Case No: CO/6489/6507/6514 OF 2015

Neutral Citation Number: [2016] EWHC 1781 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2016

Before :

MR JUSTICE EDIS

- -

Between :

THE QUEEN on the application of
(1) SUTHAKAR SATHANANTHAM
(2) VO
(3) BARZAI ALI

Claimants

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

THE SECRETARY OF STATE FOR JUSTICE

Interested Party

- -
- -

Stephanie Harrison QC, Anthony Vaughan and Greg Ó Ceallaigh (instructed by **Leigh Day & Co**) for the **Claimants**
Robin Tam QC, and Tom Poole (instructed by **The Government Legal Department**) for the **Defendant**

Hearing dates: 29 and 30 June 2016

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Judgment

Mr. Justice Edis :

1. These three separate applications for judicial review have been heard together because they raise the same general question. The cases relate to the use of the power conferred on the defendant (SSHD) under s. 4(1)(c) of the Immigration and Asylum Act 1999 (the 1999 Act) to provide accommodation. s.4 and ss.95-98 and 103 of the 1999 Act are set out in full in Annex 1 to this judgment. s.4(1)(c) of the 1999 Act provides as follows:-

> 4. **Accommodation.**
>
> (1) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of persons—
>
> ……
>
> (c) released on bail from detention under any provision of the Immigration Acts.

2. The 1999 Act makes provision for a number of powers designed to support asylum seekers and their dependants ("asylum seekers"). s.95 provides a power to support asylum seekers if they are destitute or likely to become so. This includes a power to provide accommodation which is qualified by ss.96 and 97. s.4 provides a power to provide accommodation for failed asylum seekers by ss.4(2) and (3), as well as for the three categories covered by s.4(1). There is a regulation making power in s.4(5) and (6) whereby the SSHD may specify criteria to be used in the exercise of powers to provide accommodation. Regulations have been made governing applications by non-detained failed asylum seekers[1] but not s.4(1) applicants. These Regulations set out eligibility criteria for support. They do not apply to s.4(1) which means that there are no statutory eligibility criteria for such applications. There is a right of appeal against decisions under s.95 that a person does not qualify for support and against decisions under s.4 not to provide accommodation. The appeal lies to the First-tier Tribunal (FTT).

3. The statutory scheme therefore qualifies the s.95 power and, by regulations, the s.4(2) and (3) power, but not the s.4(1) power which is widely framed. The right of appeal against decisions under s.95 is contained in s.103(1) and that against a decision under s.4 is in s.103(2A). The nature of the decision against which an appeal lies is described differently in the two sub-sections of s.103. An appeal lies against a decision under s.95 that a person does not qualify for accommodation. An appeal lies in respect of s.4 against a decision not to provide accommodation. This suggests that where the s.95 power is engaged eligibility is the factor which determines whether support is provided. All qualifying applicants receive support. Regulations 2005/930 contain eligibility criteria for applications under s.4(2) and (3) which may modify the nature of an appeal under those provisions. Where the s.4 power is engaged (at least until regulations are made) the critical decision is whether or not to provide accommodation. At least in the case of decisions under s.4(1)(c) this decision does not only involve a decision on eligibility but also a decision to offer particular

[1] The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 2005/930.

premises which are (1) available and, more importantly, (2) suitable given the needs of the applicant and the need to ensure public safety.

4. Each of the claimants was detained in immigration detention at the time when these proceedings were issued. Each is a "high risk" applicant because each has served a sentence of imprisonment for serious offences and poses a risk of harm which limits the type of accommodation which can properly be offered. The SSHD seeks to deport them, but that has not yet happened. Each had applied for s.4 bail accommodation in preparation for a bail application. No accommodation had been found for them after a considerable period of time in each case and they remained in detention at the time when the claims was issued. Ali and Sathanantham were subsequently released because it was acknowledged that their continued detention risked becoming unlawful. These proceedings challenge the lawfulness of the way in which the SSHD exercised the power under s.4 of the 1999 Act in various ways. They are brought on behalf of these three claimants, but also raise general concerns about the system which is said to be operating unfairly.

5. The Interested Party, the Ministry of Justice, has played no active part in the proceedings but lodged a witness statement by Mr. Chapman, of the National Offender Management Service (NOMS) which is an executive agency of the Ministry of Justice.

