Public Law Challenges: the changing law

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INTRODUCTION

1. In this paper, we focus on two developing aspects of the changing law in relation to public law challenges of immigration detention, namely:

    a. **Challenges to the interpretation and application of the Secretary of State's policy, in particular in respect of those with mental illness (EIG 55.10)**. Key recent cases include:

        i. *R (O) v Secretary of State for the Home Department* [2014] EWCA Civ 990;
        ii. *R (Pratima Das) v Secretary of State for the Home Department (with Mind and Medical Justice intervening)* [2014] EWCA Civ 45;
        iii. *R (DK) v Secretary of State for the Home Department* [2014] EWHC 3257 (Admin);

    b. **Challenges to the detention of those on hunger strike.** Key cases include:
        i. *IM (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1561;

    c. **The possibility of a public law challenge to detention in relation to those 'mandatorily detained' under paragraph 2(1) of Schedule 3 to the Immigration Act 1971.** Key cases include:
        i. *R (Francis) v Secretary of State for the Home Department* [2014] EWCA Civ 718

PART ONE: Challenges to the interpretation and application of the Secretary of State's policy, in particular in respect of those with mental illness (EIG 55.10)

2. The Secretary of State's policy in relation to the detention of those with mental illness and those who may have been the victims of torture is set out in EIG 55.10, which provides as follows:

> ***"55.10. Persons considered unsuitable for detention***
>
> ***Certain persons are normally considered suitable for detention in only very exceptional circumstances****, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.*
>
> *In CCD [Criminal Cases Directorate] cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.*
>
> *The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:*
>
> - *unaccompanied children and young persons under the age of 18 …*
> - *the elderly, especially where significant or constant supervision is required which cannot be satisfactorily managed within detention;*
> - *pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this (but see 55.4 above for the detention of women in the early stages of pregnancy at Yarl's Wood);*
> - *those suffering from serious medical conditions which cannot be satisfactorily managed within detention;*
> - ***those suffering serious mental illness which cannot be satisfactorily managed within detention*** *(in CCD cases, please contact the specialist Mentally Disordered Offender Team). In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act;*
> - ***those where there is independent evidence that they have been tortured;***
> - *people with serious disabilities which cannot be satisfactorily managed within detention;*
> - *persons identified by the Competent Authorities as victims of trafficking … "* (emphasis added)

3. In respect of those with mental illness, the policy states that only in very exceptional circumstances should the Secretary of State detain those suffering "serious mental illness which cannot be satisfactorily managed within detention". That formulation took effect from 10 August 2010. Prior to that date, EIG 55.10 included a different formulation which stated that "Those suffering from serious medical conditions or *the mentally ill*" ought only to be detained in very exceptional circumstances.

4. On its face, the change in policy appeared to be stark. In essence, the policy changed from stating that "the mentally ill" were "normally considered suitable for detention in only very exceptional circumstances" to treating those suffering from mental illness as being suitable for detention unless "suffering serious mental illness which cannot be satisfactorily managed within detention".

5. In *R (HA) v Secretary of State for the Home Department* [2012] EWHC 979 (Admin), Singh J held that the reformulated wording of the policy was unlawful since no Equality Impact Assessment had been undertaken before it had been promulgated. The Secretary of State appealed against this judgment, but, shortly afterwards, the Court of Appeal found in *R* (*LE Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 597 that there was, in effect, no change in the meaning between the two formulations.

6. The Secretary of State clearly took the view that the effect of *LE* was to overrule that part of the judgment in *HA* that held that the wording of the reformulated policy was unlawful. However, that is not entirely clear. It was certainly arguable that the decision in *HA* continued to stand, certainly until a retrospective Equality Impact Assessment had been concluded and published (as it now has).

7. Nonetheless, it seemed likely, in light of the decision in *LE*, that the lawfulness or otherwise of the new policy makes no difference in practice.

Assuming that the reformulation of EIG 55.10 remains unlawful in the absence of an EqIA, the *Lumba* approach applies. A decision to detain or maintain detention when applying an unlawful policy will be an unlawful decision, but release or damages will only be available if the application of the correct and lawful policy would have led to a different result. Given the Court of Appeal's clear indication that the policies mean the same thing, there is no real prospect that the application of the different formulations would lead to different results: see discussion in *R (S) v Secretary of State for the Home Department* [2014] EWHC 50 (Admin) [276-277]

8. All this is now overtaken by *Das*, where a decision was taken not to pursue the argument that the change to the policy was unlawful. In light of the fact that the CA has now treated the policy as lawful notwithstanding that it was aware of *HA*, it would be very difficult to argue that the policy itself is unlawful.

