Case No: 2YL74948

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building,
RCJ,
Strand,
LONDON
WC2A 2LL

Date: 23 October 2015

Before :

HHJ HAND QC

and

MS CATHARINE SEDDON, SITTING AS AN ASSESSOR

- -

Between :

ST CLAIR TOUSSAINT **Claimant**

- and -

THE HOME OFFICE **Defendant**

- -
- -

Mr Nick Armstrong (instructed by Deighton Pierce Glynn) for the Claimant
Mr Gwion Lewis (instructed by The Government Legal Service) for the Defendant

Hearing dates: 6th, 7th, 8th and 16th July 20

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ HAND QC

HHJ HAND QC:

Introduction

1. This is a claim alleging false imprisonment, disability discrimination by failure to make reasonable adjustments contrary to the provisions of the **Equality Act 2010** ("**EA**") and breaches of the **European Convention on Human Rights** ("**ECHR**") brought by the Claimant in respect of his detention by the Defendant for a total of 66 days, occurring over two periods, 28 February 2012 to 7 March, 2012 and 21 March 2012 to 16 May 2012, at Harmondsworth Immigration Removal Centre ("Harmondsworth"). The Claimant has been represented by Mr Armstrong of counsel and the Defendant by Mr Lewis of counsel.

2. The Defendant accepts that by failing to provide the Claimant with a self-propelling wheelchair and a specially adapted drinking cup for some periods of time during the 66 days of detention it was failing to make reasonable adjustments, which she had a duty to make pursuant to section 29(7) of the **EA** and that the Claimant is accordingly entitled to recover compensation. The Defendant also accepts that the second period of detention was unlawful because no medical assessment of the Claimant's fitness to be detained was made in respect of the second period of detention as required by rule 34 of the **Detention Centre Rules 2001**. It denies, however, any liability to pay anything other than nominal damages on the basis that had such an assessment be made it was inevitable the Claimant would have been detained. The parties agreed that I should decide issues of liability and that, if necessary, questions of quantum of damage and issues as to costs should be the subject of, and decided at, a separate hearing.

The Assessor

3. The case was heard by myself and Ms Catharine Seddon, sitting as an assessor appointed pursuant to section 114(7) of the **EA**, on 6, 7, 8 and 16 July 2015; evidence was completed in the first three days with the fourth day devoted to closing submissions. Both parties had produced skeleton arguments before the start of the case and both produced written closing submissions as well as making extensive oral closing submissions as to the evidence and the law.

4. At paragraph 34 of his judgment in **Ahmed v The Governing Body of the University of Oxford** [2002] EWCA Civ 1907, [2003] 1 ICR 7 Waller LJ gave the view of the Court of Appeal as to the function of assessors appointed pursuant to section 67(4) of the **Race Relations Act 1976**; their function was, he said, "*assisting in the evaluation of the evidence*". Whilst the reference to **Ahmed** in the recent Court of Appeal judgment in **Cary v The Commissioner of Police for the Metropolis** [2014] EWCA Civ 987, [2015] ICR 71] must be taken as an indication that the function of an assessor in a case of race discrimination can no longer be regarded as being any different to that of any other assessor appointed pursuant to **CPR Part 35.15**, I do not regard the validity of the description of the function of an assessor in the context of discrimination, as stated by Waller LJ, to have been undermined by the later decision of the Court in **Cary**. In fact, not surprisingly, because it is a case about the procedure for the appointment of assessors pursuant to section 114(7) of the **EA** and not about their functions, **Cary** does not deal with what an assessor is to do.

5. Also I recognise that there is a spectrum of different species of discrimination covered by the **EA**, both in terms of "*prohibited acts*" and "*protected characteristics*" not all of which are common to, or interchangeable between, other species of discrimination. Nevertheless, it

seems to me that, at least in the context of disability discrimination, the function of the assessor in "*assisting in the evaluation of the evidence*", as identified by Waller LJ, remains an important part of the role of an assessor appointed pursuant to the **EA** and is an important preliminary step towards that assessor assisting the judge by providing advice based on his or her experience and knowledge of the particular type of alleged discrimination with which the court is concerned. Although, in what follows, I have referred to the Court as "we" this does not imply that where there have been factual conflicts, which needed to be resolved, or factual findings, which needed to be made, there has been a joint decision. Happily we have agreed in our view of the evidence, most of which was not controversial, in any event, but where findings of fact have been made, those have been my decisions alone.

6. Ms Seddon and I met on 17 July 2015 with a view to her assisting me in evaluating the evidence. This proved a considerable task because, in order to complete the evidential part of the hearing within the trial listing of three days, the evidence had been presented to the Court by the parties with commendable despatch. This meant there had been little opportunity to give much of it the full and careful consideration it deserved during the course of the hearing. Therefore we found ourselves wishing to take more time than would usually be the case to consider it more fully. Inevitably this made it impossible to complete an evaluation of the evidence on 17 July 2015 and a second full day on 6 August 2015 was devoted to it and to receiving the assessor's advice.

The factual background and my findings of fact

7. The Claimant was born Christopher Valentine Orie in Trinidad and Tobago on 29 December 1968. When he was 34 and still in good health he came to the United Kingdom as a visitor in May 2004 and in December 2004 he was granted leave to remain as a student until November 2005. He did not leave then but overstayed and he was removed from the United Kingdom back to Trinidad and Tobago on 4 July 2006. Later that year he changed his name to St Clair Toussaint and in that name he applied for another Visa to visit the United Kingdom. As a result of his name change there was no trace of him having been in the United Kingdom unlawfully and having been deported a few months earlier. Consequently a Visa was granted to him and he returned to the United Kingdom in January 2007.

8. After he had been back in the United Kingdom for just over a year his health started to deteriorate. He was in fact suffering from a very rare medical condition known as POEMS syndrome, which, although it comprises a group of conditions, is essentially a very severe blood disorder. He was admitted to hospital in May 2009, underwent a toe amputation in March 2010 and was treated by chemotherapy. His admission had been under the name of Christopher Orie and not St Clair Toussaint and it was by his former name that he was known whilst he was in hospital and up until his first period of detention in late February and early March 2012.

9. He had a stem cell transplant in July 2010 and underwent rehabilitation and physiotherapy at The National Hospital for Neurology and Neurosciences in Queen Square, London until November 2010 when he was discharged. At that stage it was clear that he would require a great deal of assistance both with personal care and day-to-day living. By then he was unable to move out of doors without assistance. He was readmitted shortly afterwards to University College London Hospital ("UCLH") and then moved to St George's Hospital as a result of thrombosis. Subsequently he returned to UCLH.

10. Whilst he was undergoing treatment UCLH contacted the United Kingdom Border Agency ("UKBA"), which was under the control and direction of the Defendant, in order to know whether he might be removed from the United Kingdom, something of considerable importance in formulating a discharge plan. On 24 February 2011 there was a case conference (see page 2-67 of the hearing bundle) involving the Claimant, his friend Ms Beverley Shillingford, who has been a witness in these proceedings, Mr Gerard Hall, his then solicitor, a Ms Diane Kimpton, who was one of HM Inspectors at the Defendant, and various clinicians at UCLH, including Dr Nigel Hewitt, the Clinical Lead of the UCLH Homelessness Team. At that point the Claimant's state of health was that of a permanent neurological deficit with the hope that physiotherapy might improve his muscle strength. He was described as "*largely self caring*" and able to "*walk with the aid of splints and walking aids*" although a wheelchair was "*needed for distances*". The Defendant acknowledged that it had:

> **"… a duty of care and if removal from the UK is appropriate this can only be done if it can be established that appropriate medical and social care will be available to Mr Orie, and appropriate medical supervision for the journey would be provided."**

(see page 2-67 of the hearing bundle). Also the Defendant thought that, having regard to the need for a ministerial decision to be taken and for arrangements to be made in the event of a decision to remove, a final decision on removal might lie several months ahead. The next stage would be to interview the Claimant.

11. As part of the process of UCLH keeping the Defendant informed, on 11 April 2011 Professor Kwee Yong, who, together with a multi-disciplinary team, had been caring for the Claimant, wrote a letter to Ms Kimpton (see pages 2-68 and 2-69 of the hearing bundle), confirming that the Claimant was "*in a haematological remission*" and that "*no further treatment is indicated*". He had a "*residual neurological deficit from his POEMS syndrome which is unlikely to recover*" but he was then undergoing physiotherapy and gradually becoming more mobile, getting about "*mainly in a wheelchair*" but "*able to mobilize with a frame*". Professor Yong opined that "*he is now fit to return to his home in Trinidad, where he will clearly need support from the social point of view, but does not require on-going medical care*".

12. The Claimant was interviewed, accompanied by Mr Hall, on 5 May 2011 by Ms Robin Brandon of the Defendant. He gave his name as Christopher Valentine Orie and the interview was conducted on that basis (see pages 2-72 and 2-73). His position was that the medical facilities in Trinidad and Tobago would be unable to look after him properly[1] and Mr Hall indicated that "*a further representation application*" would be made "*in the light of the subject's condition*". On 23 May 2011, when it appears the Claimant's discharge from hospital was imminent, Mr Hall wrote a long letter to Ms Brandon (see pages 4-53 to 4-57 of the hearing bundle). It asked the Defendant to consider "*granting … leave to remain in the UK having regard to the exceptional, compelling and compassionate circumstances which exist in relation to him*". It also recorded (see page 4-55) the then current difficulties with accommodation after discharge, noting that:

> "**…to date, no Local Authority is prepared to accommodate him … [and that] … [w]e have been informed that the Health Authority have agreed to finance a placement within a nursing home as comprehensive medical treatment will be required by Mr Orie including physiotherapy on a daily basis … [but] … due to**

[1]Something supported by Dr Michael Lunn of Queen Square in a letter of 1 June 2011 written to Mr Hall (pages 4-57 and 4-58 of the hearing bundle) and by Professor Yong, in a letter she wrote to the Camden Health Improvement Practice on 1 August 2011 (see page 4 -59 of the hearing bundle).

> **difficulties which subsist in relation to Mr Orie's status, the assistance which is currently available is extremely limited**."

Subsequently the Claimant was not accommodated in a nursing home or a care home but in the Premier Inn hotel situated opposite Euston Station, the cost of which was born by the NHS. He seems to have been there by late May or early June 2011. The exact nature of the facilities available to him at the Premier Inn is unclear. At some stage he was in possession of a self-propelling wheelchair; as will be seen in due course he clearly had it when he was arrested. What, if any, other aids he had and precisely what assistance was available to him is also unclear, although he clearly had regular visits from District Nurses who administered daily injections, gave medication and ensured that a gel was applied to his skin. There was no evidence as to whether and, if so, what, arrangements were made for the Claimant's personal laundry, although, even without any specific evidence about it, I think it reasonable to infer that the hotel will have laundered his bed and bathroom linen.

13. In an e-mail dated 9 January 2012 (see page 4-80A of the hearing bundle and see also paragraph 19 below) Ms Fremantle claimed that the Claimant had turned down a residential care placement that would have included physiotherapy. But it is not clear to me whether, before he moved to the hotel, there ever was a certain place in a "*nursing home*" or a realistic proposal was that he be housed in a "*care home*" (where I would infer he would have been far younger than his fellow residents). What is clear, however, is that once discharged the Claimant did not get the physiotherapy he needed. Whether this was because he was not entitled to it under the **NHS (Charges to Overseas Visitors) Regulations 2011** (SI 2011/1556) irrespective as to whether he was in a nursing home, a care home or hotel[2] (although, as Mr Armstrong suggested, ironically it may be that he could have been provided with it under the auspices of the NHS once detained), or because it was available but for reasons unknown was simply not provided is only of significance in that without it his improvement declined and, unhappily, began to reverse. Consequently, his ability to function and his mobility declined. Professor Yong's second letter (see footnote 1 above) predicted that deterioration and in a third letter dated 23 September 2011 she made clear the Claimant's need for extensive medication required management, general medical follow-up, intensive physiotherapy, rehabilitation and social care (see page 4-60 of the hearing bundle). But she also said that "[h]*is clinical needs are of a very general medical nature and do not require specialist haematological input …* [and he] *… needs rehabilitation and intensive physiotherapy and he also required general medical follow-up to review his abnormal liver function which is slowly improving.*"

14. At some time relatively shortly after the interview the Claimant was served with a form IS.151A, dated 5 May 2011, giving him notice that he was liable to be removed from the United Kingdom. Part 2 of the form gave notice of the Immigration Decision that he would be removed from the United Kingdom (see pages 2-74 to 2-75 of the hearing bundle). It seems likely that this form, also dated 5 May 2011, was given to him on 3 June 2011, because it also bears that date.

15. Whether or not the Defendant received the representations contained in the letter from Mr Hall referred to above at paragraph 10 remains controversial. In a letter dated 31 October 2011 (see page 4-61 of the hearing bundle) Ms Brandon talks about "*what was discussed at*

[2] Perhaps the comment in a letter from Dr Orlando Swayne typed on 12 April 2012 (relating to a hospital out-patient visit on 27 February 2012) that "*due to his immigration status he is not entitled to any care along these lines*" (clearly a reference to physiotherapy) provides some support for that proposition (see page 6-69 of the hearing bundle).

the time" but this is not the same as acknowledging receipt of the letter of 23 May 2011. She indicated in her letter of 31 October that she was "*re-sending the forms*" (i.e. forms IS151A and IS151A part 2), and I think it reasonable to infer this was so as to facilitate the making of the "*further representations regarding your client*". But nothing further was sent by Mr Hall at that stage and his letter of 23 May 2011 was not re-sent until 29 February 2012. There is more information relating to this in a note made on 2 March 2012 at page 4-122 of the hearing bundle and I will come back to this topic when I discuss the first detention.

16. Towards the end of the year UCLH appears to have become increasingly concerned about the fact that it was still paying for the Claimant to be accommodated in an hotel (see page 4-62 of the hearing bundle). By this time Ms Carol Edwards, an Immigration Officer located at Angel Square and working in the Detention Casework department of the UKBA, had taken over day-to-day conduct of the Claimant's case. She had no formal training in dealing with disability discrimination matters.

17. By early December she had embarked on the process of preparation for detaining the Claimant and removing him back to Trinidad and Tobago, something which she referred to as "*a medical removal*" (see pages 4-63 to 4-65 of the hearing bundle). Her immediate problem appears to have been to arrange for the necessary travel documents and to that end she visited the High Commission on 15 December 2011. In an e-mail of that date, which she wrote to Dr Hewitt of UCLH, she discussed some of the technical requirements and asked him to furnish her with a list of medication currently being supplied to the Claimant. Her need for that information and its relevance to what was then intended appears clear from parts of paragraphs 4 and 6 of the matters she asked Dr Hewitt to note (see page 4-71 of the hearing bundle):

> "**The reason I ask is because should they be readily available then on receipt of this information I am going to liaise with our Removal Centres Co-ordinator in order to establish whether we could house him pending obtaining a Document and his subsequent removal. For the purpose of this exercise he would be formally detained and placed in ColnBrook Removal Centre (near Heathrow) which is what we call a Special Needs facility for those with medical issues but able and fit to travel with Medical Escorts.**
> **…**
> **At the very least with the information re his Meds I could look to negotiate his acceptance into Colnbrook during the course of next week which will ease the financial burden from the NHS giving UKBA sole responsibility and possibly get Mr O's Solicitors out of hiding.**"

That last remark, whilst by no means conclusive as to whether Mr Hall's letter had been received, at least suggests that Ms Edwards did not know about it because had she known she could scarcely have thought the solicitors were being deliberately inactive, as her wording implies. If the letter had been received then it was for the Defendant to deal with it, make a decision about it and communicate that decision to the Claimant and his solicitor. If Ms Edwards knew it was for the Defendant to take the next step she could scarcely have thought the Claimant's solicitors were in "*hiding*".

18. There was an e-mail discussion between Ms Kimpton/Ms Edwards and Ms Emily Fremantle of UCLH on 23 December, 2011 about whether the "*medical facility at Colnbrook*" would be able to "*cope*" with the Claimant (see page 4-69 of the hearing bundle). The perceived problem was the need for a daily injection of a drug called Dalteparin, which was being administered by a District Nurse whilst the Claimant was still accommodated in

the hotel. Ms Edwards indicated that she would ask Colnbrook about that (see page 4-68 of the hearing bundle). By 6 January 2012 Ms Edwards had been told by the UKBA's Country Information Team that the Claimant's "*medical needs can be fully met on return to T&T*". She was also aware that as a result of recently decided case law the legality of "*Same Day Removal*" might be in doubt and so was possibly "*no longer an option*". At that stage nothing more had been heard from "*UKBA Detention Services*" as to whether or not it would be able "*to house Christopher within the Detention Estate*" (see page 4-67 of the hearing bundle).

19. By then Ms Edwards appears to have formed the view that physiotherapy was "*a long-term programme and not for us to take on whilst in detention*" (see her e-mail to Laura of *UKBA Immigration Group detention requests* dated 6 January 2012 at page 4-81 of the hearing bundle). She was at the same time corresponding with UKBA DEPMU[3]; the e-mail is copied to that e-mail address. We understand DEPMU to be the department of UKBA responsible for sourcing a place in an Immigration Removal Centre and facilitating the removal of the Claimant to it. The reply e-mail was from Mr Mike Langran whose details, set out at the foot of the e-mail (albeit partly redacted), suggest that he was working within DEPMU and it seems likely that "*UKBA Immigration Group detention requests*" was part of DEPMU. It reads:

> **"Can we get advice from his Drs re the physiotherapy, exactly what does he need and how often?**
> **… at a loss to understand that HW may not be able to obtain his medication as it "may take some time". They have had a list of his meds since 1 January and I would have thought this was sufficient time to put in place plans to obtain his meds if so required.**"

So, at this stage the proposed Immigration Removal Centre appears to have changed from Colnbrook to Harmondsworth. This suggests to me that a decision to consider whether Harmondsworth was suitable for the Claimant and could cater for his needs might have been taken even before the New Year. As we understand it, Colnbrook and Harmondsworth, are directly adjacent to each other and located on the same road in Harmondsworth near London Heathrow Airport. Ms Edwards was at a loss to explain the change and it seemed to me probable that she simply did not know the reason as to why the Claimant was accommodated subsequently at Harmondsworth and not at Colnbrook, with its Special Needs facility. It seems likely that the decision was taken by DEPMU and we heard no evidence from anybody in DEPMU, let alone anybody who might have taken that decision.