6. The claimants sought to advance 5 grounds on which they said that the operation of the s.4 power was unlawful. Permission was refused on the papers by Cheema-Grubb J, but granted at a renewed oral application for permission by Thirlwall J in respect of grounds 1, 3, and 5 only. The claimants have sought permission to appeal against the refusal of permission on grounds 2 and 4 and that application has been stayed by consent pending this hearing. I am therefore concerned only with grounds 1, 3, and 5.

7. The claimants have filed lengthy documents at various stages of these proceedings setting out their case. I will identify the three grounds by summarising part of the Detailed Grounds which accompanied the claim forms.

   i) Ground 1: Breach of the statutory provisions. This ground contains two otherwise unrelated propositions:

      a) the current operation of the power is illegal because it is not consistent with the purpose for which the power was granted; and

      b) this interferes with the right of access to an independent court to review the justification for administrative detention.

   ii) Ground 3: Unacceptable risk of unfairness in bail applications by "high risk" applicants. Without a bail address the claimants cannot apply to the FTT for bail. This involves very similar considerations to the second part of Ground 1. I shall consider all of these arguments under this ground.

   iii) Ground 5:

      a) The delay systemically in providing bail addresses to high risk offenders is so grave that it is unlawful and unreasonable.

b) The delay in providing a bail address in each of the three cases, individually, is such that the SSHD has self-evidently acted unlawfully in the three individual cases.

8. Grounds 1 and 5 focus on the outcome of the applications and not on the fairness of the procedure by which they were addressed. Ground 3 is on its face a matter of procedural fairness, but actually involves a submission that the SSHD had an obligation to provide accommodation for an applicant because otherwise s/he had no real opportunity to apply for bail and thus the remedy for unnecessary detention which a bail application offers was not a real remedy. By grounds 1 and 3 therefore the claimants contend that the SSHD had an obligation to provide them with a bail address within a reasonable period of time. The real nub of the complaint is that it is taking far too long for accommodation to be found for high risk applicants and that this prevents them from being granted bail when otherwise they might be. In various parts of their documentation the claimants appear to assume that if they had been provided with accommodation they would immediately have been granted bail. In reality, this would have enhanced the prospect of a grant of bail by the FTT but would not have guaranteed it. By ground 5 the claimants seek to address the position which arises if their claim that the SSHD had a duty to provide them with accommodation fails, but it is held that she had a duty to make reasonable efforts to provide accommodation.

9. The principal issue is whether the SSHD owes high risk detainees:

i) A duty to provide bail accommodation on request, if satisfied that the claimant will have nowhere to go unless this is done if bail is granted; or

ii) A duty to make reasonable efforts to provide bail accommodation on request, if satisfied that the claimant will have nowhere to go unless this is done if bail is granted; or

iii) A duty to determine any application for such accommodation fairly and rationally[2]; or

iv) No duty in respect of the s.4(1)(c) power at all.

10. The SSHD's written case submits that s.4 creates a power only and that no duty exists at all. In oral submissions, in answer to a question from the court, Mr. Robin Tam QC who appears for the SSHD said that he would not quarrel with the duty identified at 9(iii).

[2] In submissions following the distribution of this judgment in draft an issue arose as to whether the duty should be expressed in this way (the preferred formulation of the SSHD) or whether it should read "fairly and reasonably". For the purposes of the definition of a public law duty the difference between the two words is minimal and they are for practical purposes interchangeable. It is not a duty to ensure that decisions are taken by someone who is rational in a medical sense. It is a duty to take decisions in a way which is objectively reasonable or, in that sense, rational. My formulation of the duty should be understood in this way wherever it appears.

The system

11. There are difficulties in identifying suitable places for those who have been in immigration detention to live while their claims are being processed. The scheme under review is, substantially, that which was considered by Nicol J in *R (oao Razai) v. SSHD* [2010] EWHC 3151 (Admin) in December 2010, and is described in that judgment. He found that it was not unlawful and no criticism is made of his decision. What is said is that experience has shown that he proceeded on evidence about proposals for improvements which have not been successfully implemented. It is said that his conclusion requires reviewing in the light of the experience of the system over the last 4 years or so. Like Nicol J in 2010 I have the benefit of evidence from Mr. Pierre Makhlouf, the Assistant Director of Bail for Immigration Detainees (BID). This is a charity which represents those who find themselves in immigration detention and carries out research into the system. On this occasion BID was refused permission to intervene in the proceedings by Singh J, but the claimants have served a witness statement from him.

