of residence, tagging and reporting.

40. The bar to release was no longer the appeal but the issue of accommodation. The defendant was not yet prepared to release the claimant without accommodation. On 3 September 2015, she formally refused the request for accommodation under section 4 of the 1999 Act.

41. On 25 September 2015, with this case moving towards the permission stage, a further 14 days' detention was authorised. On 29 September the defendant granted the claimant bail but subject to a condition of residence at an address to be supplied by him. The grant of bail therefore did not lead to release from detention. The next day his solicitors wrote saying he could stay with a friend but only for a week or so following which he would become destitute.

42. The solicitors renewed yet again the request for accommodation. On 9 October 2015, according to a case record sheet, the claimant was "trying to get the address and he will let us know as soon as he can arrange something". Thus, the claimant was starting to turn his thoughts to finding accommodation in this country, rather than pinning all his hopes on the defendant providing it, as he had done hitherto.

43. At the end of October, further progress was made in the litigious matters. On 22 October Blake J granted limited permission in the judicial review claim now before me. In the Court of Appeal, five days later, Tomlinson LJ ordered the appeal to be expedited and heard before Christmas 2015.

44. On 4 November 2015 the defendant indicated willingness to consider bail accommodation under section 4 of the 1999 Act. The defendant wrote to the claimant asking for evidence from him about access to money in Poland and why he could not use that money to obtain accommodation, even if that meant visiting Poland. In the same letter reference was made to money earned while in detention and the question was asked what efforts he had made to provide himself with accommodation.

45. On 11 November 2015 the parties were informed that the appeal would be heard in the Court of Appeal on 9 or 10 December. Then on 20 November, the claimant's solicitors wrote responding to the letter asking for evidence of attempts to find accommodation. Several witness statements were attached. The attempts to find accommodation had been undertaken after 4 November rather than before.

46. The claimant, in his witness statement, despaired of finding accommodation with only £2,000 and with a requirement for electronic tagging. He denied having access to money in Poland and expressed his strong lack of enthusiasm for returning there.

47. The position was then considered on 1 December 2015 by Mr James Holton of the defendant. He was unaware that the Court of Appeal was to hear the claimant's appeal eight or nine days later. He sought and obtained authorisation for the claimant's immediate release without an accommodation address or a tagging requirement.

48. Mr Holton did not, for his part, believe that tagging was necessary, though the relevant policy document did not rule it out in the claimant's case. He reasoned that if the claimant were released with a requirement to provide an address within 48 hours, and reporting restrictions, he would, it could be hoped, obtain accommodation using the £2,000 he had earned in detention.

49. The claimant was released, on those conditions, the next day. He provided a temporary address in Dover the next day. A requirement to live there was then added to his release restrictions.

50. The Court of Appeal heard his appeal on 10 December 2015 and orally gave judgment that day dismissing his appeal. The court held that the claimant had no legitimate expectation that the earlier policy (which, it will be recalled, had erroneously remained on the Home Office website) would be applied to him.

51. Those, then, are the facts in outline. The following matters are not in dispute between the parties:

    (1) that the onus is on the defendant to justify the decision to detain the claimant, and not vice versa;

    (2) that the legality or otherwise of the detention turns on application of the *Hardial Singh* principles;

    (3) that the first principle – that the defendant must intend to deport the claimant and can only use the power to detain for that purpose – is not in issue; the battleground is the application of the second, third and fourth principles;

(4) that the court is the judge of whether reasonable grounds for detention existed at any particular time and "examines the decision on the basis of the evidence known to the Secretary of State when she made the decision" (*Fardous v. Secretary of State for the Home Department* [2015] EWCA Civ 931 per Lord Thomas CJ at paragraph 42);

(5) that while the risk of absconding is of "paramount importance" (*ibid.* paragraphs 44 and 45), and is distinct from the risk of re-offending, there must come a time where the risk of absconding cannot justify continued detention (*ibid.* paragraph 46);

(6) that section 4 of the 1999 Act empowers the defendant to provide or arrange the provision of facilities for accommodating persons such as the claimant who are released on bail from immigration detention, but the power is removed in the case of EEA nationals unless and "to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of … a person's Convention rights, or … a person's rights under the EU Treaties" (see Schedule 3 to the Nationality Immigration and Asylum Act 2002, paragrapghs 1(1)(l), 5 and 3);

(7) That in accordance with the decision of the Court of Justice in *Onuekwere*, the claimant cannot count periods spent in prison for criminal offences towards the continuous five year period of residence required to aquire a right of permanent residence in this country; that he cannot aggregate discontinuous periods while at liberty punctuated by periods spent in prison; and that there is no clear authority on whether immigration detention (lawful or otherwise) is to be treated in the same way as imprisonment for a criminal offence.