20. Physiotherapy was still on Ms Edwards' mind on 7 January 2014; in an e-mail of that date timed at 09:37 (see page 4-80 of the hearing bundle) she appears to have had a "*take*" on physiotherapy, namely "*that…* [it] *… is a long-term issue and not for UKBA to necessarily provide whilst in a IRC*". But in a later e-mail timed at 13:28 on the same day (see also page 4-80B of the hearing bundle) she asked UCLH a series of questions by e-mail about wheelchair use and whether there was an "*obligation…* [on]*… UKBA to provide or give… access to Physiotherapy… and how often?*" Ms Emily Fremantle of UCLH in her reply of 9 January 2014 did not answer the question about wheelchair use or medication but passed the question to somebody else at UCLH and history does not relate whether it was ever answered. She did, however, deal with physiotherapy in these terms (see page 4-80A of the hearing bundle):

[3] "DEPMU" is the acronym of the Detainee Escort and Population Management Unit.

> "**In terms of physio, I would ask Dr Hewitt comment. To note, Christopher turned down a residential home placement which would have included physio, my understanding is that he has not been receiving physio over the last 6 months, although this is a recommended part of his rehabilitation.**"

21. Ms Edwards repeated the e-mail from Ms Fremantle more or less verbatim in an e-mail which she sent to "*UKBA Immigration Group detention requests*" on 14 January 2012 (see page 4-80 of the hearing bundle). In that e-mail she also deals with medication, being satisfied that the Claimant had an adequate supply at the time, and she deals with wheelchair use in these terms:

> "**The understanding is that he does have a wheelchair, which he needs to use away from the hotel."**

and then deals with physiotherapy saying:

> "**Regular physiotherapy was advised on discharge from hospital, but unfortunately I believe that he has not actually had any physiotherapy, It is not clear why - possibly there are long waiting lists in Camden. So physiotherapy would be ideal, but would only need to be considered if he was to spend several weeks or months in your care.**"

If Dr Hewitt was asked to comment we have had no direct evidence placed before us as to what he said although it seems to me the above passage is likely to be a quotation by Ms Edwards from some other document, which has either not been placed before us or which we have not noticed amidst the dense thicket of material, which comprises the hearing bundle. But the evidence is that the Defendant clearly knew that the Claimant needed a wheelchair, was taking medication and would benefit from physiotherapy. Although Ms Edwards appears to have regarded that as somewhat optional in the short term, she knew that in the longer term (i.e. "*several weeks*") it was advisable as an "*ideal*". However, the Defendant did not know (because it had not asked and, therefore, had not been told) several important facts; that the Claimant required a self-propelled wheelchair; that he relied upon friends in the hotel where he was staying for assistance with mobility; that his disability included problems with upper limb strength and fine motor control that might prevent him from doing his own laundry, meant that he might need some specially adapted cutlery and that he needed a specially adapted cup for drinking.

22. By 20 January 2012, however, the Defendant knew of the deterioration in the Claimant's "*performance status*", had been informed he was "*clinically stable from a haematological point of view*" and learned he was "*fit to fly back home to the West Indies*" (see the letter of that date from Professor Yong at page 4-77 of the hearing bundle). Ms Carol Edwards repeated the rubric of Prof Yong's letter in an e-mail to "Mike"[4] (see page 4-83 of the hearing bundle), expressed the view that the Claimant was to blame for this deterioration, apparently on the basis that he had not availed himself of physiotherapy and mused as to whether the Claimant's deteriorating physical condition had an impact on the plan to detain.

23. Apparently, so far as the Defendant was concerned, it did not because on 31 January 2012, a Mr Craig Simpson, who was a manager employed by the contractor GEO, to which the Defendant had contracted the provision of staff at Harmondsworth, indicated that Harmondsworth could take the Claimant (see emails of that date timed at 15:54 and 16:15 at

[4] Presumably Mr Langran of DEPMU.

page 4-82 of the hearing bundle). It is not immediately apparent on what basis Mr Simpson agreed that the Claimant could be admitted to Harmondsworth. We heard nothing to suggest that he was medically qualified and I think it a reasonable inference that he was not; nor was any evidence placed before us that he had consulted anybody, who was medically qualified, either at Harmondsworth or elsewhere. It had been said earlier that it was Colnbrook which had the facilities to deal with those with special needs and nothing has been said by way of explanation as to why there had been this change of venue or as to why Harmondsworth might have been in a better position to accommodate the Claimant than Colnbrook. In her evidence Ms Abdel-Hady, who is a Deputy Director in the Returns Directorate of the Defendant, accepted that proper procedure would involve making enquiries of clinical staff about disability issues in advance but we have no evidence as to whether that was ever done and I am not prepared to infer that such enquiries had been made simply because Mr Simpson agreed to accept the Claimant. I accept that following the proper procedures meant enquiries should have been made and I also accept that Harmondsworth had been "*sent a list of his meds since 1 January*" (see the e-mail of 6 January 2012 referred to above at paragraph 19 of this judgment) but in my judgment these primary facts are insufficient to support an inference that all proper enquiries in fact had been made.

24. Over the next two weeks arrangements were made for the Claimant to be detained at Harmondsworth. These arrangements appear to have been put in place by 18 February 2012 when in an e-mail from Ms Edwards to "*Narinesingh*"[5] she indicated that the Claimant would be taken from the hotel to Harmondsworth on 28 February 2012 with a view to him being removed from the United Kingdom on 2 March 2012 (see page 4-84 of the hearing bundle). In that e-mail Ms Edwards repeated something which she had said in earlier correspondence namely that it was outside the hotel that the Claimant needed the use of a wheelchair. This appears to have been an assumption that she made; at the case conference in February 2011 whilst the Claimant was still an in-patient at UCLH Dr Hewitt had said that the Claimant needed a wheelchair for distances (see above at paragraph 10 of this judgment) but I do not regard it as a sound inference that he was referring to the Claimant being outside the hospital as opposed to being inside it and none of the subsequent correspondence from doctors indicated that a wheelchair was only necessary for exterior travel.

25. A Notice of Directions to Remove, giving details of flights on 3 March 2012 (as opposed to 2 March 2012, the date given in the e-mail of 18 February referred above to in the previous paragraph), also bears a date of 18 February 2012 (see page 4-85 of the hearing bundle). The Claimant was probably served on 28 February 2012 with Removal Directions giving the same information (see page 2-98 of the hearing bundle). Having been served with the Removal Directions on 28 February 2012 the Claimant was detained at the Premier Inn. He was presented with the IS.91R form "NOTICE TO DETAINEE REASONS FOR DETENTION AND BAIL RIGHTS", which appears at page 2-89 of the hearing bundle and which was signed by Ms Edwards. It gives the reason for detention as being the imminence of removal from the United Kingdom and ticks the following pro forma factors as those upon which the decision to detain had been taken; insufficient close ties (factor 1), previous failure to comply with conditions (factor 2), failure to produce satisfactory evidence of identity (factor 7), previous failure to leave the United Kingdom when required to do so (factor 8) and serious concerns about health affecting his own well-being and public health or safety (factor 10).

[5] Who I believe to be Mr Lal of the Trinidad and Tobago High Commission.

26. The reasons for his detention were recorded on a Metropolitan Detention Review form on 28 February 2012 (see page 4-113 of the hearing bundle) by Ms Kimpton, who, although most of what might be described as the "legwork" had been done by Ms Edwards, was actually making the decision to detain. Ms Kimpton had a somewhat different focus to that in the IS.91R form. After a brief synopsis of his history and illness she said this:

> "**Consequently, and in a bid to relieve the financial burden from the NHS budget it was determined proportionate and necessary to seek to enforce his departure from the UK. The fact that SUB has been enjoying his recovery at Taxpayers expense in a Hotel could not be justified any longer and as we have the full cooperation of the T&T HC it made perfect sense to effect his departure set for Saturday 3 March 2012 with Medical Escorts. He had no willing Family/Friends in order to make the IS96SCI a feasible option so as a last resort and after lengthy investigations Detention was appropriate and so authorised.**
> **His Solicitors had been absent in their representations since the service of IS forms in May 2011 and our Systems did not record any current casework bars to removal. However, should actions raise correspondence from them then we could easily employ OSCU to consider/conclude any Reps that could be made that could obstruct the UKBA Business of securing the Borders and in this instance protecting the Public Purse.**"

The following day she added to the form in manuscript "*Detn is appropriate for the reasons set out above*".

27. The Claimant's passport could not be found in his hotel room or in the "*fair amount of luggage*"[6], which he had (see page 4-224 of the hearing bundle). The Claimant said in his oral evidence that he did not believe that he had so much luggage; his belongings fitted into the two large bags and a rucksack in which they had been contained when he arrived at the hotel. This seems to me an arid dispute. Whatever the amount of belongings or the number of bags, it was repacked by the Defendant's team which arrested him (see page 4-270 of the hearing bundle) and was taken with him to Communications House. An Incident Report completed as a result of the Claimant's complaint about the subsequent delay in the reception process at Harmondsworth referred to his belongings as comprising 10 plastic bags (see page 2-114 of the hearing bundle). Whether or not 80 kgs or 10 plastic bags amounted to something of an over estimate of his luggage, as he contends, I think it likely that searching the Defendant's hotel room and his belongings will have taken some time; the arrest team will have wanted to find his passport and spent some time looking for it and on either account there was a considerable amount to pack. Even so he was not much delayed because he had arrived at Communications House from the hotel by 12:45pm. He was not at Communications House for very long because he had left for Harmondsworth by 2:00pm. When he left for Harmondsworth I infer that the form setting out his medical notes, which is at pages 2-94 and 2-95 of the hearing bundle, either should have accompanied him or should have been sent on ahead. The form refers to a need for "*rehabilitation and intensive physiotherapy*". This was reiterated in another form, IS.91 RA "Risk Factors", which I infer should have been attached to or enclosed with the medical notes form and, thus, likewise, should also have accompanied him to Harmondsworth or have been sent on ahead so as to be available on his arrival there. The Claimant was under the impression that during his reception at Harmondsworth the notes were not available (see below). The form also refers to a wheelchair, saying "*it would also be safe to say that he would need and has the use of a wheelchair*" (see pages 2-96 and 2-97 of the hearing bundle). But his wheelchair, which was self-propelling and had been provided to him by UCLH, did not accompany him; it was left

[6] Another note gives the weight of the luggage as 80 kg (see page 4 – 270 of the hearing bundle).

at Communications House[7], apparently because the Defendant's officers thought the priority was for it to be returned to the NHS.

28. The Claimant complained at the time, and reiterated his complaints at trial, that he had been kept waiting in the reception area at Harmondsworth for a very long time. In the note of his complaint, which appears at page 2-114 of the hearing bundle, the Claimant is recorded as saying that he had arrived in reception at 17:00 hours. My understanding is that this is common ground. The notes give no explanation as to what happened between 17:00 hours and 20:20 hours when DCO Singh arrived and commenced searching another detainee. By 21:00 hours he had finished this task and was ready to search the Claimant, who it appears from the report was seated in a wheelchair (presumably one supplied by the Defendant at Harmondsworth[8]), but DCO Singh warned him that due to the number of his bags (by then said to be 10 plastic bags) the process might take some time. The Claimant, who is described as having been "*polite and compliant*" throughout, complained that he was very tired and that he needed to have some rest. Taking fingerprints took longer than might have been expected due to the Claimant's problems with his hands but by 21:30 hours DCO Singh was ready to commence a search of the Claimant and his belongings. This took until 23:05 hours. I accept that whether there were 10 plastic bags of belongings or, as the Claimant contends, somewhat less baggage, going through it with the kind of attention to detail, which I imagine is common place in the reception of any person into any kind of detention, will have taken that kind of time. That delay of about an hour and a half does not explain why it took over seven hours for the Claimant to move from the reception area to a room.

29. At some stage on 28 February 2012 a Disability Questionnaire was completed. If the procedure had been properly followed, it should have been completed by "*Reception Healthcare Staff*" (see page 2-115 of the hearing bundle) although there was little evidence that any such personnel were in attendance for any significant period of time during his reception. In the "*Detainee Healthcare Record*" (pages 6-79 to 6-85 of the hearing bundle) in which entries appear to have been made on different dates only the consent form, which was signed in the presence of a nurse, relates to 28 February 2012; the rest seems to have been completed on 29 February 2012 or later. This serialisation of the entries in the medical record may, however have been the responsibility, at least in part, of the Claimant; there is an entry in the *"Physical Care Records"* made at midnight on 28 February 2012 by a Staff Nurse, whose signature is indecipherable, which records that the Claimant was uncooperative with the result that not much history could be obtained and that the matter was handed over to the morning nurses to complete the assessment (see page 6-175 of the hearing bundle). Given the lateness of the hour the Claimant's attitude, as recorded in the note, is perhaps not surprising although in his evidence he denied being rude and said that, given the complexity of his condition, he was only referring to the need for his medical records, which he was given to understand had not reached Harmondsworth by this stage, to be consulted.

30. The Disability Questionnaire noted only a "*Mobility Impairment*" without giving any specific detail. An entry made in the "*Physical Care Records"* at 23:30 hours on 28 February 2012 refers to the Claimant having been admitted to "*HC L3*". I presume this refers to "*Healthcare*" and to Level 3. I infer that this was above ground level and that other parts of the Harmondsworth facility can only be accessed from it either by the use of a staircase or a

[7] It was described as "*Hospital issue*" and retained "*pending instructions from Emily Freemantle*" (see page 4 – 225 of the hearing bundle).

[8] A photograph of the type of wheelchair available at Harmondsworth appears at page 2 – 245 of the hearing bundle; it is obviously not a self-propelling type of wheelchair.

lift. As well as recording some medical observations and indicating that a nurse had been "*informed*" the entry also states that the Claimant had had a cup of tea and been to the toilet. At paragraph 25 of his witness statement the Claimant said that when he asked to go to the toilet he was offered one without a seat and that the alternative disabled toilet was in a very dirty condition, its support bars being smeared with traces of faeces. He maintained in his oral evidence that he did not go to the toilet at all that night and had not been given a drink.

31. This is the first of a number of differences between the Claimant's evidence, and that of his friend Ms Beverley Shillingford, on the one hand, and notes made[9] by staff, on the other. Mr Lewis in cross-examining the Claimant put various notes to him asking for an explanation as to why his evidence differed from the note or as to why the notes did not contain an account consistent with his evidence. I enquired as to whether it was the intention of the Defendant to rely upon the notes as hearsay evidence and, if so, whether appropriate notices had been given to the Claimant of that intention. Mr Lewis accepted that the proper procedure had not been followed and then made it clear he was not applying for this material to be considered by the court as hearsay evidence. In those circumstances it did not seem to me that the Claimant should be required to give any explanation of any difference between his evidence and any note.

32. This does not mean, however, that I must accept the Claimant's evidence and also it does leave the difficult question as to whether the notes can have any forensic significance at all. Obviously, where the Claimant's evidence is consistent with the notes there can be no difficulty about me regarding them as supporting that evidence, (particularly as to clarifying dates; an example of this is the identification of days when the lift was not working). Where his evidence is in flat contradiction of an account given in a note, it seems to me that the right approach must be to accord the note no evidential weight. The most difficult area is where the Claimant or Ms Shillingford makes a clear assertion (e.g. as to self-harm or complaint) and the notes do not record the matter; something to which I will come in due course.

33. In the context of hearsay evidence it is convenient to mention at this point that the Claimant had followed the correct procedure and given the appropriate hearsay notice in relation to evidence given at an inquest into the death of a person detained at Harmondsworth, a Mr Brian Dalrymple. This comprised a witness statement and exhibits from Ms Lucy Cadd (see pages 2-25 to 2-36 of the hearing bundle). She is a solicitor with Hodge Jones and Allen LLP and had acted on behalf of Mr Dalrymple's family at the inquest. The late Mr Dalrymple had died at Colnbrook but most of his time had been spent in detention at Harmondsworth and Ms Cadd's evidence related to the coroner's exploration of the state of affairs at Harmondsworth in June 2011. Poor medical record keeping, lack of communication between staff employed by GEO and staff employed by the Home Office and lack of communication between them and nursing and medical staff were all explored at the inquest. Mr Armstrong for the Claimant submitted that this material corroborated the Claimant's case that in 2012 there was similarly poor record-keeping and inadequate internal communication and also suggested a long standing failure to service and maintain equipment in that it revealed problems with the lift had been common in 2011.

34. On 29 February 2012 the Claimant was seen by Dr Naqvi, who conducted a Rule 34 assessment and, as a result, completed a rule 35 report stating in simple and clear terms that

[9] And not made; conflicts arise in the sense that the notes do not record various matters alleged by the Claimant and Ms Shillingford.

the Claimant was "*unfit for detention*" because "*the resources of Harmondsworth IRC are inadequate to cope with his complex health needs*" (see page 6-95 of the hearing bundle). The following day Ms Valerie Anderson, the interim healthcare manager, completed another form (IS.91RA Part C), saying the same thing with equal clarity, albeit in slightly different words (see page 6-100 of the hearing bundle). Some considerable time in closing submissions was devoted to whether or not this was an accurate medical opinion or had been based on a misunderstanding of the medical evidence and I will need to return to that debate later in this judgment.

35. The original plans for the removal of the Claimant from the United Kingdom envisaged a departure on 3 March 2012 (see page 4-266 of the hearing bundle) but by 1 March 2012 the removal directions had been cancelled due to the discovery that the Claimant had changed his name by deed poll (see the note at pages 4-268 and 4-269 of the hearing bundle made by "S7Miah") and on 2 March 2012 a comprehensive note[10] (see page 4-122 of the hearing bundle) sets out the altered position:

> "**Maintain detention until a release date is provided to the UKBA. The reps have indicated that they will provide this tomorrow or by the latest on Monday.**
> **Action. This is a sensitive case whereby the subject suffers with Poem's syndrome. Whilst it appears that the doctor at UCLH have stated that the subject is "fit to fly" + is in the situation where his health is as good as it is going to get, there is an outstanding further representation on the file dated 1/06/11 (it also encompasses a letter dated 01//08/11 as a reference). It appears as though the same doctors have now superceeded** (sic) **that further representation with their latest progress report. However, that needs to be made clear to the reps + answered using the case law of "N" (medical threshold proportionality) as a reference. There also needs to be a clear indication that the subject can have access to the required medical facilities in his home land (T + T). It appears as though …** [redacted] **… has covered this with her note (using the CO 15 report too) + so that should be referenced.**
> **Therefore, this case needs to be allocated to an experienced caseworker to deal with this as a matter of priority. Once dealt with, then removal can be progressed. It is also the case that the subject needs to be interviewed for an ETD[11] as he has changed his name by deed poll this also needs to be arranged …** [The rest of the note is cut off in the photocopy]."