12. The SSHD operates one system to deal with applications under ss.4 and 95. It is not submitted that the decision to operate in this way was unlawful or that it was irrational not to deal with high risk bail applicants by means of a separate system. These applicants are a very small sub-set of the whole group, namely foreign national offenders (FNOs) who are awaiting deportation (Sathanantham and Ali) or the outcome of a fresh claim application (VO). Sathanatham and Ali are awaiting emergency travel documents (ETD) to be granted by Sri Lanka and Algeria respectively and will be deported once they are granted.

13. There are three policy documents for dealing with applications under s.4 of the 1999 Act which cover similar ground. One is for UK Visas and Immigration or "UKVI" staff, the Section 4 Bail Team. This is "Asylum support, section 4 policy and process" and the current version is Version 7, ("the UKVI s.4 Policy"). The second is issued by the Home Office and is called "Section 4 Bail Accommodation version 10", ("the Home Office s.4 Policy"). The third is for Criminal Casework case owners and is called "Criminal Casework, considering cases for section 4 bail accommodation" and is based on agreed working practices across different agencies. The current version is version 3.0, valid from 3rd December 2013 ("the CC s.4 Policy").

14. Chapter 5 of the UKVI s.4 Policy contains instructions to the Section 4 Bail Team for dealing with applications for bail accommodation. An application form is required. These applicants may be asylum seekers (who could also apply under s.95), failed asylum seekers (who could also apply under s.4(2) and (3)) or people who have never had an asylum application but are otherwise in detention under any provision of the Immigration Acts. There are three types of accommodation provided by the SSHD (acting through UKVI) under the UKVI s.4 Policy, and in this respect as in others the content of the Home Office s.4 Policy is very similar (often identical). The three types of accommodation are:-

    i) Initial Accommodation (IA), or Level 1 accommodation. This is usually hostel type accommodation which is short term. People stay in such accommodation while more suitable long term accommodation is found. This can be used for bail applicants, but is not suitable for offenders who present a high risk, as shown by a conviction for a violent, sexual or serious drug

offence or a MAPPA category 1, 2 or 3, level 2 & 3[3]. This means that such people are handled outside the mainstream of the system. An early decision must be made that they are not suitable for Level 1 and whether Level 2 or 3 is appropriate. I will call this the "threshold decision".

ii) Standard Dispersal Accommodation, or Level 2 accommodation. This is longer term accommodation which is provided by third party contractors to the SSHD. It may be shared accommodation and may be unsuitable for people who present a particular level of risk.

iii) Level 3 or Complex Bail Dispersal Accommodation. The UKVI s.4 Policy says that "in the rare event the applicant is assessed as being unsuitable for Standard Dispersal Accommodation Home Office case workers should assess whether Complex Bail Dispersal Accommodation is suitable". The UKVI s.4 Policy says that this will usually only be the case when the Offender Manager[4] has identified specific licence conditions which could not be met in Standard Dispersal Accommodation. This implies that Level 3 applicants will "usually" be subject to licence after release while still serving a prison sentence. In such cases, an arrangement will usually already be in place to regulate the offender once released from immigration detention, and that will include a restriction on where s/he can live. The accommodation provided under s.4 at Level 3 will usually be a single occupancy flat which means that the occupant does not present a risk to those with whom s/he shares premises. Its location must be suitable also, and properties near schools and parks will not be judged suitable for some offenders.

15. The collation of information to enable the threshold decision to be taken is done by a pro forma which the Bail Team sends to the applicant's Home Office Caseworker in blank. This is to be returned in 2 days where a risk assessment is already available or 10 days if an up to date NOMS assessment is required from the Offender Manager. The Home Office Caseworker is expected to contact the Offender Manager if there is one, and to apply to UKVI for an extension of time if necessary. They should then recommend the type of accommodation required. The UKVI Bail Team case worker then decides whether the applicant would be destitute if released on bail without accommodation and, if not, refuses the application. If so, the appropriate accommodation should be arranged.

16. The UKVI s.4 Policy says at 5.7.3

> "If IA and Standard Dispersal Accommodation are assessed by the Home Office case worker as not being appropriate, and Complex Bail Accommodation which satisfies the accommodation requirements is not available, case workers should refuse the application on the basis that the Home Office is not in a position to provide the applicant with a suitable s.4 bail address within the cohort of accommodation available."