52. Those are the main points of common ground. The parties also agree that there is no "trump card" for the purpose of determining whether the claimant's detention became unlawful at some point and that each case turns on its own specific facts.

53. I come now to the issues that divide the parties, their respective contentions and my reasoning and conclusions.

54. At first, I was concerned about a possible conundrum: that to determine whether the detention became unlawful, the court might have to determine whether the defendant had power under section 4 of the 1999 Act to provide accommodation; while to determine the latter point, it could be necessary to determine whether the detention had become unlawful.

55. I have therefore reflected on which issues should be addressed first and have formed the view that the correct starting point is to ascertain what the claimant's rights under EU law and under the European Convention were on the footing that the detention was, at least initially, lawful.

56. I therefore propose to consider the issues in the following way: (1) what were the claimant's EU law and Convention rights on that assumption; (2) whether provision of accommodation under section 4 was necessary to avoid a breach of them; and (3) whether the detention of the claimant became unlawful, and if so from when.

57. On the first of those issues, I was referred to Directive 2004/38/EC ("the directive") and the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"), made under section 2(2) of the European Communities Act 1972 and section 109 of the Nationality, Immigration and Asylum Act 2002.

58. The parties agreed that the right to move freely and reside in the territory of an EU member state conferred by the directive may be ended by removal from the United Kingdom if the defendant "has decided that the person's removal is justified on grounds of public policy, public security or public health…" (regulation 19(3) of the EEA Regulations). Such a decision must be taken in accordance with regulation 21 of the EEA Regulations.

59. Regulation 21(5) enacts safeguards for the person liable to removal: the decision must comply with the principle of proportionality, must be based exclusively upon the personal conduct of the person concerned which must represent a genuine and sufficiently serious threat and must not be founded on "matters isolated from the particulars of the case" or "considerations of general prevention"; nor on criminal convictions alone.

60. Regulation 21(6) obliges the defendant to take account of:

> considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin.

61. Nor is there any dispute that a person subject to removal under regulation 21 may be detained pending removal (see regulation 24, applying provisions of the Immigration Act 1971 to such a person). Alternatively, he may be released subject to restrictions as to residence, not taking up employment, and reporting to police or immigration officials.

62. The claimant submitted that the requirement of proportionality in a case such as this is separate and distinct from the protection afforded by the *Hardial Singh* principles, since detention deprives a person of rights he would otherwise enjoy under EU law to reside and work in the country, as well as the right to clock up time towards the five year period required for permanent residence; and that proportionality requires the consideration of measures (i.e. reporting restrictions and the like) less draconian than outright detention as a means of protecting the public.

63. The defendant submitted that the claimant's rights under the directive and EEA Regulations are no greater than his right to secure compliance with the *Hardial Singh* principles, since the latter are (as is well established) compatible with article 5 of the European Convention and are themselves an embodiment of the principle of proportionality (see e.g. *R (Nouazli) v. Secretary of State for the Home Department* [2014] 1 WLR 3313, per Moore-Bick LJ at paragraph 16).

64. Ms Stout maintained that, while in the present case the defendant could not remove the claimant to Poland until his appeal had been determined (see regulation 29(3) and (6) of the EEA Regulations; the interim power under regulation 24AA to do so not

having entered into force in time for this case), the claimant nonetheless had no right to reside in this country worth the name under the directive, pending determination of his appeal, because the directive itself permitted removal from a member state's territory while an appeal is pending (see article 31(4)).