36. I think it is impossible to say whether the letter of 23 May 2011 had been received in May 2011 but then filed in a way that meant it did not come to the attention of those subsequently dealing with the Claimant's detention so that they laboured under the misapprehension that either he did not wish to make further representations or his solicitors were deliberately saying nothing (see the comment made by Ms Edwards quoted above at paragraph 17 of this judgment) or that it was simply never received until early March 2012 after the solicitors had re-sent it on 29 February 2012. Either way the note makes it clear that by 2 March 2012 the Defendant had realised that there was an outstanding representation and that before the Claimant could be removed from the United Kingdom this outstanding representation had to be dealt with.

37. I infer from the terms of this note and the letter of 8 March 2012 from Mr Mafurier, a Case Worker in the Detention Casework Department of the Defendant that it was the rule 35

[10] It is badly reproduced in the photocopy and the identity of the author is obscured although the writing appears to be the same as that in the note dated 23 March 2012 at page 2-106 of the hearing bundle; unfortunately the signatures at the foot are unrecognisable.

[11] "ETD" is an acronym for "Emergency Travel Document".

report and not the issue of further representations that had prompted the Defendant to release the Claimant from detention; although the note refers to a date (for discharge), what the Claimant needed to supply was an address where he would be located (see the reminder letter written by Mr Mafurier to Hetheringtons Solicitors[12] on 5 March 2012 at page 4-125 of the hearing bundle). Hetheringtons Solicitors supplied an address in two letters dated 6 March 2012 (see pages 4-128 and 4-129 of the hearing bundle) and the Claimant was released on 7 March 2012 to an address of 20 Sweets Way, Barnet. In technical terms this involved his temporary re-admission to the United Kingdom and, as well as a Release Order (see page 4-130), he was served with a Form IS 96 recording the details and conditions of his temporary re-admission (see page 4-131 of the hearing bundle). The following day Mr Mafurier sent him a "*Report of Special Illness*" in the form of a letter (see page 4-133 of the hearing bundle) in which he stated:

> "**You have informed the medical staff at Harmondsworth Immigration Removal Centre that you suffer from POEM syndrome. Following an assessment of your medical conditions, Healthcare notified us that they would be unable to provide the multiple medications, intensive physiotherapy and rehabilitation which you require. As a result of this assessment we contacted your representatives, to provide an acceptable release address and to arrange transportation from the removal centre to your release address. You were released on 07/03/2012.**"

Physiotherapy and rehabilitation are self-explanatory but it is not at all clear to what "*multiple medications*" referred; even if it is accepted that the Claimant did not receive some of his medication on some days these were isolated instances and most of the time that he was detained the Claimant seems to us to have received the same medication that he had received before his detention.

38. Perhaps the most significant development from the Defendant's point of view, however, was the discovery, referred to in the notes of 1 March 2012 and 2 March 2012 (quoted above at paragraph 35 of this judgment), that the Claimant had changed his name from Christopher Valentine Orie to St Clair Toussaint. In his evidence the Claimant treated this in a very matter-of-fact way and implied that it was Mr Hall's fault for using the wrong name but in their oral evidence the Defendant's witnesses, Ms Edwards, Mr Mafurier and Ms Abdel-Hady all made it clear that from the moment of this discovery, which seems to have taken place on 1 March 2012[13], they viewed the Claimant as having been less than straightforward in his dealings with the Defendant. In her note made on 3 March 2012 (see page 4-226 of the hearing bundle) Ms Edwards described this as "*a clear case of gross deception*". In my judgment they were clearly right to take this approach and I have no doubt that it was the Claimant's deliberate choice repeatedly to use the name Christopher Valentine Orie instead of St Clair Toussaint with the intention of covering the tracks of his re-entry to the United Kingdom and of making it more difficult for the Defendant to get to the bottom of his presence here.

39. Whilst detained at Harmondsworth during the period of his first detention the Claimant did not have his self-propelling wheelchair, although he appears from time to time, at least, to have had the use of a wheelchair of the type depicted in the photograph at page 2-245 of the hearing bundle. This is clearly not a self-propelling wheelchair and for conventional use requires the assistance of another person to push it. Mr Lewis suggested an alternative method of propulsion to which I will come directly. During his second detention the

[12] Mr Hall joined this firm some time in 2011 or 2012.

[13] See the note at pages 4-268 and 4-269 of the hearing bundle referred to above at paragraph 35 of this judgment.

Claimant did not have a self-propelling wheelchair until 27 March 2012 (see page 6-138 of the hearing bundle). There is an entry made by a J. Fada[14] on 3 March 2012 in the "*Physical Care Records*" (see pages 2-128 and 2-129 of the hearing bundle), which was relied upon by the Defendant as demonstrating that the Claimant was able to cope with having a shower. The note describes a wheelchair as having been in the room and when asked about this the Claimant, whilst he could not remember the incident, was prepared to accept that there might sometimes have been a wheelchair in his room. It was suggested to him by Mr Lewis that he might have been able to propel himself along with his feet so that, for instance, he could use it to get across his room and into the shower. He did not accept the possibility because he said that his feet[15] were not strong enough to enable him to "walk" the wheelchair across the floor. But he did accept that he could get from his bed to the shower, which he accepted might be a distance of about six feet, by supporting himself against the wall; likewise he supported himself by leaning against the wall whilst in the shower. In his witness statement the Claimant had spoken about having to crawl on all fours. He did not maintain this in his oral evidence and I regard it as having been an exaggeration. The note asserts that the Claimant was able to walk a distance of 6 feet unaided and without supporting himself. The Claimant denied that this was the case.

40. A slightly fuller note appears at pages 6-126 and 6-127 of the hearing bundle. This was written by another Health Care Assistant, Ms Faith Kianè. I presume from her account that she and her colleague were standing outside in the corridor and observing the Claimant through a glass observation panel in the door to his room. She estimated that the wheelchair was some 6 metres away from the shower; this must plainly be an error because the room, including the en-suite shower, was said by Ms Karen Abdel-Hady to have dimensions of about 15 feet by 12 feet. The note goes on to state that the Claimant had "*been able to operate TV without any issue as he had complained that he is desembled*[16] *and could hold cup properly*". In the same note there is a reference to "*a special cup*" having been brought to Harmondsworth by a friend and the following day the same author records that he was using it (see page 6-128 of the hearing bundle). Ms Shillingford said that she had brought "*a special cup*" to the centre but the Claimant said that he had not been given "*a special cup*" and that he had never received any specially adapted drinking cup during the first detention. Although the note does not actually refer to a remote control, unless the television was a very old-fashioned model, I infer that its operation would be through a remote control device but the Claimant denied that he could use a remote control.

41. For the reasons discussed above at paragraphs 28 and 29 of this judgment, these notes must be regarded as having little forensic weight and, in any event, they appear to me to have been written with the very specific purpose of pointing out that the Claimant was not disabled, a proposition entirely at odds with the expert medical evidence in the case. In his report of 18 June 2014 Dr Michael Lunn, who had been treating the Claimant at UCLH and who reported for medico-legal purposes on his condition on behalf of the Claimant, said this at paragraph 4.15 of his report (see page 3-9 of the hearing bundle):

> "**Mr Orie retains many of his neurological disabilities and following his discharge from the National Hospital for Neurology rehabilitation centre he lost many of the gains which had been achieved there. At discharge he was able to stand and walk a few steps, mainly with assistance and observation. Following his discharge he was largely confined to a wheelchair. His hand function has remained severely**

[14] From the other note of this at page 6-126 it seems likely that this is Jane Fada, a Health Care Assistant.
[15] The distal phalanx of his right big toe had been amputated and he had suffered other problems with his right leg and foot (see pages 6-28 and 6-29, 6-33, 6-35, 6-46 of the hearing bundle).
[16] This clearly should be "disabled".

> **impaired with intrinsic muscle weakness and the classical clawing of fingers, which all these patients develop. This means that simple tasks are possible with his hands, but the use of utensils, cups, pens and other hand-held tools is very impaired or almost impossible.**"

and this at paragraphs 6.02 to 6.04 (see pages 3-11 and 3-12 of the hearing bundle):

> "**6.02 Mr Orie's needs do not particularly depend upon his specific setting. He still requires assistance with activities of daily living, including eating drinking, mobility, washing, administration of drugs and ongoing physiotherapy and occupational therapy, whether or not this is in his detention setting.**
>
> **6.03 For adequate provision of care in any setting, we would expect there to be suitable facilities to accommodate someone with severely impaired ability. This would include sleeping arrangements that were accessible from a wheelchair (low-level bedding and necessary devices to transfer from the wheelchair to the bed). The bed is likely to need to be raised and lowered to meet the needs of different heights of chairs. The environment needs to accommodate a wheelchair user, including adequate door-width access, low-level bathroom and shower access and the provision of lifts to transfer the patient from one floor to another. Bathroom facilities need to be low-level and fully wheelchair accessible and/or to have non-slip surfaces and shower seating to provide a safe environment for personal hygiene needs. Furthermore, transferring from a wheelchair to a toilet, and particularly back again, usually requires the provision of adequate bars and handles.**
>
> **6.04 Activities of daily living would need to be provided for. This includes tools to assist with eating and drinking (utensils and special cups or straws). Sometimes it is impossible to administer drugs to oneself and in Mr Orie's case the administration of dalteparin and Testogel requires the interaction of a second party.**"

and this at paragraph 6.09

> "**I note that some comments in the nursing Kardex indicate that the staff were surprised that Mr Orie could get in the shower from the shower room door, and back. There are two accounts of this (which probably relate to the same shower). One indicates that he walked six feet and the other, six metres. Mr Orie is probably capable of walking a few steps at times, with the support of a wall for balance, and the support of the shower wall for balance whilst in the shower. He is, however, at a severe risk of falling, and in the last two years I have only allowed him to walk in my clinic on one occasion. This required substantial physical support from me, and then only for a few steps. This was clearly very difficult even in 2014 and would have been more so in 2012.**"

42. In their Joint Statement dated 15 December 2014 (see page 3-44 of the hearing bundle) Dr Lunn and Dr Dominic Paviour, who reported for medico-legal purposes on behalf of the Defendant, agreed "*the contents and description of the background to the case in Dr Lunn's report 4.01-4.16 …* [and]… [t]*he contents and description of the disability needs of the Claimant as set out in Dr Lunn's report 6.02-6.04*." The Joint Statement only refers to paragraph 6.09 of Dr Lunn's report at paragraph 2.6 in the context of dealing with the adequacy of the assessment of "*the Claimant's (a) disability and (b) medical needs prior to his detention*". There is no suggestion, however, that Dr Paviour disagreed with anything said by Dr Lunn at paragraph 6.09.

43. Therefore, the descriptions given in the two notes are in flat contradiction of the agreed expert medical evidence. Even if I am wrong in according the notes no evidential weight and I should balance and weigh the competing accounts, because of the inconsistency between the notes and the agreed expert medical evidence, I prefer the Claimant's account; this is so even

though, as I shall explain below, I think there has been a good deal of exaggeration in the Claimant's evidence. Before parting from these two notes I think it appropriate to make the following observations. Firstly, it seems to me somewhat ironic that the Health Care Assistants must have felt they were fulfilling their duties by keeping the Claimant under observation for 10 minutes from outside the room instead of entering it and giving him assistance to take a shower. Secondly, the notes clearly assert that there was no shower chair such as might have been expected in the case of somebody with a disability. Thirdly, I understood from the Claimant's evidence that one of his routine medications was the application of a particular cream to his skin in order to prevent it from drying out, something with which he needed assistance and something which was necessary immediately after he had taken a shower. There is no suggestion that either of the Health Care Assistants applied cream on this occasion.

44. I turn now to other complaints made by the Claimant about his detention at Harmondsworth. It is clear that from time to time the lift did not work and as a result the Claimant was unable to have social visits or meet professional advisers because he could not get from the third floor, where Healthcare was located, to the visiting area. This appears to have been the case on 1 March, 6 March and 7 March during his first detention and on 23 March and 18 April during his second detention, according to the various notes and records (see pages 6-124, 6-130, 6-152, 6-227 and 6-228 of the hearing bundle). The Claimant said that the lift was out of action on more occasions than those recorded in the documents before the court and I find that probably was the case.

45. So far as his "*special cup*" is concerned the Claimant's evidence was that throughout both periods of detention he did not have such an aid and, therefore, during the whole of that period he had no hot drink. But various notes and records refer to him having cups of tea and some entries (e.g. 4 March 2012 at page 6-128 and 12 April at page 6-149) specifically refer to "*a special cup*". Ms Beverley Shillingford said at paragraph 16 of her witness statement (see page 2-21 of the hearing bundle) that the Claimant had a special cup at some point during his detentions but that it disappeared and so she brought another, which took some time to reach him. She repeated in her oral evidence that she had brought two cups to Harmondsworth, one during the first period of detention, which disappeared, and one during the second, which we did not understand her to say had disappeared. She had also brought adapted cutlery, which she said had quickly disappeared.

46. In this context I am not prepared to ignore the notes altogether, not least because they bear some sort of relationship to the evidence of Ms Shillingford. Although the evidence on this matter is not very coherent I do not accept the Claimant's evidence that he had no cup and, therefore, no hot drink, throughout both periods of his detention. I do accept, however, that he did not have the use of such a drinking aid for periods during his detention. For the reasons explained above I do not have much confidence in the accuracy of the notes made by the Health Care Assistants. Nevertheless, it seems to me that for some periods the Claimant probably did have "*a special cup*" and that for other periods that aid had disappeared and may not have been replaced for a considerable time. I think he had it for much of the second period of detention and I reach that conclusion because Ms Shillingford did not suggest that she was asked to bring or ever brought a third cup. Whether or not he had such a drinking aid, however, I do not accept that he had no hot drinks throughout both periods of his detention. In my judgment this is an exaggeration on his part. I accept that adapted cutlery was brought by Ms Shillingford for the Claimant during the first period of detention and that

it disappeared fairly quickly. It seems to me not to have been a very significant issue because no we heard no more about it in relation to the second period of detention.

47. The Claimant, in common with other detainees, was required to do his own laundry. He found this very difficult for three reasons. Firstly, without somebody to take him from his room in Healthcare on the third floor of the building to the laundry he was unable to get there by himself unless and until he had a self-propelling wheelchair. Secondly, on those occasions when the lift was out of action he was unable to get the laundry even if a member of staff was prepared to assist him. Thirdly, he had neither the upper limb strength nor the manual dexterity so as to enable him to handle the clothing during the laundry process. Despite the best efforts of his friend Ms Beverley Shillingford to bring in fresh clothing, the consequence was that he did not have available a sufficient supply of clean clothing, something which he found distressing and uncomfortable. This was a problem that faced him during both periods of detention.

48. It is common ground that the Claimant received neither physiotherapy nor rehabilitation during either period of his detention. His evidence also was that he did not receive all of his medication. Firstly, the records of medication are not complete; there appear to be some gaps in the prescription charts. Ms Abdel-Hady acknowledged that the records were "*patchy*". Secondly, it appears that there were two medical records in simultaneous use, something which seems to me an undesirable practice, likely to lead to inaccurate record keeping. Moreover, Mr Armstrong relied upon the state of affairs attested to by Ms Cadd in relation to the Dalrymple inquest as illustrative of poor record-keeping in 2011, something, which he submitted, still persisted in 2012. Although I do not find that what had happened in 2011 was necessarily any sort of reliable guide to the situation in 2012, I have no hesitation in accepting that the recording of medication taken by, or applied, to, the Claimant was by no means a paradigm of medical record keeping and that the accuracy of the records must be questionable. It seems to me, however, that cuts both ways; in other words, an omission does not mean that medication was not given or applied; it may just mean that it was not properly recorded. But there are a few gaps in the record and the notes of the Health Care Assistants referred to above suggest that on at least one occasion more attention was being paid to observation than the application of required medication or treatment. Therefore, I am prepared to find, the medication may not have been given or applied completely at all times but for the most part I have reached the conclusion the Claimant did receive the medication he required.

49. The Claimant says that at one time the shower seat in his shower was cracked and, consequently, was unsuitable for use. He says that at other times there was no shower seat. This latter proposition seems to me to be confirmed by the notes from the Health Care Assistants in relation to 3 March 2012. But I think that this difficulty was confined to the period of his first detention. He also complained about the general lack of hygiene in respect of bathing and toilet facilities. Ms Abdel-Hady explained there was a routine system of cleaning the premises including the toilet facilities and showers, which system included checking whether cleaning work had been done; the system also provided for the making of complaints. Like all such systems I think it possible there might have been lapses from time to time. But there is nothing to suggest that such shortcomings as there might have been in the cleaning system were confined to, or were directed deliberately towards, the Claimant. In reaching that conclusion I bear in mind that good hygiene may be of paramount importance to somebody with a complex medical condition and the Claimant may have found it more distressing than might have been the case in a more robust able bodied person and

that may need to be reflected in any award of compensation, although there is no evidence that the Claimant suffered any ill health as a result. If, as he alleged, the Claimant's food been stolen, although Ms Shillingford suggested that the staff condoned, or were complicit in, such dishonesty, I infer that in an institution like Harmondsworth pilfering was likely to be commonplace and was most unlikely to have been specifically directed towards the Claimant because of his disability. I think that for all detainees it was just an unhappy feature of life at Harmondsworth and although the distress he suffered arose from and was a feature of his detention I do not think that distress should be reflected in any award of compensation under the **EA**.

50. Ms Shillingford told me that when she went to see the Claimant at Harmondsworth a day or two after he was first detained he looked ill and it seemed as though he had started to harm himself by scratching his face. The Claimant himself referred to self-harm in paragraph 41 of his witness statement at page 2-12 of the hearing bundle. Both said that he started to lose a considerable amount of weight. I have no doubt that the Claimant found his detention a very distressing experience and during the second period of detention, in particular, the Healthcare unit seems to have housed some rather disturbed people, which added to his discomfort. The Claimant refers to them at paragraph 39, 40 and 41 of his witness statement as having created an unpleasant, difficult and noisy environment. He complained about the latter on 10 May 2012 (see page 6-171 of the hearing bundle).

51. To my mind there is no compelling documentary evidence of weight loss. The Claimant's weight had gone down to 65 kg in 2010 when he was still very ill (see page 6-20 of the hearing bundle) and by October 2011 he weighed 85.6 kg so he had put on 20 kg (see page 6-77 of the hearing bundle). At the start of his second detention on 21 March 2012 he weighed 78 kg (see page 6-118 of the hearing bundle), which meant he had lost about 8 kg since was weighed the previous October. It seems to me very unlikely that he lost such an amount of weight between 28 February 2012 and 7 March 2012. Moreover, his weight in July 2012 of 80 kg (see also page 6-77 of the hearing bundle) was only 2 kg more than it had been on 21 March 2012. The various notes and reports indicate no appetite problems and frequently refer to him eating well. Although these various notes and reports can carry little evidential weight, the picture presented by the documentary evidence about the Claimant's weight, which I regard as reliable and objective medical evidence, is not consistent with sudden weight loss and on the balance of probability I do not accept the evidence of the Claimant and Ms Beverley Shillingford that he suffered considerable weight loss as a result of either period of detention.