[3] Multi-Agency Public Protection Arrangement. The terms of such an arrangement may include a requirement that an offender lives in Approved Premises, formerly known as bail or probation hostels.
[4] A person employed by NOMS, for which the Secretary of State for Justice is responsible. Now called a "Supervising Officer" this person is responsible for dealing with prisoners released on licence.

17. The Home Office s.4 Policy gives guidance on how the Home Office Caseworker plays his or her part in this process. It says (as does the UKVI s.4 Policy):-

> "There is only a very finite supply of Complex Bail Accommodation. In addition, this type of accommodation is more costly than Standard Dispersal Accommodation. As a result the Home Office caseworkers are expected to fully outline in the pro-forma why the use of this type of accommodation is required.
>
> "If an applicant is assessed as being unsuitable for Standard Dispersal Accommodation and suitable Complex Bail Accommodation cannot be found, the s.4 Bail Team may refuse the application for a bail address under s 4(1)(c). Please note that any decision to refuse support may be challenged at an appeal to the Tribunals Service-Asylum Support and/or at Judicial Review at which the validity of accommodation recommendations made by Home Office Caseworkers must be substantiated."

18. That document also requires consultation with NOMS where the applicant is subject to licence after serving the custodial part of a prison sentence. It says this:

> "Occasionally, the Police may express concern or ask to be consulted about the location of where bail accommodation is offered. There is no requirement to ask the Police to approve bail accommodation, but every effort should be made to listen to their concerns and take appropriate action."

19. The CC Home Office s.4 Policy says:

> "To apply for bail a foreign national offender (FNO) must give an address to be granted bail to live at. Not all FNOs applying for bail require s.4 accommodation addresses, but where a bail application is made and no address is given on the prison licence, the FNO must be asked to complete a s.4 application form."

20. s.4 accommodation is secured by the SSHD through a system known as COMPASS[5] by which she contracts with private sector companies which have a contractual obligation to secure accommodation and financial incentives to do so within given time limits. It is not suggested that this is an inherently unlawful system.

21. A Memorandum by Mr. CMG Ockleton, Deputy President of the Asylum and Immigration Tribunal, sets out a procedure whereby the FTT can grant bail in line with the system identified above. Guidance by Mr. Clements, President of the FTT, makes it clear that the Tribunal expects an address to be given by an applicant, and that it must be checked by "the immigration authorities" for suitability. "Bail in

[5] Commercial and Operational Managers Providing Asylum Support Services. The providers are each responsible for a geographical area.

principle" can be granted, for example to enable accommodation to be secured, but in practice this only involves a short deferment of release. This is why the three s.4 Policies are all premised on the accommodation claim being determined before the bail application is made. Once made a bail application will be listed and determined quickly. This indicates that the claimant's submission that in the context of high risk offenders no bail application without an address has a realistic prospect of success is well-founded in practice. I accept that this is so generally, but where the SSHD has been unable to identify accommodation after a very long period of detention and the applicant has nowhere else to go the FTT has power to vary the usual practice.

22. On a monthly basis the level of bail cases is usually less than 2% of the total number of accommodation requests under the 1999 Act accommodation system. Those who are suitable for Initial Accommodation are usually allocated to dispersal accommodation within an average of 14.7 days. This applies to the overwhelming majority of users and the complex cases, which take much longer, are a very small proportion of the overall number. Of the bail cases 74%, on average, are suitable for Initial Accommodation. I am only concerned with the small proportion of bail cases where Initial Accommodation is not suitable and Level 2 or 3 accommodation is recommended by the Home Office caseworker.

The evidence about the operation of the system since 2010

23. This comes mainly from Asma Bano Nazir of UKVI and Mr. Pierre Makhlouf of BID. The witness statements of the claimants can only recount their individual experience. Mr. Makhlouf refers to the research published in BID's report *No Place to Go* (2014) and Ms. Nazir to a wide variety of sources of information. A significant change was made in 2012 when the procurement system of accommodation was changed so that 6 new COMPASS contracts replaced 22 separate contracts with 13 different suppliers. The contracts require the contractors to confirm to standards of performance, Key Performance Indicators (KPI), and allow compensation to be sought by SSHD if those are not met. These include standards relating to the identification of accommodation for s.4 applicants. Compliance is monitored by UKVI. This is now the only way in which UKVI seeks to provide accommodation in the exercise of the SSHD's s.4 power. The introduction of this new system caused problems initially but some improvements in the system were achieved. A report by the National Audit Office was published on 10th January 2014. This demonstrated that many problems remained.