65. Similarly Ms Stout submitted that the claimant may also, if released, be subjected to restrictions such as a prohibition on employment under provisions in Schedule 3 to the Immigration Act 1971, in a manner that is compatible with the directive (see article 27(2)), which itself confers no right to reside or work pending an appeal against deportation.

66. In response to the argument that the EU law principle of proportionality required consideration of measures less intrusive than detention, the defendant countered that detention is by its nature the measure best suited to deter re-offending and absconding and that the *Hardial Singh* principles provide a framework for balancing the efficacy of that deterrent against the desirability of release if achievable by less restrictive measures such as reporting restrictions, and the like.

67. I think the defendant's submissions are, in general, to be preferred. Ms Stout has demonstrated that they are not incompatible with the legislative scheme, domestic and international, nor with decided cases. They also appear to me more closely attuned to the reality of the situation. The context here is that the defendant is seeking to deport the claimant to Poland because he is a criminal and is dangerous. The claimant wishes to stay in this country and, until recently, his right to do so was awaiting determination in the Court of Appeal.

68. The power of detention was being used to secure the claimant's removal from this country, as the first *Hardial Singh* principle requires and as the claimant does not dispute. It would be odd if the claimant's putative right to remain in this country (premised on his appeal succeeding, though as it turned out it has failed) should carry greater weight during the interregnum while the appeal is pending, than the putative countervailing public interest in his deportation, premised on his appeal failing, as it has done.

69. It seems to me, after reflection, that the claimant's arguments founded on prejudice to his EU law right to reside in this country, and on proportionality, ultimately do no more than restate his basic argument that his detention has gone on too long and that he should have been released sooner than he was. Any rights to reside, move freely and work in this country must depend on whether he may properly be deported from this country. The Court of Appeal has recently decided that he can be.

70. Before that decision was made, the question whether his detention had become unlawful must be determined applying the ordinary domestic *Hardial Singh* principles to which the requirement of proportionality adds nothing of substance here.

71. The next question is whether provision of accommodation under section 4 of the 1999 Act to the claimant by the defendant was necessary to avoid a breach of the claimant's rights under EU law or the Convention.

72. The claimant, through Mr Westgate, submitted that there would be a breach of his right under article 27 of the directive if such accommodation were not provided,

because failure to provide it would keep him in detention, preventing him from exercising his putative right to live and work in this country by means of a decision that violated the principle of proportionality.

73. Secondly, Mr Westgate contended that measures less intrusive than detention could sufficiently protect the public and accordingly there was a breach of the ancillary duty under article 5 of the Convention articulated by the Supreme Court in *R (Kaiyam) v. Secretary of State for Justice* [2015] AC 1344.

74. The defendant, through Ms Stout, submitted that the Supreme Court's decision in *Kaiyam* is irrelevant because the ancillary duty contained within article 5 of the Convention arises in a case where a person is in preventive detention for the purpose of rehabilitation; the content of the duty being to take reasonable steps to provide the means of rehabilitation. That has nothing to do with a case such as this, of detention for the purposes of deportation.

75. Ms Stout went on to submit that there is no freestanding Convention right (either under article 3 or 8) to accommodation in this country for the purpose of pursuing legal claims to have a right to remain here: see *R (Kimani) v. London Borough of Lambeth* [2004] 1 WLR 272, per Lord Phillips MR at paragraph 49.

76. The simple factual answer to the claimant's contention, she submitted, is that the claimant could have obtained his release much sooner than he did by returning to Poland and, once ensconced there, pursuing his fight against deportation and seeking to return here. Mr Westgate countered that *Kimani* was not a case of immigration detention and is not in point.

77. For my part, I do not rule out the possibility that there could be cases where unlawful prolongation of immigration detention could, even in the case of an EEA national with a right to return to his or her country of origin, only be avoided by provision of accommodation, under section 4 of the 1999 Act or otherwise. The difficulty for the claimant is that I am quite satisfied this is not such a case.

78. The claimant does not say that the Secretary of State misdirected herself on the issue of whether she had power under section 4 of the 1999 Act to provide accommodation. There is no public law challenge to the legality of the detention founded on an alleged misdirection of law. The claimant asserts a *duty* to provide accommodation and a declaration that the defendant acted unlawfully by failing to provide it. The simple factual answer is that, on the evidence before the court, the claimant could have accommodated himself.