52. Nor do I think it probable that he harmed himself. Ms Shillingford said at paragraph 9 of her witness statement that when she visited during the first detention scratch marks were obvious on his face (see page 2-19 of the hearing bundle) and she repeated this in her oral evidence. But paragraph 41 of the Claimant's witness statement, in which he refers to scratching his face, clearly relates to the second period of detention. He makes no reference to his own self-harm in his diary entries, although he refers to other detainees being noisy and cutting themselves (see the transcript of his diary entries at pages 2-55 and 2-56 of the hearing bundle and see also paragraphs 5 and 6 of his second witness statement at page 2-38 of the hearing bundle). In his oral evidence the Claimant said that he could not recall whether or not he had reported any self-harm. Nothing in the nursing or medical notes records any observation of self-harm. Despite the fact that for most purposes these notes and records can carry little weight, it seems to me very surprising that if self-harm had occurred and was visible it was not noted and the fact that the various records and notes make no mention of

any self-inflicted injury seems to me to weigh against the Claimant's evidence and that of Ms Shillingford.

53. On the other hand, the records do show that the Claimant did make complaints on occasions. He clearly complained about the long time spent in reception on arrival. He complained during his first detention about the cancellation of a domestic visit due to a lift breakdown (see page 6-24 of the hearing bundle). He complained about having been discharged to unsuitable room on 31 March 2012 (see page 6-140 of the hearing bundle). But in respect of alleged self-harm, where no complaint is disclosed by the official record, he explained the absence of any record or note of any of his complaints by the fact that he had complained to visitors from the Independent Monitoring Board and not to employees or agents of the Defendant. Likewise, Ms Shillingford raised matters with the chaplain as opposed to employees or agents of the Defendant. I do not understand this disparity. Pages 6-124 and 6-140 illustrate that the Claimant did not hesitate to voice a complaint in some circumstances and yet he says he did not do so in respect of other circumstances. I regard the evidence of the Claimant and Ms Shillingford as unreliable on the issue of self-harm and I have not been deterred from reaching that conclusion by the fact that their evidence was, in a sense, unchallenged.

54. Likewise, I cannot be confident about the Claimant's evidence that he fell on two occasions. Nothing is reported in the medical records about this. Despite all my reservations about the records and their accuracy it seems to me very odd that the falls were not recorded. Even though this evidence was, in a sense, unchallenged, I cannot find on a balance of probability that any such falls occurred.

55. I do accept, however, that on three occasions, 6 and 7 March 2012 during the first period of detention (see pages 6-129 and 6-130 of the hearing bundle) and on 31 March 2012 during the second period of detention (see page 6-140 of the hearing bundle), he was discharged from the Healthcare unit and offered accommodation in rooms that would obviously be unsuitable for him. On two of those occasions he was offered a top bunk, something which his disability manifestly prevented him from being able to occupy. It seems to me that these episodes demonstrate that some of the staff at Harmondsworth had completely failed to understand or, possibly, as in the case of the Health Care Assistants who made the note relating to the shower on 3 March 2012, simply refused to believe, the Claimant's degree of disability, his consequent needs and the alterations to the ordinary Harmondsworth routine necessary because of his disability. That on 31 March 2012 the discharge was by a doctor, who appears not to have interested himself or herself with details of the accommodation to which he might be transferred, seems to me almost as worrying an aspect of that incident as the fact that the staff who allocated the room appeared completely oblivious to the Claimant's condition or his needs.

56. After his discharge the Claimant made his way to UCLH. It is not clear to me why he did this but if he was seeking to be re-admitted he was to be disappointed and when UCLH would not accept him he then went to Barnet. He only stayed one night at the address in Barnet. The house was not adapted to his needs, his host turned out to be herself suffering from some degree of mental disability and the Claimant developed internal bleeding. He was admitted to Barnet General Hospital ("BGH") as a result of the bleeding. He recovered and on 14 March 2012 BGH wrote to the UKBA indicating that the Claimant was fit to be discharged from hospital (see page 4-134 of the hearing bundle). There is a dispute as to

whether or not he told a manager at BGH that he wished to go back to Trinidad and Tobago. It seems that, under the impression that now the Claimant would go back voluntarily, the Defendant asked him to sign a waiver. By this time Mr Hall, now at Hetheringtons Solicitors Ltd, was corresponding with the Defendant and this is mentioned in his letter of 19 March, 2012 (see page 4-139 of the hearing bundle). In the event the Claimant did not sign any waiver and he hotly disputed in his oral evidence that he had ever said he wished to go back to Trinidad and Tobago. I think it is perfectly possible that the Claimant had become despondent and whether or not what he had said had been misconstrued by the hospital manager, as he maintained in his evidence, it seems to be understandable that up until the point that the Claimant refused to sign any waiver the Defendant was entirely reasonable to think that he might have been going to cooperate in his repatriation to Trinidad and Tobago.

57. As is confirmed by the fax from the Defendant to Hetheringtons of 20 March 2012 (see page 4-140 of the hearing bundle) both the hospital and the Defendant proceeded on the basis that unless the Claimant could provide an address to which he could be discharged, detention would be preferable to him being without accommodation. According to the fax the Claimant's solicitors had said that they would have "no objection to … [the Claimant] ... *being taken to an Immigration Removal Centre, as at least, you said, he would be kept in secure environment*". It is not clear whether the Claimant had been consulted by Hetheringtons about that and, therefore, I do not find that statement represented his own views.

58. The Claimant was detained again on 21 March 2012 by Ms Edwards. Because of the way responsibilities were then divided between different departments of the Defendant, Ms Edwards had not seen the Rule 35 report nor was she aware of any of the difficulties, which the Claimant alleged he had encountered during his first period of detention. Once again she completed the IS.91R form "NOTICE TO DETAINEE REASONS FOR DETENTION AND BAIL RIGHTS". Like the form discussed above at paragraph 25 of this judgment, this later form relies on the imminence of removal from the United Kingdom but it also gives as an additional reason for detention the insufficiency of reliable information to decide whether to grant temporary admission and ticks the following pro forma factors upon which the decision to detain had been taken; insufficient close ties (factor 1), previous failure to comply with conditions (factor 2), the past use of deception leading to apprehension of continuing deception (factor 5, not previously relied upon), failure to give satisfactory reliable answers to enquiries (factor 6, not previously relied upon) failure to produce satisfactory evidence of identity (factor 7), previous failure to leave the United Kingdom when required to do so (factor 8) and serious concerns about health affecting his own well-being and public health or safety (factor 10).

59. Ms Edwards was accompanied by her superior Ms Sally Spencer. The latter made an entry on a review form (IS93E(LC) - "Reasons For Initial Detention"), which provides a useful summary of the various strands of the Defendant's reasoning at this time (see page 4-149 of the hearing bundle):

> "**SUB was an Overstayer and had been without permission to be in the UK since July 2007 according to his claimed entry of January as a Visitor in the same year.**
> **Owing to an unfortunate illness he had been here receiving life saving treatment from the NHS which was now at a successful conclusion in that his only issues now related to rehabilitation and these needs could be met back in Trinidad as per COI information.**
> **Consequently, and in a bid to relieve the financial burden from the NHS Budget it was deemed proportionate and necessary to seek to enforce departure from the UK. The fact that the SUB had been enjoying his recovery at Taxpayers expense**

> **in a Hotel could not be justified any longer and as we have the full cooperation of the T&T HC it made perfect sense to effect his departure set for Saturday 3rd March 2012 with Medical Escorts. He had no willing Family/Friends in order to make the IS96 SCI a feasible option so as a last resort and after lengthy investigations Detention was appropriate and so authorised.**
> **His Solicitors had been absent in their representations since the service of IAS forms in May 2011 and our Systems did not record any current casework bars to removal. However, should our actions raise correspondence from them then we could easily employ OSCU to consider/conclude any Reps that could be made that could obstruct the UKBA Business of securing the Borders and in this instance protecting the Public Purse.**
> ***SUB detained again today for ALL the reasons above and the fact that the T/R address given on a 7/03/2012 was not reliable and in turn he used this failed address as his springboard to get back into the NHS System in a bid to be housed by their Homeless Persons Unit. He is and never will be entitled to such accommodation as long as he remains here illegally. The current bar to Removal were the Reps that were submitted while he was previously in detention and the lack of a valid ETD. A caseworker has now been assigned to consider the Reps and an ETD i/v had been set for 23/03/2012.***
> ***Detention to be maintained pending the outcome of these 2 barriers and also to prevent him becoming a further burden on the NHS or deemed a nuisance.***"

60. The first three paragraphs (not in bold text in the original) appear to be Ms Spencer's interpretation of what had led to the first detention (they bear a strong resemblance to Ms Kimpton's note quoted above at paragraph 26 of this judgment and are presumably taken from the documentary material relating to the first detention), although, perhaps, her analysis also reflects her personal thinking about the existing record as she understood it. So far as the last paragraph (now italicised to maintain the emphasis provided by bold text in the original) is concerned, three things seem to me to be clear. Firstly, she was strongly of the view that the Claimant was not entitled to any accommodation. Secondly, she seemed confident that any representations that might be made on the Claimant's behalf could be overcome as a matter of formality and would not prove to be a significant obstacle to removal. It seems possible that she was not aware of the fact that representations had been made; if so that would be a yet further illustration of the compartmentalised structure and the lack of internal communication. She does not consider, or if she did, mention, the prospect of any appeal and its impact on detention. Thirdly, it was of great importance to her for the Claimant to be interviewed for ETD purposes. In my judgment she was not simply expressing her personal view at this point in her report but echoing the general thinking of the Defendant. Moreover, it seems to me that at the time of detention, and for a couple of days afterwards, the Defendant was still under the impression, despite the fact the Claimant had not signed any waiver, that he was resigned to leaving the United Kingdom (see the notes made on the "*3 day review*" page 4-149 of the hearing bundle).

61. On 4 April 2012 the Claimant's representations in relation to a right to remain in the United Kingdom were rejected (see the letter at pages 4-156 to 4-162 of the hearing bundle). This appears not to have reached the Claimant but, in any event, as the Defendant well knew, he had a right to appeal (the letter included an appeal form). Nevertheless continued detention was authorised by "M. Walker" in these terms (see page 4-151 of the hearing bundle):

> "**Unusually I am authorising detention despite the subject having a right of appeal. This is because the subject has Poem's syndrome; has no fixed abode and his solicitor are aware that they cannot provide accommodation either, should the subject not appeal, then RDs can be set. If the subject does not appeal then release will be granted, pending a release address.**"

The only way to make sense of this note is that the "*not*" in the last sentence is erroneous and that the author intended it to be the positive alternative to the negative postulation in the previous sentence. In other words if he appealed then he would have to be released, always providing suitable accommodation could be found for him. The Claimant did appeal but not until later, presumably because he and his advisers were not aware until later that his representations had been rejected (see belwo).

62. I have already dealt with the circumstances of the second detention above but the following points are worth emphasising. Once again his wheelchair had not accompanied him to Harmondsworth; it did not arrive until 27 March 2012; likewise he did not have his specially adapted drinking cup although that also arrived later. Throughout this second detention there was no Rule 34 assessment although there had been a nursing assessment made (see pages 4-143, 4-145, 6-104 and 6-118 of the hearing bundle). There is also a note, dated 22 March 2012, which records that he had been readmitted because there was no care in the community (see page 6-178 of the hearing bundle). Over 3 weeks later on 16 April 2012 he was seen by a Dr Wozniak from the charity Medical Justice, who opined that he was clearly unfit for detention at Harmondsworth. By this time the Claimant had started to suffer from post rectal bleeding, to which Dr Wozniak specifically referred (see page 2-135 of the hearing bundle). On 21 April 2012 a medical note records that a Rule 35 report would be made the following Monday (see page 6-184 of the hearing bundle) but no such report was ever made.

63. In the meantime the Claimant had been fortunate enough to obtain the services of his current solicitors (then Pierce Glynn[17]). They wrote a letter before claim in respect of a proposed judicial review action on 20 April 2012 (see pages 4 -168 to 4 -174 of the hearing bundle). Their fundamental contention was "*the sole reason for his ongoing detention is the lack of alternative accommodation*" (see page 4 -172 of the hearing bundle). Mr Mafurier sent a fax to Pierce Glynn on 23 April 2012 (see page 4-178 of the hearing bundle) enclosing letters said to have been sent to Hetheringtons informing them of the decision (see pages 4-156 to 4-162 and 4-163). On 26 April 2012 Pierce Glynn sent a fax to Mr Mafurier in reply indicating that an appeal would be "*lodged immediately*" (see page 4-184 of the hearing bundle). He responded by a letter dated 27 April 2012 (see page 4-191 of the hearing bundle). This dealt with the current position and the history leading to it in these terms:

> "**The detention of Mr Toussaint was no longer considered a priority as, due to his application to remain in the UK based on Human Rights and medical grounds, he was no longer imminently removable. Yet, as Mr Toussaint could not be left to sleep rough on the streets due to his medical conditions, we contacted the medical staff at Harmondsworth Immigration Removal Centre who agreed to do whatever they can to look after your client, in the knowledge that if his condition happens to deteriorate then they might have to refer him to specialist care outside of the removal centre.**"

He ended the letter by requiring a release address to be provided before the request for release could be considered. The above passage is the only indication as to what might have passed between the arrest team, DEPMU and the medical staff at Harmondsworth about the re-detention of the Claimant and as to what the latter's view about his return might have been.

64. Pierce Glynn had asserted in the correspondence that the Defendant had an obligation under section 4 of the **Immigration and Asylum Act 1999** ("**IAA**") to provide accommodation for the Claimant and that the relevant local authority would also have an

[17] By the beginning of May 2012 they had become Deighton Pierce Glynn.

obligation to obtain accommodation (see also page 4 -172 of the hearing bundle). After a false start with the London Borough of Camden to whom they wrote on 30 April 2012 (asserting an obligation under section 21 of the **National Assistance Act 1948** ("**NAA**") - see pages 4-175 to 4-177 of the hearing bundle), they turned their attention (see the letter at pages 4-186 to 4-188 of the hearing bundle) to the London Borough of Hillingdon, which confirmed that it was willing to assess the Claimant and on 11 May 2012 accepted the obligation to accommodate him. Consequently, his solicitors provided a release address on 15 May 2012 and on the same day the Defendant granted temporary admission to the United Kingdom (see page 4-208 of the hearing bundle) and he was released on 16 May 2012.

65. His appeal against the refusal of his representations as to permanent right to remain was heard on 29 July 2013 by the First Tier Tribunal and dismissed. On 14 January 2014 the Upper Chamber reversed that decision and allowed his appeal. Whether or not such a prolonged appeal timetable could have been envisaged in March or April 2012 it seems to me clear from Mr Mafurier's letter of 27 April 2012 (see above at paragraph 63 of this judgment) that the Defendant understood that once an appeal was lodged it was likely to be some time before it would be resolved.

The Expert Medical Evidence

66. I have already referred above at paragraphs 38 and 39 of this judgment to some of the expert medical evidence, namely extracts from the report of Dr Lunn, who is the expert instructed on behalf of the Claimant, and to the Joint Statement made by him and Dr Paviour, the expert instructed on behalf of the Defendant. It is necessary, however, to consider paragraphs 2.4 and 2.5 of the Joint Statement because their meaning has proved to be controversial. In order to understand the meaning it is necessary to understand their context and what the points being addressed in the respective paragraphs amounted to.

67. "Point 4" is to be found at page 3-58 of the hearing bundle and reads:

> **"Please could the experts discuss and clarify whether they agree or – disagree as to whether – or to what extent – the Claimant's general medical health could be satisfactorily managed within the detention setting that was available.**
>
> **At page 21 of his report, Dr Paviour confirms "it is my opinion that the Claimant's neurological condition could have been managed satisfactorily within the detention setting if the facilities were well maintained and access to simple mobility aids were available". The following paragraph continues "I am minded that this opinion appears to conflict with the documented opinion of the doctors attending the detention centre … it is possible that these doctors based their opinion on the Claimant's general medical health rather than specifically his level of neurological function.**"

It is that question, posed in the context of Dr Paviour's opinion, which is being answered by paragraph 2.4 in these terms (see pages 3-44 and 3-45 of the hearing bundle):

> "**We discussed point 4 at length. We concluded that to comment on the Claimant's general medical health would mean stepping outside of our area of expertise. In part 2 of Dr Paviour's original report he made it clear that he would only consider commenting on the Neurological aspects of the Claimant's care. We agreed that if the Claimant was medically stable and if he would have had access to medical assessment by a competent practitioner as well as access to appropriate investigation, via primary care, in the event of a change in his well-being, then we felt that he could have been satisfactorily managed within the detention setting. What might occur medically is theoretical, and in the context of post-transplant POEMs syndrome potentially more complex than some other patients with other diseases. Dr Naoni [sic][18] stated on p 3 of the UK Border Agency Detention Centre**

[18] It appears that the joint medical experts had difficulty in deciphering Dr Naqvi's name.

> **Rule 35 form (29.2.12) that "patient has complex needs due to POEMs syndrome causing multiple symptoms and requiring multiple medications….The resources of Harmondsworth are inadequate to cope with this complex needs". Dr Naoni had concerns at the time of admission that Harmondsworth could not manage his problems, medical or neurological. We discussed Dr Paviour's's statement on page 21 of his original report and quoted in the appended questions relating to this opinion apparently conflicting with that of the doctors attending the detention centre. We concluded that in our joint opinion, on the balance of probabilities, the attending doctors, after a brief assessment concluded that the Claimant had a significant but stable level of disability as well as complex needs and potential complex needs rather than being of the opinion that he was acutely medically unwell.**"

68. "Point 5" (also at page 3-58) reads as follows:

> "**Please could the experts discuss and clarify the extent to which the Claimant's medical conditions were satisfactorily managed in detention during each of the periods of detention, dealing with them separately where appropriate. This is dealt with at 6.2 to Dr Paviour's report (pages 22 and 23) and from pages 12 to 15 of Dr Lunn's report.**"

Paragraph 2.5 Joint Statement (also at page 3-45) answers that is in these terms:

> "**We discussed point 5 and were of the opinion that during the first period of detention, the Claimant on the balance of probability was medically managed appropriately in that he had access to medicines and during this time. We agreed there was no provision of physical or other therapies in the context of rehabilitation of his disability and that in any case, during this first short period of detention, he would not have access to this in the community. We agree that aids such as his "… hospital issue wheelchair had been retained at Comms House" (p3 GCID Case Records Exhibit KAH1) and were only returned to him at a later date. During the longer second period of detention, we agreed that *had* the Claimant had access to the adaptations previously made available to him in the community (as stated in the original independent reports and in the records reviewed) and had the detention centre been able to provide the Claimant appropriate adapted sleeping and washing facilities then his condition could have been managed satisfactorily but as it seems this may not have been the case, then the Claimant's neurological disability was on the balance of probabilities not satisfactorily managed detention.**"

Before reaching a conclusion as to the significance of these passages I need to consider counsel's submissions and before coming to those I should set out some of the relevant legal principles, which I believe to be common ground.