24. The statement of Mr. Makhlouf of BID refers to the BID Report of September 2014 which identified problems which may be summarised as follows:-

    i) Slow processing of applications by UKVI and others involved.

    ii) The threshold decision as to the type of accommodation which was required was 6.61 weeks against a policy goal of 10 days. This involves the completion of the pro-forma by the Home Office caseworker and is the first stage since the COMPASS provider could not be asked to propose accommodation until this was done.

iii) There were delays by COMPASS providers. COMPASS contractors took an average of over three weeks to source a bail address, which is longer than the contractual requirement of, normally, 9 working days.

iv) Level 2 offer times averaged 25 weeks where NOMS approval was required and 8 weeks where licence checks were not required. This suggests that NOMS Offender Managers were taking over 4 months to perform their part of the process.

v) Reasons for risk attribution to applicants were not given which meant errors could not be challenged and corrected.

25. Ms. Nazir produces a Table which shows that annual numbers of new asylum applications had increased by 80% from the 2010 level in 2015. Very many of these applicants require asylum support including the provision of accommodation. The number of applications for asylum support has increased in the same period by 89%. The number seeking accommodation as part of that support has grown significantly over that period. The demand for asylum accommodation has grown from 8,347 applications per year in 2010 to 17,314 in 2015. In 2010 the ratio of single applicants for support to families was 3:1, in 2015 it was 9:1 meaning that the demand for accommodation for single destitute adults has grown disproportionately to the overall increase in demand. The supply of such accommodation cannot be increased overnight to meet this demand. The end point of the analysis is that the system is under pressure from increased demand and that increase is the result of external circumstances which are not the fault of the SSHD. The submission is made on behalf of the claimants that many years ago the system was faced with even higher levels of demand and that it should therefore be adequate now. This is not well-founded. The amount of accommodation available and the administrative resources of the system will vary over time along with demand.

26. A consequence of the system is that in some cases time and money is wasted in securing accommodation which is never occupied. This is because accommodation offered under s.4 will only be occupied if bail is granted. Currently, Ms. Nazir says, there are 56 empty addresses because accommodation was secured in cases where bail was not granted. This suggests that a primary motivation in changing the policy to the use of Initial Accommodation in 2009 as explained by Nicol J in *Razai* has not been satisfactorily achieved.

27. A letter of 16th June 2016 from the Government Legal Department to the claimants' solicitors by way of disclosure attaches two Tables. The letter declines to answer a number of questions designed to produce further statistics because the data is not maintained in a way which allows them to be answered. The number of applications is not indicated in these figures. These Tables measure only the number of offers made and the time between the application and the offer. The data works backwards from the offer and applications which did not result in an offer are not included. Cases where no offer has been made, such as two of the three claimants, do not appear. The tables show the total number of offers made and the time in respect of those offers which had elapsed since the application. The Tables are annexed to this judgment in Annex 2. They cover the months from January 2014 to May 2016 inclusive, a period of 29 months.

28. The Tables in Annex 2 appear to show

a) That the length of time between application and offer in Level 2 cases has worsened significantly over that time. The average time between application and offer in 2014 was 62 days, in 2015 84 days and in the short year to May 2016 it was 136 days. The number of offers made remained very approximately stable during 2014 and 2015 but fell sharply in 2016. Without further information it is not possible to assess whether the reduced number of offers in 2016 is a consequence of the slower processing of applications or a consequence of a reduced number of applications or a reduced number of suitable properties. All three factors, and others, may be at work.

b) The number of offers of Level 3 accommodation is very small. Statistical extrapolation from such a small dataset is not likely to be useful. Each case is a separate problem which requires a bespoke solution. Solutions are not likely to be easily found. This cohort is comprised largely of criminals who have been released from custodial sentences and whose deportation on public safety grounds is being attempted by the SSHD. It is likely to be very difficult to find accommodation for them which is regarded by all relevant agencies as safe. The figures show that the average time between application and offer was 91 days in 2014, 190 days in 2015 and 283 days in 2016. This, again, shows a slowing in process. It is not likely that the difficulty of locating accommodation is a major factor in the increase since that might be expected to be constant. If there has been a surge in the number of applications, the resources available for processing them may be stretched and this might lead to a slowing in the allocation of accommodation.