79. He did not assert that he would be destitute and homeless if he should return to Poland. He said he did not want to go there. I therefore dismiss, on the facts here, the notion of a duty to provide an address under section 4 of the 1999 Act. Even if, contrary to the defendant's case, there existed a power to provide one, it would have to be shown that a reasonable Secretary of State could not but exercise the power. That is far from the case here.

80. The third and final issue I have to determine is whether the claimant's detention lasted too long and became unlawful at some point, and if so when. For reasons already

given, it would have to be as from a date not earlier than 12 December 2014 when the Upper Tribunal issued its decision on the claimant's appeal.

81. There was a disagreement about the significance of the claimant's unwillingness to return to Poland and pursue his claims and rights in this country while living there pending their determination. Surprising though it may seem, the claimant plainly preferred the four walls of a British immigration detention centre to the open skies of Poland.

82. He says that work is difficult to find in Poland but not that he would become homeless and destitute if he went back to live there. His solicitors' position was that he was entitled to be accommodated here at the expense of the defendant rather than pursue his claims from a base in Poland or (subject to domestic law of the territory) elsewhere outside the United Kingdom.

83. The difference between the parties mainly centred on interpreting what Lord Dyson JSC said in *R (Lumba) v. Secretary of State for the Home Department* [2012] 1 AC 245 at paragraphs 122 to 128, and in particular at paragraphs 127-8. The issue is whether refusal of voluntary return is relevant only to the risk of absconding or, more broadly, to the reasonableness of the duration of detention.

84. I do not propose to review in detail the authorities considered by Lord Dyson JSC in *Lumba*. In none of them was the case of an EEA national refusing to leave one member state to go to another, before appeals had been exhausted, under consideration.

85. In paragraph 127, Lord Dyson said that it is reasonable to remain in the United Kingdom while legal proceedings here continue unless they are an abuse. He said that was so if "return would be possible, but the detained person is not willing to go". He did not expressly limit his remarks to cases in which return would be perilous or pursuit of claims difficult or impossible. Nevertheless, his concluding words in paragraph 127 were these:

> In accepting voluntary return, the individual forfeits all legal rights to remain in the United Kingdom. He should not be penalised for seeking to vindicate his ECHR or Refugee Convention rights and be faced with the choice of abandoning those rights or facing a longer detention than he would face if he had not been offered voluntary return.

86. That reasoning suggests that he might have taken a different view in a case such as this where voluntary return would not entail loss of the right to pursue outstanding legal claims in this country. EEA states usually make a better litigation base than non-EEA states, for litigating in this country. Indeed the scheme of the directive and the EEA Regulations requires the ability to pursue claims here from another EEA state. It is now commonplace for parties to attend and give evidence by video link from one state to another.

87. It seems to me that Lord Dyson's observations, though unqualified on their face, were not intended to govern the position here, where the right of appeal is relatively easily exercisable from abroad. In such a case, the remarks of Toulson LJ (as he then was) in *R (A v. Secretary of State for the Home Department* [2007] EWCA Civ 804, at paragraph 54, still resonate and are not denuded of authority:

> …there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss of liberty involved in the individual's continued detention is a product of his own making.

88. I conclude that the claimant's unwillingness to return to Poland is relevant to the reasonableness of the period of detention and not just to the risk of absconding. It is a factor, here, of some weight given the proximity of Poland and its benign environment. However, it is not a trump card in the defendant's favour.

89. That leaves the question of the legality of the claimant's detention applying other aspects of orthodox *Hardial Singh* principles. I turn finally to consider that question.

90. The claimant points out, rightly, that this detention lasted for a long time. Mr Westgate submits that it was clear in early 2015 there was no reasonable prospect of the claimant's imminent removal, and that the defendant did not take reasonable steps to expedite the matter. It did not help that the defendant's information about the forthcoming appeal was tardy and inaccurate.