The role of the court and the meaning of, and compliance with, policy: public law review or primary decision maker?

9. It is trite law that the meaning and construction of policy is a matter for the court: *First Secretary of State v Sainsbury's Supermarkets Ltd* [2005] EWCA Civ 520, *MD (Angola) v Secretary of State for the Home Department* [2011] EWCA Civ 1238 at para.12. Consequently, the meaning of EIG 55.10 is a matter for the court to determine and not for the Secretary of State's discretion.

10. What was less clear, until recently, was the role of the court when determining whether the Secretary of State had complied with his or her policy when making a decision to detain. Clearly, where detention is challenged on *Hardial Singh* grounds, the court acts as primary decision maker. But what about when detention is challenged on the basis of a failure to comply with policy?

11. In *R (AM) v Secretary of State for the Home Department* [2012] EWCA Civ 521, the Court of Appeal held, on the basis of an agreed position of both parties, that the question of whether the Secretary of State had complied with

her policy in an unlawful detention claim is "for the court itself, and does not depend on the application of Wednesbury principles of review." (para 26).

12. By contrast, in *R (LE (Jamaica)) v Secretary of State for the Home Department* [2012] EWCA Civ 597, Richards LJ said that "the power to detain is discretionary and the decision whether to detain a person in the particular circumstances of the case involves a true exercise of discretion. That discretion is vested by the [Immigration Act 1971] in the Secretary of State, not in the court. The role of the court is supervisory, not that of a primary decision maker: the court is required to review the decision in accordance with the ordinary principles of public law, including Wednesbury reasonableness". However, Richards LJ noted that this part of his judgment was obiter.

13. In *R (O) v Secretary of State for the Home Department* [2014] EWCA Civ 990, the Court of Appeal resolved the conflict. Arden LJ gave a clear judgment that the court was the primary decision maker in the interpretation of policy, but that a review of the Secretary of State's decision to detain in accordance with policy could only be carried out on ordinary public law grounds. Consequently, where it was contended that detention was unlawful on the grounds that the Secretary of State had failed to comply with her own policy on the detention of those with mental illness, the claim could only succeed where no reasonable decision maker could have done taken the decision to detain in the circumstances.

EIG 55.10: what is the meaning of "serious mental illness which cannot be satisfactorily managed within detention "?

14. In *R (Pratima Das) v Secretary of State for the Home Department (Mind and Medical Justice intervening)* [2014] EWCA Civ 45, the Court of Appeal gave guidance on the construction of EIG 55.10 in respect of those with serious mental illness. At first instance, Sales J. had applied a particularly restrictive definition to the policy, holding that it was only engaged when the mental condition of the detainee was such that the detainee had a serious inability to

cope with ordinary life, at or about the level requiring in-patient treatment, or that detention created a real risk that the detainee would reach that state.

15. The Court of Appeal rejected that threshold and gave detailed guidance on the Secretary of State's policy in relation to the mentally ill. In summary, the Court said[1]:

    a. The purpose of EIG Chapter 55 is to ensure compliance with the requirements of immigration control but prevent treatment that is inhumane.

    b. A purposive and pragmatic construction is required *"In the light of the purpose of immigration detention identified above, that is enabling lawful removal pursuant to an effective immigration policy, the policy seeks to ensure that account is taken of the health of the individuals affected and (save in very exceptional circumstances) to prevent the detention of those who, because of a serious mental illness are not fit to be detained because their illness cannot be satisfactorily managed in detention"* [47]

    c. The phrase "suffering from a serious mental illness which cannot be managed satisfactorily within detention" must not be dissected but considered as a whole [47] and [57].

    d. The policy exception in chapter 55.10 does not apply simply because a person has a diagnosis of a mental illness that is regarded as 'serious' [48], [50], [55] and [57]. In *LE (Jamaica)* the claimant had a long established condition of paranoid schizophrenia (which had rendered him unfit to plead to criminal charges) but the policy was not engaged as the condition was one that could be managed satisfactorily in detention.