Some Legal Principles

69. In respect of the two periods of detention it is common ground that the burden is on the Defendant to show on a balance of probability that the Claimant was lawfully detained and it is also accepted that the lawfulness of the detention must be judged by reference to the principles set out by the Court of Appeal in **R v Governor of Durham Prison ex p Hardial Singh** [1984] 1 WLR 704 (subsequently approved by the Supreme Court in **Lumba v Home Secretary** [2011] UKSC 12); [2011] 2 WLR 671). The principles can be summarised as:

a. the Secretary of State must intend to deport the detainee and can only use the power to detain for that purpose;
b. the detainee may only be detained for a reasonable period;
c. if, during a period when it would otherwise be reasonable to detain, it becomes clear that the detainee cannot be deported within that reasonable period, then detention should not be continued;
d. the Secretary of State must act promptly and diligently to remove the detainee.

70. The Defendant's policy on detention is set out at paragraph 55.1.1 of Chapter 55 of the Enforcement Instruction and Guidance ("EIG")[19] where it is said that "*there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used*" and one of the appropriate uses of detention is said to be "*to effect removal*". This is expanded upon as follows at paragraph 55.14 of Chapter 55 of the EIG:

> "**In cases where a person is being detained because their removal is imminent, the lodging of a suspensive appeal, or other legal proceedings that need to be resolved before removal can proceed, will need to be taken into account in deciding whether continued detention is appropriate. Release from detention will not be automatic in such circumstances: there may be other grounds justifying a person's continued detention, for example a risk of absconding, risk of harm to the public or the person's removal may still legitimately be considered imminent if the appeal or other proceedings are likely to be resolved reasonably quickly. An intimation that such an appeal or proceedings will be brought would not, of itself, call into question the appropriateness of continued detention.**"

and at paragraph 55.1.3 of Chapter 55 of the EIG the following general statement appears:

> "**Detention must be used sparingly, and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process, for example once any rights of appeal have been exhausted if that is likely to be protracted and/or there are no other factors present arguing more strongly in favour of detention. All other things being equal, a person who has an appeal pending or representations outstanding might have relatively more incentive to comply with any restrictions imposed, if released, than one who is imminently removable.**"

71. Finally, at paragraph 55.10 of Chapter 55 of the EIG consideration is given to those unsuitable for detention. Persons within this category "*are normally considered suitable for detention only in very exceptional circumstances*" and the list set out in paragraph 55.10 includes those "*suffering from serious medical conditions …*" and those "*... with serious disabilities which cannot be satisfactorily managed within detention*".

72. Paragraph 55.10 of Chapter 55 of the EIG was considered by the Court of Appeal in **R (Das) v Home Secretary** (2014) EWCA Civil 45; [2014] 1 WLR 3538. The judgment of the Court was given by Beatson LJ; at paragraph 67 he said this:

> "**As to satisfactory management, at the time detention is being considered, the Secretary of State, through her officials, should consider matters such as the medication the person is taking, and whether his or her demonstrated needs at that time are such that they can or cannot be provided in detention. Account should be taken of the facilities available at the centre at which the individual is to be detained, and the expected period of detention before he or she is lawfully removed.**"

73. At paragraph 68, referring to the phrase "*in only very exceptional circumstances*", he described serious medical conditions and disabilities as constituting "*a high hurdle to overcome to justify detention*" and he then turned to the question of clinical needs at paragraph 70 where he said this:

> "**The Secretary of State is not entitled to abdicate her statutory and public law responsibilities to the relevant health authorities or clinicians in the way deprecated by Singh J in the HA (Nigeria) case… . However, where (unlike the present case) the Secretary of State through the UKBA officials has conscientiously made reasonable enquiries as to the physical and mental health of**

[19] Published by the Defendant for the assistance of her officers charged with carrying the enforcement of the laws and rules relating to immigration.

> **the person who is being considered for detention, has obtained such reports of clinicians who had previously treated the person as have been made available, and considered the implications of the policy in paragraph 55.10 for the detention of that person, leaving aside cases in which there has been negligence by the clinicians of the detention centre, she should generally be entitled to rely on the responsible clinician… .**"

There is a further safeguard in such cases because by rules 34 and 35 of the **Detention Centre Rules 2001** a medical assessment must take place within 24 hours of arrival at a detention centre. Nowadays this comprises an examination by a general practitioner appointed to provide medical services to the centre. Where "*health is likely to be injuriously affected by continued detention*" there is an obligation under rule 35 to provide a report to that effect to the Secretary of State. As set out above, this did not happen in the second period of detention and for that reason the Defendant accepts that the second period of detention was unlawful. Mr Lewis argues, however, that had the Claimant been assessed pursuant to rule 34 inevitably no such rule 35 report would have been made and the Defendant could then have detained the Claimant lawfully and would have done so with the result that he has suffered only nominal damage. This has proved to be one of the major issues in this case.

74. Disability is a protected characteristic pursuant to section 4 of the **EA**. It is not disputed that the Claimant is a disabled person. The underlying purpose of the disability discrimination legislation has been explained in these terms by Elias LJ[20] at paragraph 35 of the judgment of the Court of Appeal in **R (MM) v Secretary of State for Work and Pensions** [2013] EWCA Civil 1565, [2014] 2 All ER 289:

> "**The laws regulating disability discrimination are designed to enable the disabled to enter as fully as possible into everyday life. This requires not merely outlawing discrimination against the disabled; it also needs those who make decisions affecting the disabled to take positive steps to remove or ameliorate, so far as is reasonable, the difficulties which place them at a disadvantage compared with the able-bodied. Baroness Hale identified the reason for this is in Archibald v Fife Council [2004] UKHL 32, [2004] 4 All ER 303, [2004] ICR 954. After noting that traditional anti-discrimination law requires treating the relevant characteristic, for example, race or sex as irrelevant, she explained why this approach does not suffice in respect of the disabled:**
>
> > **'[47]… The [Disability Discrimination Act 1995], however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment….**
> > **[57] It is common ground that the 1995 act entails a measure of positive discrimination, in the sense that employers are required to take steps to help disabled people which they are not required to take for others.'**
>
> **And the purpose of this is, as Sedley LJ noted in Roads v Central Trains Ltd [2004] EWCA Civ 154 at [30], (2004) 104, Con LR 62 at [30] 'so far as reasonably practicable, to approximate the access enjoyed by disabled persons to that enjoyed by the rest of the public'.**"

75. In relation to disabled persons there is a duty imposed by section 20 of the **EA** to make "*reasonable adjustments*" and by section 20(2) of the **EA** that duty comprises "*three requirements*" (as defined by section 20(3), (4), and (5)) to avoid substantial disadvantage to

[20] It is also worth noting that he regarded the previous legislation relating to reasonable adjustments not only to have been consolidated by, but to also have been simplified by, the EA- see paragraph 36 of the judgment.

a disabled person by taking reasonable steps to do so. The "*first requirement*" arises "*where a provision, criterion or practice*" applied to the disabled person puts him or her "*at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled*" (see section 20(3); in that event the reasonable steps, which must be taken to avoid the disadvantage, are likely to involve an alteration to the "*provision, criterion or practice*". The "*second requirement*" arises "*where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled*" (see section 20(4)); in that event the reasonable steps, which must be taken to avoid the disadvantage, are likely to involve some alteration to the "*physical feature*". The "*third requirement*" arises where "*but for the provision of an auxiliary aid*" the disabled person would "*be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled*" (see section 20(5)); in that event reasonable steps must be taken to provide the relevant auxiliary aid.

76. Failure to comply amounts to disability discrimination (see section 21 of the **EA**). Disability discrimination is prohibited in relation to those providing services by section 29 of the **EA** and by section 29(6) it is also prohibited in respect of "*the exercise of a public function that is not the provision of a service to the public or a section of the public*" and by section 29(7) a person exercising a public function of that nature is under a duty to make reasonable adjustments[21].

77. Also I should say something about the Public Sector Equality duty ("**PSED**") now contained in section 149 of the **EA** because it is something upon which Mr Armstrong relies, although, as explained below, I think his focus is somewhat narrow. In the context of Part VII of the **Housing Act 1996** (as amended) ("**HA**") paragraph 26 of the judgment of the Court of Appeal (given by Wilson LJ, as he then was) in **Pieretti v Enfield LBC** [2010] EWCA Civ 1104, [2011] HLR 3 makes clear that the **PSED**[22] applies both at the level of drawing up any criteria/policy to be applied and at the level of the application of the criteria/policy in any individual case and in memorable sentences (the first at paragraph 26 and the second at paragraph 28) he explained the purpose of the provision as follows:

> "**The part of it with which we are concerned is designed to secure the bright illumination of a person's disability so that, to the extent that it bears upon his rights under other laws, it attracts a full appraisal. …**
>
> **For disability to play its rightful part in determinations made by public authorities (including those under areas of Pt VII…) there must (so Parliament clearly considered when enacting s 49A(1)) be a culture of greater awareness of the existence and legal consequences of disability, including of the fact that a disabled person may not be adept at proclaiming his disability.**"

Both Wilson LJ in **Pieretti** (see paragraph 34) and, earlier, Dyson LJ in **Baker and others v Secretary of State for Communities and Local Government (Equality and Human Rights Commission Intervening)**[23] [2008] EWCA Civ 141, [2009] PTSR 809 (see paragraph 31) have considered the phrase "**have due regard to … the need to …**", which appears in both statutes. But section 149 of the **EA**, which, despite judicial criticism that this

[21] So the kind of distinction between public services and public functions which was accepted by the parties in the Court of Appeal case of **Gichura v Home Office and another** [2008] EWCA Civil 697, [2008] ICR 1287 is not a consideration in this case.

[22] Then contained in section 49(A)(1) of the **Disability Discrimination Act 1995** (as amended).

[23] The duty under consideration there being the similarly worded duty under section 71 (1)(b) of the **Race Relations Act 1976.**

phraseology is "convoluted" [24], is similarly worded, to my mind makes the position much clearer because sections 149(3) and (4) (read together) say that "*having due regard to the need to advance equality of opportunity*" includes taking steps "*to meet the needs of disabled persons that are different from the needs of persons who are not disabled*" and that includes taking "*steps to take account of disabled persons' disabilities*."

78. Recently the Court of Appeal in **Bracking v Secretary of State for Work and Pensions** [2013] EWCA Civ 1345; [2014] EQLR 60 (cited by Mr Armstrong) helpfully summarised previous judicial decisions as to the **PSED**[25], and the duty has now been considered by the Supreme Court in three conjoined appeals, again about Part VII of the **HA**, **Hotak v Southwark LBC, Kanu v Southwark LBC and Johnson v Solihull MBC** [2015] UKSC 30, [2015] HLR 23. The section of the judgment of Lord Neuberger (PSC) dealing with the **PSED** is at paragraphs 72 to 82 and I have considered the whole of those paragraphs but for present purposes it is only necessary for me to quote part of paragraph 75:

> "**… the duty "must be exercised in substance with rigour and with an open mind" …** [and]... **it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been rigorous consideration of the duty". Provided there has been "a proper and conscientious focus on the statutory criteria … the court cannot interfere… simply because it would have given greater weight to the equality implications of the decision.**"

and the whole of paragraph 78:

> "**In cases such as the present, where the issue is whether an applicant is or would be vulnerable under s.189(1)(c) if homeless, an authority's equality duty can fairly be described as complementary to its duty under the 1996 Act. More specifically, each stage of the decision-making exercise as to whether an applicant with an actual or possible disability or other "relevant protected characteristic" falls within s.189(1)(c), must be made with the equality duty well in mind, and "must be exercised in substance, with rigour, and with an open mind". There is a risk that such words can lead to no more than formulaic and high-minded mantras in judgements and in other documents such as s.202 reviews. It is therefore appropriate to emphasise that the equality duty, in the context of an exercise such as a s. 202 review, does require the reviewing officer to focus sharply on: (i) whether the applicant is under a disability (or has another relevant protected characteristic); (ii) the extent of such disability; (iii) the likely effect of the disability, when taken together with any other features, on the applicant and if and when homeless; and (iv) whether the applicant is as a result "vulnerable".**"

The important question in the instant case might be whether the **PSED** can be regarded as "complementary" to decisions about detaining the Claimant? But for reasons explained below I think I have been asked to address a narrower question of its relevance in the context of the **EA**. I return to this topic in the Discussion and Conclusion section of this judgment below.

79. The Defendant accepted that it owed a duty to the Claimant pursuant to the "*third requirement*" and that by failing to provide a wheelchair during the first period of detention and during the earlier part of the second period of detention it had failed to make a reasonable adjustment. Therefore it was liable to pay a modest amount of damages in respect of that matter. Likewise the failure in respect of the provision of a specially adapted drinking cup would also be a breach of the duty and attract a modest amount of damages.

[24] See paragraph 84 of the judgment of the Divisional Court in **R (on the application of Brown) v Secretary of State for Work and Pensions** [2008] EWHC 3158 (Admin) referred to at paragraph 33 in **Pieretti**.
[25] See paragraphs 24 to 27.

80. The Claimant also argued that the duty to make reasonable adjustments can be regarded as encompassing "*an anticipatory duty*". I will come back to that in the Discussion and Conclusion section when considering the competing submissions, to which I now turn.

The Claimant's Submissions

81. Mr Armstrong submitted that the detention of the Claimant had never been necessary at any stage because throughout he had not presented a risk of absconding or offending; detention is, after all, a last resort (see paragraph 55.1.1 of Chapter 55 of the EIG). If it was a relevant consideration that UCHL/NHS no longer wished to foot the bill for his accommodation then the Defendant could and should have considered the application of section 4 of the **IAA**. When giving evidence Ms Abdel-Hady accepted, having thought about it overnight, that the Defendant had a duty to consider the provision of accommodation pursuant to that Act. It was, submitted Mr Armstrong, a very surprising omission that the provision of accommodation pursuant to that legislation had not been considered and equally surprising that nobody at the Defendant knew about, and therefore nobody considered, the duty of a relevant local authority pursuant to section 21 of the **NAA** to provide accommodation, as ultimately happened in this case. The duty under section 4 would not arise if there were a duty under section 21; therefore, consideration of the former must lead to consideration of the latter. But the Defendant appears not to have considered the former and to have been ignorant of the latter.

82. Instead the Defendant relied upon the terms of the Risk Assessment system established under the **Detention Service Order 2003**. Mr Armstrong submitted this was woefully out of date. It makes no reference to medical conditions or disability. This is hardly surprising because at the time it was drafted public functions were not within the scope of the **Disability Discrimination Act 1995** and were only brought into scope as a result of amendments in 2006. Since then, however, the Defendant has not been able to ignore medical conditions or disability and Mr Armstrong submitted it is no defence to the instant claim that the Risk Assessment system was followed.

83. In Mr Armstrong's submission the detention of the Claimant was unlawful in this case because a disabled person should almost never be detained and the facts of this case did not amount to "*very exceptional circumstances*". The Defendant had not satisfied itself that the conditions at Harmondsworth IRC were satisfactory for the Claimant and at no time was his removal from the United Kingdom sufficiently imminent so as to comply with the second and third of the **Hardial Singh** principles, i.e. detention for only a reasonable period and not continued after it was obvious the removal could not be accomplished within that period.

84. Moreover, the Claimant had been detained for an improper purpose; his lack of accommodation, a component of the first detention and the mainspring of the second detention, was nothing more than an argument that it was in his best interests to be detained because he had no accommodation elsewhere. That is an improper purpose, submitted Mr Armstrong, relying upon paragraph 40 of the judgment of Cranston J in **Queen on the application of AA v Home Secretary** [2010] EWHC 2265 (Admin), a case where detention had been used in the best interests of the detainee to prevent his suicide and the detention had been held to be unlawful. According to Mr Armstrong's submission factor 10 of form IS.91R (see e.g. 4-143 of the hearing bundle), which reads "*Your health gives serious cause for concern on grounds of your own well-being and/or public health or safety*" is really directed at contagious diseases and, in any event, cannot be set against the clear judicial

pronouncement of Cranston J, which renders the first part of factor 10 to be an unlawful consideration.

85. The failure to follow the policy of paragraph 55.10 of Chapter 55 of the EIG was not simply a facet of the failure of the Defendant to follow the **Hardial Singh** principles. Even though the EIG reflects what was said by the Court of Appeal in **Hardial Singh**, it also provides a freestanding and separate basis for the court to conclude that detention was unlawful. The real issue in this context was whether his disability could be satisfactorily managed at Harmondsworth. Here, submitted Mr Armstrong, the Defendant was in difficulty because of the concession that there had been breaches, albeit limited, of the **EA**. Moreover, the agreed medical evidence concluded that the Claimant could not be satisfactorily managed at any stage of his detention; that is how Mr Armstrong interpreted paragraph 2.5 of the Joint Statement (see above at paragraph 65 of this judgment) and he submitted it was not to be understood as confined to the second period detention. Also the "in his best interest point" was no more a defence in this context than in connection with the **Hardial Singh** principles.

86. Nor was the failure to follow the policy liable to be defeated in this case by the argument approved in **R (on the application of OM) v Home Secretary** [2011] EWCA Civ 909 that the outcome would have been the same if the policy been properly considered and applied. Firstly the instant case is one of inadequate consideration and misapplication in approach and not one of a total failure of consideration of the policy, as was the case in **OM**. Secondly, on the evidence it is clear that had the medical staff been approached at Harmondsworth before the first detention and asked whether the Claimant could be satisfactorily managed, inevitably the answer would have been that provided by the rule 35 report i.e. in the negative. Thirdly, had proper enquiries been made in relation to accommodation the Claimant would not have been detained on the second occasion. Fourthly, even if he would have been detained it could not have been lawful to do so by taking into account his best interests and leaving out of account his disability.

87. Turning to the **EA** Mr Armstrong argued that the **PSED** was relevant in two ways. Firstly, failure to comply with it made it evidentially much harder for the Defendant to argue that it had made "*reasonable adjustments*". Secondly, it emphasised the incompleteness of the Defendant's consideration before any decision to detain had been made. I did not understand him to ask me to consider it in the context of the lawfulness of the detention, although, for the sake of completeness and in case I have misunderstood his position, I intend to do so.