91. The defendant submits that the period of detention was not over-lengthy, if one avoids the error of hindsight. In particular, the claimant's failure to notify the defendant properly of his application for permission to appeal to the Court of Appeal caused removal directions to be set, quite reasonably, for 20 April 2015. This, says Ms Stout, belies the notion of drift and inertia.

92. If the claimant did not like custody, said Ms Stout, his remedy was simply to pursue his rights from Poland. If he did not favour that course he had the wherewithal (including £2,000 and friends in this country) to obtain accommodation in this country, to which he could have been released earlier. Instead, he chose to accept custody while demanding lodgings at the defendant's expense.

93. As to the risk of absconding, this was considered relatively high and, the defendant submitted, fairly so in view of the evidence of past non-cooperation (including with the process of documentation for the acceptance of the Polish authorities), unwillingness to go to Poland, prior offences involving non-cooperation with the judicial system; altercations and poor conduct in custody and the lack of strong social and strong personal ties in this country, albeit he has friends here.

94. The claimant says the risk of absconding is overplayed and that this is shown by the recent decision to release him into the wilds of Kent with neither tag nor accommodation. However, the latter point is met by Mr Holton's evidence that, in his mind, the passing of time had ratcheted up the urgency of release to the point where it must occur even without those safeguards.

95. Mr Holton is plainly right, as the claimant himself has argued, that the longer detention continues, the more urgent early release becomes. The claimant must, in my view, accept the logic that increased urgency necessarily brings with it increased willingness to accept risk.

96. The same argument applies to the risk of re-offending. The defendant submits that the claimant's time in detention gave little comfort that the risk of further violent offences, assessed on sentence in 2012, had materially diminished. The claimant, rightly, points out that he has also at times been found to have "good custodial behaviour", has undertaken courses while in custody and done work requiring a high degree of trust in him.

97. In my judgment, the defendant cannot be faulted for harbouring continued concern about the risk of re-offending; nor for showing increased toleration of that risk by releasing the claimant. The latter cannot fairly hold against the defendant the decision to fulfil the claimant's wish for release.

98. I agree with the claimant that it was less than fair of the reviewing officer on 5 June 2015 to describe the claimant's then forthcoming appeal as "without merit". It is unusual for the Upper Tribunal to permit a second appeal to the Court of Appeal, and the merits of that appeal then had yet to be determined.

99. Nonetheless, despite that error, I am unpersuaded that the period of detention in 2015 was characterised by the sense of inertia, incompetence and drift asserted by the claimant. There were the usual periodic reviews. The reviewing officers and authorising officers examined and assessed the factors that were properly relevant and did not lose sight of the need for progress towards release, nor of the increasing urgency of release once the April 2015 removal directions had, of necessity, been cancelled.

100. It would have been better if the defendant's information about the forthcoming appeal had been more timely and more accurate, but it was in part the claimant's responsibility to contribute to providing that information, which he and his separate immigration representatives did not always do; instead, concentrating his fire on obtaining a mandatory accommodation address, which actually contributed to delay in his release.

101. In the end, it was the defendant and not the claimant who broke the impasse, when the urgency became such that release was judged essential even at the risk of absconding and further offending which were, rightly, still perceived as present. By doing so, in my judgment the defendant complied with, rather than breached, the second and third *Hardial Singh* principles.

102. Nor is the claimant assisted by the existence of an internal debate, and disagreements, among the defendant's officials. Far from evidencing unlawfulness, that process shows a healthy concern to air and discuss the issues and flush out the right and lawful conclusion in the course of resolving any internal disagreements about the timing of release, the conditions thereof and the balance of risk against the presumption of liberty.

103. One senses the increasing urgency of release in the documents evidencing that internal debate within the defendant, not just after the present claim was issued but in the period leading up to issue. In short, the defendant correctly judged when the time had come for release and did not, in my judgment, act unlawfully in failing to release the claimant earlier.

104. It follows that the claimant was not, in my judgment, unlawfully detained. Nor was the failure to provide him with accommodation under section 4 of the 1999 Act unlawful. The claim must therefore be dismissed.

105. The parties are invited to agree a form of draft order, in the usual way, and submit it to my clerk for my approval.

106. I conclude by expressing my thanks to both counsel for their erudite and cogent submissions, both written and oral.

107.