[1] This summary is taken in part from the judgment of Mr CMG Ockleton in *R (SA) v Secretary of State for the Home Department* [2014] EWHC 2570 (Admin)

e. It is for the Secretary of State to consider whether the policy is engaged on the basis of the information available [66].

f. The 'threshold for applicability of the policy' is that the mental illness is serious enough to mean it cannot be managed satisfactorily in detention [67].

g. 'Satisfactory management' involves considerations such as the medication required and whether 'demonstrated needs' can or cannot be provided by the place of detention. The Court noted that *OM (Nigeria)* at [33] shows that some of those suffering significant adverse effects of mental illness may be managed appropriately in detention, the views of the experts were divided but the Court of Appeal found that the balance of expert advice was that her illness could be managed appropriately in detention [67].

h. For the purposes of the decision in *Das*, the Court did not decide whether 'satisfactory management' involved facilitating the possibility of recovery but at [71] the Court 'strongly doubted' that this was the correct approach as this was unlikely to be the intention of the policy given its purpose.

i. Where the threshold for applicability was met and a serious mental illness could not be managed satisfactorily in **detention** so the policy applied – the 'very exceptional circumstances' test was a demanding one. It was not met by the mere fact of liability for removal and the refusal to repatriate voluntarily. It could be met by circumstances such as the detainee posing a serious risk of harm to the public or the anticipated period of further **detention** being short. It required an assessment of where on the 'spectrum' of seriousness the case fell (that spectrum including those with no record of offending right through to the most serious terrorism cases). [68]."

j. The Secretary of State is generally entitled to rely on the responsible clinicians where reasonable enquiries have been made and the requirements of Chapter 55.10 were considered, so long as there was not a total abdication of the Secretary of State's own responsibilities to the clinicians [70].

16. The clearest take-away point is that the threshold for the applicability of the policy is the fact that the mental illness is serious enough to mean it cannot be managed satisfactorily in detention. This will *always* be context specific and will require evidence both of the needs of the individual and the capacity of the detention centre to manage those needs.

17. Two matters were left open by the judgment of the Court of Appeal, namely i) the scope of the duty to inquire into the existence of a serious mental illness and ii) the question of whether 'satisfactory management' of a mental illness required the possibility of recovery. These matters have been resolved, in large part, by subsequent cases.

The scope of the duty to inquire

18. In the first instance judgment in *Das*, Sales J. said as follows:

> *"Having adopted a policy regarding detention of persons suffering from serious mental ill-health, the Secretary of State was in my view under a public law obligation to take reasonable steps to give practical effect to that policy, bearing in mind the importance of the objective which it was designed to promote (namely, the humane treatment of individuals who suffer from serious mental ill-health). That means that if there was a real (as opposed to a fanciful or insubstantial) possibility that an immigrant facing removal was suffering from serious mental ill-health which could not be effectively managed while in detention, the Secretary of State had an obligation to take reasonable steps to inform himself sufficiently about the relevant circumstances so as to be able to make an informed judgment whether the policy would have application or not in that individual's case: see* Secretary of State for Education and Science v Tameside Metropolitan Borough Council *[1977] AC 1014, 1065B per Lord Diplock ("... did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"*

19. This aspect of Sales J's judgment appears to have survived the Court of Appeal. Although the Court of Appeal did not address the question directly, Beatson LJ noted a requirement for the Secretary of State "*conscientiously to make reasonable inquiries as to the physical and mental health of the person who is being considered for detention***"** [70]. Consequently, the judgments of both the High Court and Court of Appeal confirmed a duty on the Secretary of State to give practical effect to his own policy by inquiring into the possibility of detainee's suffering from serious mental illness. However, the scope of that duty is unclear.

20. In *R (DK) v Secretary of State for the Home Department* [2014] EWHC 3257 (Admin), the claimant argued that where there is evidence available to the Secretary of State that a person is suffering from a mental illness that may fall within Chapter 55.10, the decision maker must consider the person's medical records and an up-to-date psychiatric assessment and report as to the person's mental illness and the application of Chapter 55.10 when making a decision to detain. That submission was rejected by the Court, which appeared to minimise the scope of any duty to inquire. Haddon Cave J. said as follows:

> *[That] is far too broad a proposition and does not accord with the true view of Tameside. If the Claimant's proposition was correct, then in every case in which there was a mere possibility that a detainee, or potential detainee, might be suffering from a mental illness which might trigger Chapter 55.10 EIG, the authorities would be obliged (a) to conduct a full trawl of all the person's medical records, including confidential medical records, and (b) to procure a full up-to-date psychiatric assessment on that person, whether or not these steps were in fact necessary to determine the application or non-application of 55.10 EIG. This is, in my view, clearly incorrect in law and, in any event, would be unworkable and wasteful. The decision to detain is made on a case-by-case basis. I repeat that Tameside requires the decision-maker to make only reasonable inquiries as to the potential detainees physical and mental health (See Beatson LJ in* ***Das*** *at [70]). In many cases, the question of the possibility of the application of 55.10 EIG will be capable of early and easy resolution without resort to wasteful and unnecessary archaeology into all the detainees's medical records or procuring full-blown medical reports. Each case depends on its own facts. I repeat that Tameside only requires the scope of inquiries to be reasonable and proportionate, i.e. tailored to the instant case and question. The duty to inquire is not at large or not open-ended.*