88. Turning to more specific matters he submitted that apart from a wheelchair and the specially adapted drinking cup, as to which there was no dispute, the relevant factual considerations were toileting and bathing facilities, the lift, visits, doing the laundry, receipt of medication, falls, an overlong induction and interference with his food. He argued that the duty to make adjustments is an anticipatory duty, something which he supported by reference to paragraph 2(2) of Schedule 2 of the **EA** and to paragraph 7.21 of the **Equality and Human Rights Commission's Statutory Code**, which refers in terms to the need to anticipate, and paragraph 7.80 the same Code, which identifies advanced planning, and conducting audits of premises (both anticipatory in nature) as examples of reasonable adjustments.

89. Stepping back, however, he also submitted that arranging detention, the act of detention itself and the continuation of detention were provisions, criteria or practices. So a reasonable

adjustment might relate to alterations to the structures or systems in relation to Harmondsworth or might be an adjustment requiring the decision to detain to be adjusted to a decision not to detain. This analysis led to a dispute between the parties as to whether or not a judgment of Mr Stephen Morris QC sitting as a deputy judge of the High Court in **The Queen on the application of BE v Home Secretary** [2011] EWHC 690 (Admin) was correct. He found that there had been no failure to make reasonable adjustments in that case; at paragraph 167 of the judgment he said this:

> "**Here, the relevant "practice, policy or procedure" of the Secretary of State is the practice, policy etc of detaining persons pending deportation pursuant to the 1971 Act. I accept that, absent reasonable adjustment to that practice, that practice would make it unreasonably adverse for disabled persons (or perhaps even particular classes of disabled persons) to experience being subject to the detriment of detention to which persons were generally subject under the practice, pursuant to s.21E(1)(b). Thus the Secretary of State was, and is, under a duty, pursuant to s.21E(2), to make reasonable adjustments to change that practice so that it no longer has that effect on disabled persons or a particular class of disabled persons. It follows from *Lunt* and *Roads* (paragraph 45 above) that the words "that effect" in s.21E(2) refer back to the effect on disabled persons described in s.21E(1)(b) (not to the effect on the individual disabled person described in s.21D(2)(a) (ii)). In my judgment, the Secretary of State has complied with the duty towards disabled persons to adjust "practice, policy or procedure", by the provision made for disabled persons in chapter 55.10 EIG and by, in general, applying *Hardial Singh* principles to questions of detention. For this reason I conclude that s.21D(2) is not engaged in the present case.**"

90. Mr Armstrong submits that this is wrong. It is tantamount to concluding that once an adjustment has been anticipated, then the duty has been fulfilled even if the adjustment is not actually applied in practice. Mr Armstrong submits that cannot be right but recognises that I am bound by it and, if necessary, wishes to his reserve his position for argument in the Court of Appeal.

91. But he submits that is not necessary because the statutory regime has now changed, as pointed out by the Court of Appeal at paragraph 36 of its judgment in **R(MM) v Secretary of State for Work and Pensions** [2013] EWCA Civ 1565; [2014] 2 All.E.R. 289. The wording of section 21(2) of the **EA** now precludes the analysis of Mr Stephen Morris QC sitting as a deputy High Court Judge. Also he submits that the conclusion in **MM** is entirely at odds with the reasoning in **BE** and demonstrates that it cannot be correct. Thirdly he submits that **BE** is inconsistent with the **ECHR**, which requires practical and effective solutions to be applied. Although the claim has been formulated as an **ECHR** claim in the alternative that alternative probably has its only significance in this context because if I reject the Claimant's argument that despite the changed statutory language I am bound by **BE** then he should still succeed in this context by reason of his **ECHR** claim.

The Defendant's Submissions

92. It is convenient straightaway to set out the position taken by Mr Lewis on **BE**. Not surprisingly, Mr Lewis takes the opposite position to that of Mr Armstrong. Mr Lewis submitted that the judgment in **BE** was binding upon me and inoculated the Defendant against any **EA** challenge to the decisions to detain, always provided that the decisions had been taken in accordance with **Hardial Singh** principles and paragraph 55.10 of Chapter 55 of the EIG. Mr Lewis submitted that, absent evidence of any general disregard of those principles and/or of paragraph 55.10 of Chapter 55 of the EIG, the judgment of the High Court in **BE** would preclude me from finding disability discrimination at the level of policy.

Putting it another way, he was submitting that there could be no breach of the *first requirement* provision of section 20(3) only breaches of the *second* and *third requirement* and the Defendant did not accept there was anything wrong with the building. She accepted responsibility to compensate the Claimant in respect of the absence of a wheelchair and a specially adapted drinking cup, something which he would argue at a later hearing could give rise to only a very limited award of compensation. What the judgment in **BE** precluded, submitted Mr Lewis, was an examination of "*practice, policy or procedure*" in the kind of *granularity*, which the Claimant favoured and which led to a conflation of "*reasonable adjustments*" relating to the *second* and *third requirements* with the more generalised nature of the *first requirement*.

93. Mr Lewis submitted that paragraph 55.10 of Chapter 55 of the EIG really embodies **Hardial Singh** principles and for all intents and purposes the two are really the same thing. In any event, mindful of Mr Armstrong's submission that each was freestanding, he submitted that both had been followed by the Defendant in respect of the first period of detention. The Defendant had not relied on the Claimant posing a risk of harm or a risk of absconding. The Claimant had not produced his passport, he clearly had no close ties with the United Kingdom so as to make it likely he would stay in one place and previously he had failed to comply with the conditions imposed on his stay here and had not left the United Kingdom when it was time for him to do so. Thus the Defendant's plan to remove the Claimants from the United Kingdom had been perfectly rational and he was detained on 29 February 2012 in order to be removed on 3 March 2012, a perfectly reasonable timescale. Mr Lewis pointed to paragraph 65 of the judgment of Richards LJ in **MH v Home Secretary** [2010] EWCA Civil 1112, emphasising the sentence which reads:

> "**There must be a *sufficient* prospect of removal to warrant continued detention when account is taken of all other relevant factors.**"

In the submission of Mr Lewis throughout the history of the two periods of detention there was always a "sufficient" prospect of removal.

94. Moreover, he submitted, relying on paragraph 105 of the first instance judgment of Sales J in the same case, that the test is whether the court concludes the Defendant had an objectively justifiable belief that the Claimant would be removed within a reasonable period. Here, so far as the Defendant was concerned, there were no outstanding representations, the processing of which might delay the stipulated date of departure. The problems over the passport arising from the Claimant's change of name were complications that were unknown to the Defendant immediately before the first detention and the Defendant should not be judged by reference to hindsight. Nor should the fact that ultimately the Claimant succeeded in his legal challenge to the refusal of his representations that he be granted temporary residence in the United Kingdom be given much weight (see paragraph 121 of the judgment of Lord Dyson in **Lumba**).

95. So far as his medical condition and disability were concerned the Defendant had considered extensive medical evidence about the Claimant's medical needs and as to his disability and the decision that paragraph 55.10 of Chapter 55 of the EIG could be complied with was therefore a reasonable one arrived at after a proper consideration of the evidential material. It was important not to conflate his needs for physiotherapy and rehabilitation with medical needs; the former were not medical needs and in reality he had no need for medical care. All that was required of the Defendant was sufficient evidence for coming to a

preliminary view that he could be managed in Harmondsworth and the approval of its senior management of the Claimant being detained there.

96. The significance of rules 34 and 35 of the **Detention Centre Rules 2001** had been considered by Davis J in **R (D and K) v Home Secretary** [2006] EWHC 980 (Admin). At paragraph 50 of his judgment Davis J regarded rule 34 as an important part of the safeguards in relation to detention and/or the continuation of detention. But he had concluded at paragraph 52 that the weight to be given to such a safeguard in any one particular case depended upon the evidence with the result that not every adverse rule 35 report would necessarily mean that continued detention could not be justified; much might turn on the accuracy of, and the strength with which, concerns were raised. In the instant case the rule 34 assessment and rule 35 report had been based on a misunderstanding of the Claimant's needs by Dr Naqvi; both medical experts had agreed in paragraph 2.4 of their Joint Statement that the Claimant's medical condition could have been managed adequately. Mr Lewis submitted that the Claimant's case was attempting to perpetuate the misunderstanding by Dr Naqvi and his Rule 35 report should be given very little weight.

97. Even if there was no evidence as to direct consultation between the Defendant's staff responsible for making the decision about detention at Harmondsworth and the medical staff working at Harmondsworth, such consultation was not an essential precondition to lawful detention. Nor was it the case that, in the event of a rule 35 notification, release from detention must inevitably follow and that continued detention must be unlawful.

98. As to the allegations that the Claimant had endured insanitary and unpleasant conditions during both his periods of detention at Harmondsworth, if they had not been raised at the time, which the Defendant contended they had not been, then little credence should be given to them now. Moreover, the complaints made by the Claimant and Ms Shillingford, even if true, which the Defendant did not accept, would not, without more, render the detention unlawful. Whilst Mr Lewis accepted that the Defendant could not challenge some of the factual allegations made by, or on behalf of, the Claimant he submitted that matters such as missing food, occasional failure to administer medication, problems with laundry, the lift not working and insanitary conditions neither taken in isolation nor coupled with admitted **EA** breaches relating to the absence of the self-propelling wheelchair and the specially adapted drinking cup could make the detention unlawful because they were, at most, administrative failures of one sort or another not capable of rendering the detention unlawful.

99. Mr Lewis acknowledged, however, that he had to accept the rule 35 report made in connection with the first detention should have been considered as part of the decision to detain for a second time and that the failure to make a rule 34 assessment at any time during the second detention made it technically unlawful. But he argued the Claimant had suffered no loss justifying any award of damages because he could and would have been lawfully detained in any event. He was "an overstayer" in the process of being removed and both medical experts had agreed in paragraph 2.4 of their Joint Statement that he had no specific medical needs for which Harmondsworth could not provide. In so far as the medical experts had concluded that the Claimant had not been "*satisfactorily managed within detention*" this should be understood as relating not to the lawfulness of the detention but to the question as to whether or not reasonable adjustments had been made and it was very important for the court to maintain a clear distinction between those two entirely different topics. Also at the point when he was about to be discharged from BGH he was a vulnerable person with no accommodation and his then recent attempt at finding somewhere to stay had proved a failure

with his host turning out to be as fragile as he was and unable to look after him. At the very least these were the kind of "*very exceptional circumstances*" contemplated by paragraph 55.10 of Chapter 55 of the EIG.

100. Nor was it a fair characterisation to say that the Claimant had been detained because detention was in his own best interests. The reasons for the second detention were essentially the same as the reasons for the first detention, namely that his removal from the United Kingdom was imminent. In respect of both detentions serious concerns about health affecting his own well-being and public health or safety (factor 10) had been ticked as a consideration on the relevant IS.91R form "NOTICE TO DETAINEE REASONS FOR DETENTION AND BAIL RIGHTS" (see above at paragraphs 25 and 58) and it was a perfectly relevant matter, although more acute in relation to the second detention when it was reasonably believed by the Defendant that the Claimant was likely to be thrown out onto the streets. Mr Lewis submitted this was a legitimate consideration for the Defendant to take into account when deciding whether or not to detain but it by no means followed that the sole, or even a predominant, reason for detention was "the best interests" of the Claimant. The reason for his detention was always his imminent removal. As a matter of construction factor 10 on form IS.91R could not be read as being confined only to public risk of contagious disease emanating from a detainee. The words clearly involve the best interests of the detainee as well but only as one of a number of other factors.

101. There was no obligation on the Defendant to find accommodation for the Claimant. Whilst he accepted that paragraph 55.1.1 of Chapter 55 of the EIG referred to using "*alternatives to detention*" in his submission that could only mean an alternative available to the Defendant and the provision of accommodation under section 21 of the **NAA** was the responsibility of the relevant Local Authority. Whilst it was true that the Defendant had the power to provide accommodation under section 4(1) of the **IAA** that only applied to those "*with no avenue to any other form of support*" (see paragraph 1.1.3 of the "*Asylum Support, Section For Policy and Process*" document[26]) and, manifestly, the Claimant did have another avenue of support as demonstrated by subsequent accommodation by the London Borough of Hillingdon. Also it was quite clear from paragraph 1.1.3 the Defendant was only required to look at providing accommodation in cases where the subject was destitute, had no other avenue of support, was likely to remain in the United Kingdom and would otherwise suffer very adverse conditions breaching his or her human rights; the relevant passage reads as follows:

> "**The consideration of whether support is necessary to avoid a breach of the person's human rights will usually require an assessment of whether they are likely to suffer inhumane or degrading treatment if they are not provided with accommodation and the means to meet their essential living needs whilst in the UK. However, Caseworkers should only provide support for these reasons if it is clear that the person cannot reasonably be expected to leave the United Kingdom.**"

Moreover, the Claimant's solicitors at the time of the second detention clearly took the view that the detention was the preferable course and the Defendant cannot be at fault for those solicitors failing to investigate available alternative accommodation properly.

[26] A document produced during the course of the hearing which I have marked as Exhibit 1. Mr Lewis told me that it had been published on 9 January 2015 but I understood him to accept that even before its publication the Defendant should have been approaching section 4 in the same way.

102. Nor was the decision to detain for the second time unlawful in terms of the length of time during which the Defendant might have reasonably anticipated the Claimant would be detained before being deported. The travel document problems created by his change of name were about to be resolved; an interview in relation to his ETD had been fixed for 23 March 2012. Also, although not called this, a kind of fast-track procedure had been set up in relation to his representations that he be granted permission to remain; the caseworker was standing by and in the event the submissions had been rejected by 4 April 2012. Accordingly, the Defendant was acting perfectly reasonably in concluding that the Claimant's removal was imminent.

103. In summary, Mr Lewis submitted that once it was understood from the agreed medical expert evidence that the Claimant could have been properly managed at Harmondsworth the only compensation which he could recover in respect of his detention related to those incidents where he had not actually been properly managed. These did not make his detention unlawful but they amounted to a failure to make reasonable adjustments contrary to the provisions of the EA. It was only in respect of that course of action the Claimant could recover any compensation. His over-arching theme was that, at least so far as his second detention was concerned, the Claimant presented a very exceptional case of a vulnerable individual who had no other accommodation and was quite properly regarded by the Defendant as subject to removal.

The assessor's advice

104. Ms Seddon's general perspective as an assessor on "*reasonable adjustment*" provided a companion piece to the judicial perspective of Elias LJ set out at paragraph 35 of his judgment in **R (MM)** (quoted above at paragraph 73 of this judgment). She advised me that from her experience a disabled person wishes to participate as fully as possible in every aspect of life. She also emphasised that the adverse impact upon a disabled person of not being able to do so may not be limited to the deficit imposed by the physical limitations arising from the disability but may also have a psychological effect upon the disabled person. In order to ensure that the disabled person suffers as little disadvantage as possible thought has to be given as to how the disabled person can function day-to-day in any of the situations to which that person is likely to be exposed. To avoid the disabled person suffering difficulty or even indignity there always has to be planning ahead but all the more so when there is to be a change of environment.

105. Such forethought cannot hope to be effective without a detailed knowledge and understanding of the nature and extent of the disability because without a thorough understanding of the nature of the limitations placed upon the disabled person by his or her disability an effective and comprehensive audit of the day-to-day situations likely to be faced cannot be compiled and without that there are bound to be failures to address or ameliorate the difficulties which will be encountered. She advised me that an obvious step towards minimising difficulty before somebody was placed in a particular environment would be for medical records to be examined by someone competent to understand their implications with a view to obtaining proposals as to how the disability might be managed in that environment.

106. But that was a first step. An audit made without any observation would be unlikely to be successful. Ms Seddon advised me that it is not enough to know that someone is disabled but stable and requiring no specialist medical treatment. It is necessary to make some assessment, preferably from visual observation, of that disabled person's ability to cope with elementary things to do with day-to-day living. The list of things to be considered depends,

of course, on the nature and extent of the disability and the circumstances in which the disabled person is to be placed. Ms Seddon gave me examples of what things should be considered; I need only quote some of them; how well a person can get from one point to another and at what speed; how well a wheelchair-bound person is able to get into and out of a wheelchair; whether a person can support themselves without assistance and for how long.

107. Moreover, Ms Seddon advised me that a lack of training in the disability discrimination provisions of the **EA**, a deficit which the witnesses called by the Defendant accepted, in this case had quite typically resulted in a lack of awareness on their part of the purpose of the disability discrimination provisions of the **EA** and of the need to make "*reasonable adjustments*" for the disabled. An analysis made by somebody without any real understanding of the disability discrimination provisions of the **EA** is unlikely to be a comprehensive analysis and Ms Seddon advised me that meant significant matters were bound to be overlooked. She advised me that a significant example of this was that nobody at Harmondsworth appears to have understood that the Claimant's upper limb weakness would make it difficult for him to do his own laundry as he was required to do. Whilst recognising that questions of law were matters for me to decide (and certainly without wishing to be drawn into arguments about "*granularity*") Ms Seddon advised me that requiring detainees to do their own laundry could be regarded as a rule which might place those with upper limb weakness at a considerable disadvantage. That no forethought appeared to have been given to this, might be regarded as a product of the lack of training and awareness on the part of the Defendant's officers. She also regarded in a similar light the Harmondsworth rule that a detainee could only see a visitor in a designated visiting room; this could be regarded as placing somebody who was wheelchair-bound at a disadvantage when the lift was not functioning

Discussion and Conclusion

(i) False Imprisonment

108. Mr Armstrong made four criticisms as to the lawfulness of the both periods of detention. Firstly, and by way of an overarching submission, he complained that on her own policy, as expressed in the EIG, the Defendant could only have detained the Claimant, a disabled person, if those disabilities could have been "*satisfactorily managed*" in detention, and, if so, then only "*in very exceptional circumstances*". The Defendant had not proved that the Claimant could be "*satisfactorily managed*" in Harmondsworth and, if she had, then she had not established that these were "*very exceptional circumstances*". Secondly, if the preponderant purpose of the detention is the protection from harm of the detainee or, putting it another way, is "*in the best interests*" of the detainee, then the intention to deport becomes so subsumed in the other motive of protecting the detainee as to cease to be effective. Thirdly, detention cannot be lawful if deportation is not imminent or once it ceases to be imminent. Fourthly a period of detention cannot be lawful if the conditions of it are so unsatisfactory for a disabled person as to amount to breaches of the **EA**.