21. On a fair reading, *DK* does not - in our view - undermine the requirement for the Secretary of State "*conscientiously to make reasonable inquiries as to the*

physical and mental health of the person who is being considered for detention" but it does emphasise that the scope or extent of any duty to inquire is likely to be fact specific and dependent on the *prima facie* evidence apparent to the Secretary of State in the absence of any medical assessment. If there is no obvious need to conduct a medical assessment, then the failure to consider a medical report when reaching a decision on detention will not be unlawful. By contrast, where there is clear prima facie evidence of mental illness (for example, serious self harm), the failure to conduct any assessment of the detainee's mental health and/or the failure to consider any such assessment when making a detention decision may well be an unlawful breach of the *Tameside* principle.

22. It is likely that the same duty to inquire applies to those who may have been subjected to torture, but such a duty will be limited. In *R (SN) v Secretary of State for the Home Department* [2014] EWHC 1974 (Admin), the Court held that where a rule 34 medical examination had been carried out and where the claimant had been asked whether he had been tortured and answered that he had not, that was sufficient to satisfy a duty to inquire, even where subsequent evidence suggested that he may well have been the victim of torture.

23. In respect of the policy requirements in relation to possible victims of torture and the requirements for medical examination and independent evidence, see also: *R (AM) v SSHD* [2012] EWCA Civ 521, *R (EO and others) v SSHD* [2013] EWHC 1236 (Admin).

Prospect of recovery?

24. At paragraph 71 of his judgment in Das, Beatson LJ said as follows:

> *[It has not been] necessary to decide whether it suffices for satisfactory management of mental illness in detention that deterioration is prevented or whether, as Miss Rose submitted, it involves facilitating recovery, so far as is possible. Mind's view (see Ms Nash's statement, paragraph 35) is that there would not be satisfactory management where a person's mental health could be improved by a particular treatment, such as counselling, but that treatment is not available in detention, or is not available without delay. I strongly doubt that the framers of the policy intended it to have this meaning or that it is the natural construction of the words used. It also appears inconsistent with the view taken in the previous decisions of this*

court and the Administrative Court where the question addressed was whether detention would result in deterioration. It raises broad policy questions of a kind which Miss Anderson informed the court is the subject of an investigation being undertaken on behalf of the Secretary of State by the Tavistock Institute. It also seems impractical as a test given the likely effect on an individual's mental health of the prospect of his or her involuntary removal from the United Kingdom in the very near future and given the variability of what treatment is available in different parts of the country to those with mental illnesses who are not detained. If Mind's position represents a general view among mental health clinicians, it may be an example of where legal policy and medical opinion diverge.
[Emphasis added]

25. Although Beatson LJ did not decide the point, a differently constituted Court of Appeal agreed with his comments in *R (O) v Secretary of State for the Home Department*. Arden LJ said as follows:

The word "satisfactorily" in my judgment requires an objective judgment to be made. It does not refer to the opinion of the decision maker. That objective judgment must be as to whether the outcome of the detention centre's treatment will be satisfactory. Importantly, there is no requirement that it should necessarily be equal to that available outside detention. Generally speaking what is required is that the treatment would generally be regarded as acceptable medical practice for dealing with this condition appropriately, which may mean keeping the condition stable. As Beatson LJ was minded to conclude, it would not necessarily mean treatment that provided the hope of recovery. Ms Anderson pointed out that PTSD was a common disorder and there were many people in detention with PTSD. By implication, their condition in many cases, on the present state of medical knowledge and facilities, may appropriately only be kept stable."
[Emphasis added]

26. Consequently, it seems clear that "satisfactory management" of mental illness does not require care equal to that available outside of detention and does not require the possibility of improvement or recovery. However, it is likely to require care that will at least prevent a decline in a detainee's condition.

Hunger strikers – IM and IW

27. EIG 55.10 states that those suffering from serious medical conditions which cannot be satisfactorily managed within detention should only be detained in very exceptional circumstances. One would naturally assume that this would mean that those who had reached a stage of critical illness as a result of food/fluid refusal, or 'hunger strikers', must be released. However, in *R (IM*

Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1561, the Court of Appeal held otherwise.