(a) The first period of detention

109. The Claimant had previously been deported as an "overstayer" and in early 2011, as a result of contact by UCLH, the Defendant realised that the Claimant was once again unlawfully in the United Kingdom. The interests of UCLH in drawing the Claimant to the Defendant's attention appear to have been twofold; to enable the hospital to make arrangements for his discharge from the hospital and for the hospital to be relieved of the burden of accommodating him. In the short term, the Claimant was discharged from hospital but accommodated at its expense in an hotel. It seems to me that later in 2011 Ms Fremantle

and Dr Hewitt of UCLH became increasingly concerned about the cost of continuing to accommodate the Claimant and communicated those concerns to the Defendant. So much so that Ms Kimpton, the Inspector in charge of the case in late 2011 and early 2012, emphasised this cost to the National Health Service as a justification for the decision to detain (see the passage from the Metropolitan Detention Review form quoted above at paragraph 26 of this judgment) and this was repeated by Ms Spencer when she set out the reasons for the second detention (see above at paragraph 59). Therefore, prominent amongst the reasons for detention on both on 29 February and 21 March 2012 was the Defendant's wish to relieve the NHS of the cost of accommodating the Claimant, although this was perhaps more predominant in respect of the second period of detention.

110. It was, of course, the case that the Claimant had been extremely ill and the Defendant was given some information about the nature of his illness, his current need for treatment and the extent of any disability he had suffered in consequence of his illness. But, although the Defendant, through the medium of various letters and reports from the treating doctors, knew quite a lot about the Claimant's condition and his need for treatment its officers contented themselves with the descriptions as to the Claimant's disabilities in the letters from the treating doctors and these were of a very general nature. Knowledge that he was "*largely self-caring*", able to "*walk with the aid of splints and walking aids*" and that a wheelchair was "*needed for distances*" had been obtained some months before his detention in the context of his removal from the United Kingdom (see above at paragraph 10 of this judgment), and before the acknowledged deterioration in his functioning. Not surprisingly the focus, if not entirely, at least to a considerable extent, was as to the impact of his illness and consequent disability on the logistical aspects of his repatriation to Trinidad and Tobago. This concentration on a unique problem of transportation, no doubt attended by potential logistical difficulties but of relatively short duration, to my mind rather masked what, in the event of detention, would be the more significant analysis as to the Claimant's day-to-day capabilities over a longer period.

111. Moreover, it seems likely that other information such as that he was "*mainly in a wheelchair*" (see above at paragraph 11 of this judgment) had not been given much weight because the erroneous conclusion was reached that he needed to use a wheelchair only when he was away from the hotel (see above at paragraph 22 of this judgment). Ms Edwards' lack of training in, and her consequent lack of awareness of, disability discrimination issues and "*reasonable adjustments*" probably contributed towards her arriving at that conclusion. But the fact is that nobody on behalf of the Defendant conducted any kind of assessment of the Claimant's day-to-day capabilities and needs and measured those against the environment of detention at Harmondsworth. Ms Edwards understood that the Claimant had not received physiotherapy or rehabilitation after he had left UCLH with the result that previous improvements in his functionality had stalled and then reversed. She had clearly considered that matter and ultimately concluded that it was not up to the Defendant to provide physiotherapy or rehabilitation. But she appears to have had no knowledge at all about his upper limb weakness and, likewise, the significance of him not having a self-propelling wheelchair available to him at Harmondsworth seems not to have been considered at all. As I mentioned above at paragraph 23 of this judgment, there is no evidence that the clinical staff at Harmonsdworth were ever asked to consider whether the Claimant could be satisfactorily managed within detention at Harmondsworth and it was, of course, for the Defendant to show that her own policy had been complied with.

112. Mr Lewis submitted that the evidence did show that. Criticisms of what might have happened during detention might be apposite in the context of alleged breaches of the **EA** but what mattered when considering the lawfulness of the detention was whether the detention was in breach of **Hardial Singh** principles or Chapter 55 of the EIG (insofar as that added anything to the **Hardial Singh** principles). Essential to his submission was the proposition that Harmondsworth could have coped with the Claimant and essential to that was his construction of paragraphs 2.4 and 2.5 of the Joint Statement of the medical experts (see my recitation of this aspect of the expert medical evidence set out above at paragraphs 66 to 68 of this judgment). Mr Lewis submitted that the medical evidence showed that the Claimant's condition was in remission and consequently that he had limited medical needs, which the two medical experts agreed could be catered for during detention at Harmondsworth, and which, with the exception of the intermittent absence of a self-propelling wheelchair and specially adapted drinking cup, had been catered for during both periods of detention. Mr Armstrong did not accept the construction placed by Mr Lewis on paragraphs 2.4 and 2.5.

113. To my mind this controversy illustrates the danger of striving to make agreed medical evidence answer questions it is not addressing. Whilst laudable efforts had been made to ensure that the medical experts had considered all aspects of the case so that it would be unnecessary to hear oral evidence from them, the reality is that paragraphs 2.4 and 2.5 are addressing very specific questions raised by "Points 4 and 5". Paragraph 2.4 addresses "Point 4", which asks whether the doctors agree or disagree that "*the Claimant's general medical health could be satisfactorily managed within the detention setting*". "Point 4" continues by giving more general context through setting out Dr Paviour's view that the Claimant's "*neurological condition could have been managed satisfactorily within the detention setting if the facilities were well-maintained and access to simple mobility aids were available*" and going on to record his interpretation that it was possible Dr Naqvi had based the conclusion in his Rule 35 report that "*the resources of Harmondsworth IRC are inadequate to cope with his complex health needs*" on the Claimant's "*general medical health*".

114. From the answer given by the medical experts at paragraph 2.4 Mr Lewis derives the conclusion that they were both agreed Dr Naqvi had based his rule 35 report on a misunderstanding of what Harmondsworth needed to address in looking after the Claimant. I cannot accept that reading of paragraph 2.4. On the contrary, it seems to me clear from the second sentence of paragraph 2.4 that the medical experts were not prepared to say anything about the Claimant's "*general medical health*". Moreover, the only thing that the medical experts were prepared to say about Dr Naqvi was that he had been concerned "*at the time of admission that Harmondsworth could not manage his* [i.e. the Claimant's] *problems, medical or neurological*" and they thought he had concluded the Claimant had "*a significant but stable level of disability as well as complex needs and potential complex needs rather than being of the opinion that he was acutely medically unwell*".

115. I accept that they both agreed "*that if the Claimant was medically stable and if he would have had access to medical assessment by a competent practitioner as well as access to appropriate investigation, via primary care, in the event of a change in his well-being, then we felt that he <u>could</u> have been satisfactorily managed within the detention setting.*" But it seems to me that none of this supports the construction put upon it by Mr Lewis and I do not accept that the medical experts reached any conclusion as to whether or not Dr Naqvi had been right to take the view expressed in his rule 35 report. It would have been surprising if they had reached that conclusion when they had not heard Dr Naqvi's explanation as to why he held that view or as to what factual circumstances led him to be of that view on 1 March

2012. Putting their evidence as high as I can, it seems to me it amounts to them saying that other things being equal they might have expected Harmondsworth to cope with the Claimant but they knew nothing as to why Dr Naqvi had reached his rule 35 conclusion that Harmondsworth could not cope with him at that time.

116. Nor do I accept Mr Lewis's reading of paragraph 2.5 of the Joint Statement as establishing that whilst the medical experts agreed there were deficiencies in the management of the Claimant's medical conditions in the second period of detention, in respect of the first period of detention they agreed there were no such deficiencies. Clearly from the first sentence of paragraph 2.5 (see above at paragraph 68 of this judgment) they were agreed that the Claimant had access to medicines during the first period of detention. The second sentence agrees that he did not have access to physiotherapy or rehabilitation in detention but makes the point that he would not have had that elsewhere. The third sentence accepts that he did not have his self-propelling wheelchair. The joint statement is silent as to his specially adapted drinking cup and makes no reference to some of his other complaints, which I have dealt with above. In other words, in my judgment paragraph 2.5 goes so far but no further and it certainly cannot support the suggested interpretation of an acceptance there were no problems in the first period of detention; on the contrary the absence of a self-propelling wheelchair clearly was a problem.

117. I do accept, however, the general proposition, which it seems to me can be derived from the Joint Statement, namely that in theory and other things being equal Harmondsworth "*could*" provide a satisfactory environment for the Claimant. I reiterate that Mr Lewis submitted that in so far as in practice "other things" were not "equal" that could not affect the lawfulness of the detention and did not mean the Claimant fell into the category of a person "*with serious disabilities*" who could not be "*satisfactorily managed within*" Harmondsworth. Putting the matter in another way, he submitted that whilst there might have been some practical deficits, resulting in specific breaches of duty to make "*reasonable adjustments*" under the **EA**, the evidence being if these things had not gone wrong then Harmondsworth "*could*" have satisfactorily managed the Claimant, then it followed that the decision to detain was reasonable and the subsequent detention was lawful.

118. In my judgment I should reject this proposition and conclude this first detention was in breach of the Defendant's own policy contained in paragraph 55.10 of Chapter 55 of the EIG (see above at paragraphs 70 and 71 of this judgment). I have taken into account what was said in paragraphs 67 and 68 of the judgment of Beatson LJ in **Das** about disabilities being satisfactorily managed in detention (as set out above at paragraphs 72 and 73 of this judgment) but I have reached the conclusion, for the reasons set out below, that in the factual circumstances of this case the evidence did not establish on a balance of probability the Defendant's case that the Claimant's disability could be satisfactorily managed in detention either at the outset or later.

119. I have the following reasons for rejecting Mr Lewis's proposition. Firstly, his analysis ignores the evidence of Dr Lunn, with which Dr Paviour agreed (as discussed above at paragraphs 41 and 42 of this judgment), as to what the Claimant required in order for his disabilities to be satisfactorily managed. Some of the required features of a satisfactory environment set out by Dr Lunn can be said to have been present but some (e.g auxiliary aids and adherence to some rules which disadvantaged the Claimant) were not. The evidence was never presented in terms of a check list of what was or was not available but it established some important things were missing and I do not think it can be regarded as having been

proved by the Defendant that everything necessary by way of "*reasonable adjustments*" was in place on admission on 29 February 2012 or later.

120. Secondly, and following on from that, I find the argument being put forward by Mr Lewis, which seems to me to amount to saying that if things had been working or been better thought through or some things had been provided or some rules had been changed or some staff had been trained in disability matters (or awareness) then everything would have been alright, an unattractive one. In my judgment the Defendant must establish that the environment is suitable at the outset not that at some stage during the detention it might become suitable. I hope the Defendant would not wish to construe her guidance as providing for a theoretical state of affairs, which might be capable of being implemented at some time in the future as opposed to a set of practical measures taking effect on admission and enabling the disabilities to be managed properly from the outset. But that seems to me to be the effect of the submissions made by Mr Lewis and I am not prepared to endorse that approach.

121. Thirdly, albeit possibly just a different way of looking at the previous point, the argument that the Claimant can succeed on breaches of the **EA** so the fact that things may be wrong in practice cannot detract from detention being lawful because in theory the environment might be or become suitable, seems to me an unrealistic proposition, which the law should not support; that the Claimant has an admitted entitlement to one remedy is not a basis for regarding the Defendant's action in a different legal context as lawful. Whilst I should make it clear that up to a point I accept the submission of Mr Lewis that failures to make "*reasonable adjustments*" do not necessarily make detention unlawful I think that will depend on the facts of any one case. I do not accept that will always be so and I do not accept there can be no overlap between breaches of the **EA** and the lawfulness or otherwise of detention. To give an example, if the only deficit in an otherwise perfectly adapted environment had been a failure of the lift on one occasion then, although that might amount to a beach of the **EA**, it could scarcely render the detention unlawful; it will always be a question of fact and degree. The corollary is that I also reject Mr Armstrong's opposite contention that breaches of the EA will always render detention unlawful; my view is that might be correct in some circumstances but not in others.

122. Fourthly, I do not accept the fact that the detention might have only been for a short time (discussed below) can justify a decision to subject the Claimant to an unsuitable environment in which he might suffer discomfort. Fifthly, and, to my mind, most significant of all, the Defendant has failed to prove that she undertook any audit of the Claimant's range of disabilities at the time that the decision was made to detain for the first time and match them against what was available at Harmondsworth. Indeed, there was no very clear evidence in relation to either period of detention as to what the disabled facilities (i.e. structural features/auxiliary aids) there were in the toilet and bathroom facilities in Healthcare. We know that some attempts were made to discharge the Claimant from Healthcare to rooms said to have disabled facilities. This implies that there were no such facilities in Healthcare and it prompted Ms Seddon to ask Ms Abdel-Hady about whether there were rails in the en-suite facilities in Healthcare. She did not know but added that the only en-suite facilities adapted for the disabled were in the main part of Harmondsworth and not in Healthcare. Also the medical evidence available to the Defendant was out of date. It was known to Ms Edwards that the Claimant's level of functioning had declined. Apart from the sending of a list of medication, there is no evidence of any contact with the medical staff at Harmondsworth before the Claimant was sent there and no evidence that his medical records were forwarded to them (indeed, there is evidence that they arrived after him). No

observation was ever made by any competent person as to his level of functioning whilst in the hotel and no inquiries made about the nature of the facilities in his bedroom or ensuite bathroom. Ms Edwards, because of her lack of training in, or knowledge of, disability discrimination, was completely unaware of the Claimant's upper limb weakness with the result that a significant part of his disability was simply ignored and the disadvantage he might suffer at Harmondsworth because of it was not appreciated.

123. In my judgment this first detention was in breach of the Defendant's own policy contained in paragraph 55.10 of Chapter 55 of the EIG (see above at paragraphs 70 and 71 of this judgment). I have taken into account what was said in paragraph 67 and 68 of the judgment of Beatson LJ in **Das** about disabilities being satisfactorily managed in detention (as set out above at paragraphs 72 and 73 of this judgment) but I have reached the conclusion that in the factual circumstances of this case the Defendant has not established on a balance of probability that the Claimant could be satisfactorily accommodated at Harmondsworth from the outset or that adequate steps were taken to establish what would need to be done before he could be satisfactorily managed there.

124. Nor do I accept there were "*very exceptional circumstances*" relating to the first period of detention justifying it. Even though, as I shall explain below, I think it was reasonable to regard removal from the United Kingdom as imminent, it does not seem to me the evidence establishes there was any significant risk that the Claimant would abscond. The very reason that he was living at the Premier Inn was that he had no alternative accommodation and I cannot see why he could not have been left there even after he had been served with the appropriate papers and informed he would be removed from the United Kingdom within a few days. Although I think the Defendant was influenced by the desire of UCLH to cease paying for the Claimant's accommodation, accepting the Defendant's thinking that his removal was imminent it does not seem to me that a day or two more in the hotel would have mattered.

125. Likewise, I do not accept the argument put forward by Mr Lewis that, looked at in another way, the Joint Statement of the medical experts means that the Claimant can only recover nominal damages in respect of any false imprisonment relating to the first period detention. In my judgment the Joint Statement does not support that analysis. It does provide some basic evidential foundation for the proposition that a more thorough investigation coupled with a series of alterations being made to Harmondsworth in terms of structure, equipment and rules of operation might have rendered the environment a satisfactory one for the accommodation of the Claimant but it does not comprise anything like the complete edifice of establishing that the Claimant's disabilities could be satisfactorily managed there. The Defendant would have had to prove a great deal more than she has done by the evidence in this case about the capability of Harmondsworth to deal with the Claimant in order to discharge the burden upon her of proving that probably the Claimant could have been satisfactorily accommodated, something I think the evidence falls short of establishing.

126. I do not accept, however, that the Claimant has succeeded in establishing the proposition that the detention was unlawful for other reasons. I accept that as at 29 February 2012 the Defendant was reasonable to take the view that the Claimant's removal from the United Kingdom was imminent. The question as to whether there were any outstanding representations raises a difficulty but, on balance, it seems to me reasonable for the Defendant to have thought on 29 February 2012 that any representations were not being actively pursued. Representations had been made at the end of May 2011 but somehow or

other they had been overlooked and then no further representations had been made. It does not seem to me unreasonable on the part of the Defendant not to have pursued the question of further representations with the Claimant or his solicitors. I do not understand Mr Armstrong to have been submitting that the onus lay on the Defendant to pursue an apparently moribund application, which seems to me an apt description of the state of affairs, at least following Ms Brandon re-sending the relevant forms in October 2011 (see above at paragraph 15 of this judgment). But if he was, on the factual circumstances of this case I conclude that the Defendant was not unreasonable in taking the position in February 2012 that, having heard nothing further either from the Claimant or his solicitors, the representations in May 2011 did not prevent the removal from being imminent.

127. Although I accept that part of the reason why the Claimant was detained on 29 February 2012 was because the Defendant wished to relieve the NHS of the continuing expense of accommodating the Claimant, looking at the evidence in the round that does not seem to me to amount to an improper motive for detention. That it was a component of a compendium of reasons for detention does not make it the main reason for detention. Ascertaining what the main reason was is a question of fact and it seems to me that the predominant reason was the apparent imminence of the Claimant's removal from the United Kingdom. If the sole reason, or even the predominant reason, for detaining on 29 February 2012 the Claimant had been because he was being accommodated at the expense of the NHS then I might have reached a different conclusion. As it is, on the factual matrix as I find it to be, whilst that was a factor it was by no means the main reason for detention and in my judgment, the detention was not unlawful on account of it.

(b) <u>The second period of detention</u>

128. I take a different view as to the main reason for detention on 21 March 2012. By then it seems to me that the main reason for detention was the problem posed by the Claimant's accommodation. This conclusion seems to me justified by considering three documents, Ms Spencer's note on the Review Form dated 21 March 2012 (set out above at paragraph 58 of this judgment and discussed at paragraph 59), M Walker's note made after the rejection of the Claimant's representations on 4 April 2012 (set out above at paragraph 61 of this judgment) and Mr Mafurier's letter to Pierce Glynn dated 27 April 2012 (set out above at paragraph 62 of this judgment).

129. I accept that Ms Spencer's note is in part a reiteration of the previous note made by Ms Kimpton and that both may represent, to an extent, the personal views of the authors. But it seems to me, developing what I said above at paragraph 60 of this judgment, Ms Spencer's note must also be taken to be an expression of the Defendant's reasons for detention on 21 March 2012. In particular, it must be read in the light of the immediate past history. When released from Harmondsworth on 7 March 2012 the Claimant had gone back to UCLH before making his way to the address in Barnet. Shortly afterwards he had been admitted to BGH. The hospital's ambition seems to me to have been to ensure that following the Claimant's discharge it had no responsibility for his future accommodation. Ms Spencer clearly interpreted this history as a deliberate tactic on the part of the Claimant to get himself back into the NHS system and the last sentence of Ms Spencer's note clearly articulates that his detention is to prevent any further accommodation in hospital.