28. The Court (Lewison and Lloyd Jones LJJ, and Sir Stanley Burnton) held that the policy in EIG 55.10 "does not address the continuation of detention generally but the continuation of detention in an IRC or prison" (para.36). Consequently, EIG 55.10 does not require that an individual suffering from a serious medical condition must be released but simply requires that he "must be moved to a suitable place of detention" which is not a detention centre or prison but which might include a hospital. In the circumstances of that case, where the detainee has been offered but refused transfer to a hospital, his continued detention was held to be lawful. Recently, that decision was followed in *R (IW) v Secretary of State for the Home Department* [2014] EWHC 3485 (Admin).

29. In my view, the Court's approach in *IM* was driven more by a fear of the consequences of requiring the release of all hunger strikers, than a careful interrogation of the meaning of EIG 55.10. On a fair reading of EIG Chapter 55 as a whole, EIG 55.10 is not intended to limit the *place of detention* for vulnerable groups, but is instead intended to limit the *exercise of statutory powers to detain* in respect of those vulnerable groups. That approach is consistent with the 'purposive and pragmatic construction' of EIG Chapter 55 favoured by the Court of Appeal in *Das*. As a result, I would submit that the application of *IM* outside the context of hunger strikers may be doubted.

PART TWO: CHALLENGES TO 'MANDATORY DETENTION'

30. Paragraph 2 of Schedule 3 to the Immigration Act 1971 provides as follows:

> *"2.— (1) Where a recommendation for deportation made by a court is in force in respect of any person, and that person is not detained in pursuance of the sentence or order of any court. . . he shall . . . be detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary of State directs him to be released pending further consideration of his case . . .*

> *(2) Where notice has been given to a person . . . of a decision to make a deportation order against him and he is not detained in pursuance of the sentence or order of a court he may be detained under the authority of the Secretary of State pending the making of the deportation order.*
>
> *(3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless . . . the Secretary of State directs otherwise)."*

31. As can be seen, paragraph 2 of Schedule 3 to the 1971 Act provides for both mandatory ("shall") and discretionary ("may") detention. So-called mandatory detention is also provided by section 36(2) of the UK Borders Act 2007.

32. In *R (Francis) v Secretary of State for the Home Department* [2013] EWHC 2115 (Admin), the High Court held that where detention was authorized under paragraph 2(1) or subsequently under paragraph 2(3) of the 1971 Act, the statutory scheme provided a lawful basis for detention, such that it would not be undermined by public law error or breach of the *Hardial Singh* principles. The judgment held the extreme consequence that a sentencing court making a recommendation for deportation would impose detention for an indeterminate period until deportation took place.

33. Fortunately, that extreme consequence has been tempered by the judgment of the Court of Appeal in *R (Francis) v Secretary of State for the Home Department* [2014] EWCA Civ 718. The Court of Appeal (Moore-Bick and Christopher Clarke LJJ and Sir Stephen Sedley) held that detention under paragraph 2(1) or subsequent detention under paragraph 2(3) of the 1971 Act provides a lawful basis for detention which would not be vitiated by public law error, but that the lawfulness of continued detention would remain subject to *Hardial Singh* principles. The consequence of the Court of Appeal's judgment is as follows. Where detention is authorized under paragraph 2(1) or subsequently under 2(3) of the 1971 Act:

a. A public law error – for instance a failure to review detention - will not bear on and will not be relevant to the continued detention, so will not render that detention unlawful;

b. A challenge to a public law error during the period of detention is possible, but the remedy will not be release. Instead, the remedy will be that the public law error is made good (by, for example conducting a review of detention);

c. A claim based on *Hardial Singh* principles may be made both during and after detention and a breach of *Hardial Singh* principles will render detention unlawful, irrespective of the statutory basis for it. As explained by Moore-Bick LJ, *"insofar as paragraph 2(1) (and, on the making of a deportation order, paragraph 2(3)) contains a statutory obligation to detain, the* Hardial Singh *principles can be understood as implied limitations on the scope of an otherwise unqualified direction."*

34. A further issue which remains open is how this plays out in relation to section 36(2) of the UKBA 2007. Section 36 provides as follows:

> *(1) A person who has served a period of imprisonment may be detained under the authority of the Secretary of State–*
> *(a) while the Secretary of State considers whether section 32(5) applies, and*
> *(b) where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order.*
> *(2) Where a deportation order is made in accordance with section 32(5) the Secretary of State shall exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 (c. 77) (detention pending removal) unless in the circumstances the Secretary of State thinks it inappropriate.*

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