130. M Walker's note states that the detention had been because of the Claimant's disability, because he had no fixed abode and because his solicitors could not provide accommodation. Plainly, from the terms of their respective notes, both Ms Spencer and M Walker were

thinking of short term accommodation on the basis of imminent removal. The latter, however, clearly contemplated (see above at paragraph 61 of this judgment) that if there was an appeal then the Claimant would have to be discharged because, I infer, M Walker understood that his detention would not then be short term. Ms Spencer does not seem to have been too concerned about the Claimant's welfare but that may be implicit in M Walker's use of the expression "*no fixed abode*" and Mr Mafurier's letter to Pierce Glynn is quite explicit both about his welfare and the fact that the removal could no longer be considered imminent.

131. Mr Armstrong submitted that it was clear from the reasons stated the Claimant had been detained in his own best interests, namely because he had no accommodation elsewhere and, therefore, relying upon the judgment of Cranston J in **AA,** he had been detained for an improper motive. Mr Lewis argued that even though the Claimant's difficulties over accommodation might have been a significant feature in the reasoning as to why he should be detained that did not mean he had been detained in breach of the Defendant's policy. **AA** was a very specific case and the detention there had been unlawful because the detainee had been detained to prevent suicide not to facilitate removal from the United Kingdom. But in the instant case on 21 March 2012 it was anticipated that removal was imminent, it was reasonably believed that the Claimant would cooperate in the removal process and that, now the Claimant had been correctly identified as Mr St Clair Toussaint, obtaining the correct documents would be a straightforward and speedy process. Moreover, his solicitors accepted that there was no alternative accommodation other than detention.

132. Mr Lewis submitted that essentially the issue of the lawfulness of the detention on 21 March 2012 depended on whether the policy set out in Chapter 55 of the EIG had been followed by the Defendant. The Claimant did not accept that he had ever expressed a wish to go back to Trinidad and Tobago but the issue was whether or not the Defendant reasonably believed that to be the case. She had relied on information supplied by a manager at BGH and had been reasonable to do so. Likewise the Defendant was acting reasonably in regarding the stance taken by the Claimant's solicitor namely that it was better for him to be detained than to be left out on the streets as expressing the Claimant's own position. The Defendant was acting reasonably in concluding that the solicitor was speaking for his client; that is the conventional position where there is a general retainer and there was nothing to indicate the contrary. Finally Mr Lewis argued that looking for alternative accommodation is not a responsibility of the Defendant.

133. Cogent though some of this argument appears to be at first sight I find it unacceptable overall. Firstly, it seems to me implicit in the concept of detention as a last resort in Chapter 55 of the EIG that consideration should be given to alternatives to detention and that must involve consideration of alternative accommodation. Secondly, I accept Mr Armstrong's point that the Defendant cannot consider section 4 of the **IAA** without consideration of, and elimination of, section 21 of the **NAA** as a source of alternative accommodation. This seems to me to undermine the submission made by Mr Lewis that alternative accommodation is not a matter for the Defendant, something, which, in any event, cannot stand up to scrutiny after the concession made by Ms Abdel-Hady in her oral evidence that section 4 of the **IAA** ought to have been considered. Mr Lewis may be right when he says that it is not for the Defendant to source accommodation via section 21 of the **NAA** but I cannot accept that because the Claimant's then solicitor was apparently unaware of that possibility the Defendant was also reasonable not to consider it. In my judgment the Defendant should be as much aware of the possibility of the Local Authority as a potential source of alternative accommodation as was

the Claimant's subsequent solicitor and, in the appropriate circumstances, namely, as here, where detention might not be justifiable if there was a viable alternative, the Defendant has the responsibility to give some consideration to the possibility of the Claimant making an application pursuant to section 21 and to informing the Claimant of that possibility. In the instant case no such consideration was ever given to such a possibility by the Defendant's officers because they were not aware of it. Indeed, Ms Spencer was confident that he was not entitled to alternative accommodation so long as his status as an illegal immigrant persisted (see above at paragraph 59 of this judgment) and, as subsequent events proved, this was entirely erroneous.

134. Thirdly, Mr Lewis's argument takes no account of the fact that Ms Edwards never made any enquiries as to why the medical staff at Harmondsworth had concluded at an early stage of the first detention that "*the resources of Harmondsworth IRC are inadequate to cope with his complex health needs*". Nor is there any evidence that Ms Spencer had done so. When Mr Mafurier wrote to Pierce Glynn on 27 April 2012 he said that:

> " **… we contacted the medical staff at Harmondsworth Immigration Removal Centre who agreed to do whatever they can to look after your client, in the knowledge that if his condition happens to deteriorate then they might have to refer him to specialist care outside of the removal centre.**"

but this seems to amount to an expression of "best endeavours" on the part of the medical staff and is by no means the same as establishing that the Claimant's disabilities could be satisfactorily managed in Harmondsworth. Because the Claimant was not examined under rule 34 after he had been detained in Harmondsworth for the second time, the only evidence there is of any medical opinion as to whether the Claimant could be satisfactorily managed relating to the second period of detention is that of Dr Wozniak given on 16 April 2012, nearly four weeks after he was detained. She thought he was clearly unfit to be detained and that his post rectal bleeding should be investigated (see page 2-135 of the hearing bundle). It should be said, however, that this condition appears to have been managed by the medical staff at Harmondsworth and before that on 31 March 2012 he had been discharged from Healthcare because "*we are not doing anything medical for Mr Toussaint*" (see page 6-140 of the hearing bundle discussed above at paragraph 53 of this judgment in the different context of complaints).

135. I would not wish to place too much emphasis on the opinion of Dr Wozniak; it refers to, and may take matters no further than, Dr Naqvi's earlier rule 35 report discussed above. Nor, considering the Defendant's points, do I think much reliance can be placed on the fact that the post rectal bleeding seems to have been managed at Harmondsworth or that at one point the Claimant was discharged from Healthcare. These are slight evidential indications pointing in one direction or the other but in my judgment they take the matter no further than the debate, discussed at length above at paragraphs 113 to 121, about Dr Naqvi's report and whether the Joint Statement of the medical experts had concluded that the rule 35 report was based on his misunderstanding as to what was at issue.

136. In the context of the second period of detention this debate is also crucial, because, as I have already explained above, Mr Lewis accepts that the failure to comply with rule 34 at any time during this period renders the detention unlawful but argues that the Claimant is only entitled to recover nominal damages because had there been a medical examination it would have revealed that the Claimant's disabilities could be satisfactorily managed during his detention at Harmondsworth. I reject that argument in the context of the second period of

detention for the same reasons that I rejected it above at paragraphs 113 to 121 of this judgment in the context of the first period of detention.

137. Mr Lewis also faces another problem, namely that when the Claimant was detained on 21 March 2012 it was by then clear to the Defendant that there were outstanding representations. It is true that they were "fast tracked" to a speedy rejection but as M Walker said (see above at paragraph 61 of this judgment) an appeal would result in the Claimant's release. The implicit reason for that must have been because an appeal would mean that removal could no longer be considered imminent. It is not completely clear as to why there was not an immediate appeal but it seems to me that by 4 April 2012 the Defendant must have realised that not only was the Claimant not resigned to removal but also that it was at least possible he would take steps to challenge the rejection of his representations. I do not think, however, that the Defendant can be criticised for not releasing the Claimant until there was a release address. This was what was envisaged by M Walker and it seems to me that was a reasonable approach for the Defendant to take.

138. Finally I do not accept the argument that the need for the Claimant to be accommodated amounted to "*very exceptional circumstances*". Its premise is a false dilemma. The real choice was not between Harmondsworth and rough sleeping on the streets but between Harmondsworth and the sort of accommodation, which was ultimately provided by the London Borough of Hillingdon.

139. Accordingly I conclude that the Claimant's second period of detention was unlawful. Contrary to the principles of Chapter 55 of the EIG the Claimant was detained on 21 March 2012 because the Defendant wrongly believed she was the only person with responsibility to accommodate him. Had the correct procedure of considering her own duty and the section 4 of the **IAA** been followed the Defendant would have realised there was an alternative route to accommodating the Claimant via section 21 of the **NAA** as opposed to detaining him at an Immigration Removal Centre the physical circumstances of which, the equipment in which and the rules pertaining to which remained exactly the same as they had been during his first period of detention.

140. Before I turn to consider the EA I should say something about the **PSED** in the context of the decisions to detain. Mr Armstrong's written and oral submissions focused upon the evidential importance of the **PSED** in the context of breaches of the EA but in case I have misunderstood the intended scope of his reliance upon the **PSED** I propose to consider what impact it might have on the false imprisonment claim. Use of the words "false imprisonment" provokes an instinctive reaction in my mind that a failure to comply with the provisions of section 149 of the **EA** would be unlikely, without more, to render a party liable in the tort of false imprisonment. But on reflection I wonder what difference in principle there is between section 202 HA review being unlawful because of a failure to comply with the duty imposed by section 149 and the decision to detain being unlawful because of the same failure. In the sense in which Lord Newburger uses the word "*complementary*" in **Hotak**, I would accept that in principle section 149 of the EA will also be "*complementary*" to a decision to detain.

141. In practice, however, I think it can make very little difference in the instant case. I have not reached the conclusion that Chapter 55 of the EIG represents a failure to comply with **EA** principles and in my judgment it certainly would not represent a failure, of itself, to comply with section 149 of the **EA**. It is the decision-making process under the EIG and the actual

implementation of that decision to which section 149 of the **EA** might be "*complementary*". But in that context it seems to me that the failure to comply with section 149 adds nothing to the unlawfulness of the failure on the part of the Defendant to consider properly whether the Claimant could be "*satisfactorily managed*" in detention at Harmondsworth. The position in **Hotak** was that the failure of the Housing Authority to fulfil its section 149 **EA** duty tipped the balance and resulted in the section 202 review being unlawful. In the instant case, to my mind the **PSED** failure is identical to the Defendant's failure to implement properly her own policy and it adds nothing.

142. As I have already indicated there is a limited acceptance by the Defendant of breaches of the **EA** in terms of reasonable adjustments. The limit of the concession is that for some part of both periods of detention a specially adapted drinking cup was not available and that for all of the period of the first detention and up until 27 March 2012 in the second detention the Claimant did not have the use of his self-propelling wheelchair. All other matters relating to the **EA** are in dispute. Above at paragraph 75 of this judgment I gave a brief summary of the "*reasonable adjustments*" provision and the "*three requirements*" set out in sections 20(2), (3), (4) and (5) of the **EA**. I propose to address each of the three requirements in turn.

143. Before doing so, however, I need to say something about whether the duty to make "*reasonable adjustments*" is "anticipatory" and about the **PSED**. As to the former for the textual reasons that he set out I accept Mr Armstrong's submission, which it seems to me is entirely consistent with the advice I have received from the assessor about how things work in practice, that the mechanism of "*reasonable adjustments*" in section 20 of the **EA** can only work satisfactorily in practice if the "*requirements*" call for an anticipation of a consideration of the impact of particular situations on a disabled person in advance of those situations actually occurring. It seems to me that the EA can be regarded, therefore, as calling for anticipation on the part of those upon whom section 29 places a section 20 duty.

144. So far as the **PSED** is concerned in this context I have summarised the recent authorities above at paragraph 77 and 78 of this judgment. None of these cases attempts any analysis of the relationship which section 149 might bear to allegations of discrimination in an individual context such as might arise under section 29 of the **EA**, with which I am concerned here. This is not surprising because the issue did not arise in those cases. I do not doubt that if it was appropriate and necessary to do so in a private law action section 149 might well have to be considered in the context, for example, of the "*first requirement*" as to "*reasonable adjustments*" pursuant to section 20 of the **EA**. If it were necessary for me to consider whether Chapter 55 of the EIG was a "*provision, criterion or practice*", which should have been altered in order to eliminate a "*substantial disadvantage*" to disabled persons, then considerations as to whether the Defendant had observed the provisions of section 149 in giving the guidance might well arise.

145. But it does not seem to me that the Claimant is challenging Chapter 55 of the EIG on the basis that, of itself, it puts disabled persons generally, and the Claimant in particular, at a "*substantial disadvantage*" in relation to detention "*in comparison with persons who are not disabled*". What is at issue in this case is whether that policy has been properly and completely applied. I hope I am not oversimplifying the matter when I say that this case is not about the policy itself but its application in the particular factual circumstances. Moreover, even if I am wrong to approach the matter in that way, if there have been failures not at the overarching level of policy but in terms of specific rules (i.e. "*the first requirement*" looked at from the lower level of specific rules at Harmondsworth) or aspects of the structure of the

premises ("*the second requirement*") or a failure to provide auxiliary aids ("*the third requirement*"), I am not at all clear what the alleged failures to comply with the **PSED** add to the evidence of failure of implementation. Indeed, my instinct is to think that where individual breaches of the **EA** are made out, then a concomitant PSED failure may add very little. Mr Armstrong submitted that it added weight to the evidential material but there was quite enough evidence in this case already. Moreover, the only practical significance of a **PSED** failure is likely to relate to the nature of any declaration and it is to be noted that the remedies sought by the Claimant, whilst including declarations, do not include a declaration that Chapter 55 of the EIG contravenes the **EA** or that the Defendant failed to comply with its **PSED**. If there is anything more to be said on this topic, however, I am quite prepared to listen to it in the context of deciding what the nature and scope of any remedy should be.

146. Moreover, at least in the factual context of this case, I wonder whether Chapter 55 of the EIG amounts to a "*provision*" contravening section 20(3) of the **EA**? In excepting disabled persons from detention, save insofar as they can be satisfactorily managed and unless there are very exceptional circumstances justifying detention, it seems to arguable that the "*provision*", which Chapter 55 of the EIG may be regarded as constituting, does not put the disabled at a "*substantial disadvantage*" in terms of section 20 in relation to detention when compared to the able-bodied. The same issue might well arise under section 149 of the **EA**. But on my conclusions that the failures here are not at the level of general policy but in relation to the implementation of that policy it is not necessary for me to reach any conclusion about this.

147. I do not accept the submission of Mr Lewis, based on the judgment in the High Court in **BE**, that because I conclude Chapter 55 of the EIG does not contravene section 20(3) it follows that the decision of the High Court in **BE** requires me to conclude that the existence of a general policy compliant with the **EA** eliminates consideration of any other breaches of the **EA** and, in particular any other "first requirement breaches" relating to rules about laundry or receiving visitors. In my judgment **BE** does not justify the argument put forward by Mr Lewis that once the Defendant has made an **EA** compliant general policy it follows no other criticisms of policy matters can be considered. I do not regard myself as bound by **BE** to reach such a conclusion because **BE** is not a decision about section 20(3) but is a decision about the much more complex relationships between section 21D and section 21E of the Disability Discrimination Act 1995 (as amended), which no longer apply and which, in my judgment, do not arise in the context of the much simplified **EA**. Whatever the correctness of the judgment in **BE** on the particular facts of that case in relation to the then relevant statutory provisions, in my judgment that authority does not preclude me from considering the impact of specific rules or practices in operation at Harmondsworth.

148. I do not regard the "*first requirement*" provision of section 20(3) as being confined to overarching expressions of general policy. In my judgment it applies equally to local matters such as the rules or practices in relation to laundry and in relation to meeting visitors at Harmondsworth. If these were not "*provisions*" to my mind they were clearly "*practices*". As to the former the Claimant without a self-propelling wheelchair and with an inability to get to the laundry unaided and, in any event, if the lifts were not working, was at a "*substantial disadvantage*" in relation to having clean clothes when compared with his fellow detainees not suffering from disabilities. Also when he got to the laundry his upper limb weakness and limited mobility would have been a disadvantage in carrying clothes to and from the washing machines/driers and in loading and unloading them; handwashing, if not impossible, would have been difficult for him. Likewise, if the lifts were not functioning and the Claimant did

not have a self-propelling wheelchair then the rule requiring him to see visitors only in designated rooms capable of being accessed if the lift was working and/or he could either get himself or get there provided he was given assistance placed him at a "*substantial disadvantage*" in comparison to the able-bodied. In my judgment both of these rules should have been altered and there was a failure to make a reasonable adjustment in respect of the "*first requirement*".

149. I have already accepted above that the lift was not working on at least six occasions and the Claimant said that it was on more occasions than that, although it is impossible to put any firm figure on it I have accepted that it probably was. The failure to have a functioning lift was a failure to make a reasonable adjustment in respect of the "*second requirement*". It is accepted by the Defendant that the failure to provide a self-propelling wheelchair and a specially adapted cup amounted to a failure to make a reasonable adjustment in respect of the "*third requirement*". In addition to that, however, I have found that the Claimant was not provided with specially adapted cutlery and that when his friend Ms Shillingford brought some during the first period of detention, it rapidly disappeared and was not replaced in either period of detention. I have also concluded that the auxiliary aid of a shower seat was not always available to him either because it was simply not there or because it was damaged and could not be used. As mentioned above at paragraph 119 (see footnote 24) there is a lack of clarity as to whether other auxiliary aids such as wall mounted bars or pull down grab handles were available in all or any of the bathroom and toilet facilities used by the Claimant in either period of detention. This is what the joint medical experts regarded
as necessary for someone with the Claimant's disabilities (see paragraph 6.03 of Dr Michael Lunn's report quoted above at paragraph 41 of this judgment). There is a reference to "bars" at paragraph 31 of Mr Armstrong's closing submissions and, although we did not hear much about this Ms Abdel-Hady did tell Ms Seddon that there were no specially adapted en-suite facilities in Healthcare (see above at paragraph 122 of this judgement). Therefore the evidence justifies a finding of a failure to make "*reasonable adjustments*" (either in terms of the "*second requirement*" or the "*third requirement*") in respect of the bathing and toilet facilities available to the Claimant in Healthcare

150. There are other matters relating to the general environment which do not strike me as amounting to breaches of any of the "*requirements*" to make "*reasonable adjustments*", although if the matter is to go to a further hearing I may be persuaded to hear further evidence and certainly would wish to be assisted by further submissions. I refer to issues of the pilfering of food, the behaviour of the Claimant's peers whilst in the Healthcare department during the second period of detention and a lack of hygiene. As I have already indicated I am disposed to think at the moment that these are part and parcel of the conditions applying generally to all detainees at Harmondsworth and I remain to be convinced that the Claimant was put at a "*substantial disadvantage*" when compared to the able-bodied. I am also not clear as to what "*requirement*" is engaged by these factual circumstances and what "*reasonable adjustment*" is said to have been necessary. But I reiterate that I may be open to persuasion to look at the matter differently.

151. In any event these factors must relate to issues of compensation in respect of unlawful detention. Indeed, except as set out above, I accept that there is very considerable overlap between damages in respect of false imprisonment and damages in respect of injury to feelings as a result of breaches of the **EA**. So far as the ECHR is concerned Mr Armstrong only referred to one possibility of it making a practical impact on this case and on the findings above the situation he envisaged does not arise. In those circumstances it seems to

me that I need make no findings about breaches of the ECHR and, by the same token, need not consider any question of compensation relating to it.