29. Mr. Makhlouf at 2-17 gives figures for applications for the years 2010-2014. The lowest number was 3,138 and the highest 3,841. This is very approximately level. Over the 5 years taken together, 83% of offers were of Initial Accommodation, 15% of Level 2 accommodation and 12% of Level 3 accommodation. The total number of Level 3 offers was 137 over 5 years, although this does not reveal the total number of cases assessed as requiring Level 3 accommodation as there was certainly at least one (VO) where no offers were ever made.

30. Ms. Nazir offers a summary of the current position in paragraphs 85 and 86 of her statement. She says that improvements have been secured but that there are cases where it is extremely difficult to find accommodation because of serious convictions or other circumstances. She says that the UKVI and Home Office s.4 Policies allow refusal of an application where the applicant is assessed as being unsuitable for any available accommodation (paragraphs 16 and 17 above), but says that she does not recall any case where this has happened. After hearings in the FTT in 2010 a policy was adopted whereby the most appropriate (or "least worst") address available would be provided where NOMS or the police repeatedly reject addresses proposed by UKVI. This has happened in a small number of cases and Ms. Nazir says that in hindsight in some cases it should have happened earlier. She says that a policy of abandoning the attempt to find approved accommodation earlier would have drawbacks as well as benefits. The FTT is responsible for the ultimate decision about

whether to bail an applicant to a particular address and may take the same view as NOMS and the police. Dispensing with the approval process too soon would not in some cases assist the applicant in getting bail. Further, the failure to find a bail address may ultimately lead to the release of the applicant without a residence restriction as has happened in the cases of Sathanantham and Ali[6]. This is because long detention may be held unlawful applying the *Hardial Singh* principles explained in *R (Lumba) v. SSHD* [2012] 1 AC 245.

31. If a property is rejected as unsuitable after consultation about it with NOMS or the police, the process starts again from scratch. There is no central stock of accommodation of this kind and it may have to be sourced by the provider when the application is made. This system is inevitably cumbersome and vulnerable to delay even without maladministration which may occur in individual cases from time to time. The process is explained in the statement from Brian Chapman, of NOMS, dated 17th June 2016. The system differs between cases where the applicant is in immigration detention while on licence after release from the custodial part of the sentence to which s/he is still subject and cases where the licence has expired. In the former cases conditions are attached to licences which require an address to be approved for the purposes of the licence quite separately from any such requirement as a condition of immigration bail. There is a Supervising Officer (called Offender Manager in the UKVI and Home Office s.4 Policies) employed by Probation Services who is responsible for proposed accommodation and who is required to conduct a risk assessment and consult other agencies, such as the police, social services, and Home Office Immigration Enforcement. Where relevant MAPPA (established under ss.325-327 of the Criminal Justice Act 2003) will also be engaged. As might be expected, there are detailed Probation Instructions, and Prison Service Orders which seek to regulate this process. Public safety is at the forefront of these policies but the need for speed is emphasised and the aim, namely the re-integration of the offender into the community as expressly stated. They provide for the preparation of a risk assessment and provide a system for that. NOMS now proposes to pilot a scheme which is designed to reduce delays in its processes which is expected to be signed off in July 2016 and published shortly thereafter. Mr. Chapman says that he has "no clear information about when this pilot will start." Where the licence has expired NOMS and the police will not already be involved in a process of evaluation of a proposed address for an applicant. If the applicant is a sex offender s/he will be required to notify the police of his/her address but this does not import a power to dictate where the offender should live.

32. The FTT in deciding whether to grant bail to a person in immigration detention will consider public safety in all cases and the suitability of a bail address. It is inevitable therefore that the SSHD will do likewise, even in cases where the detainee is not subject to licence. There is no point in sourcing accommodation which will be found unsuitable by the FTT leading to a refusal of bail. This involves consultation with the police and any other agencies who are involved, not only as to the type of accommodation required at the pro-forma stage but when considering the particular accommodation proposed by the COMPASS provider against the needs of the FNO as well as public safety.

[6] In the case of Ali he was released with a restriction to an address which he says is not available to him with the result that he is street homeless. How this happened is a matter of dispute between him and the SSHD, see below.

33. Paragraphs 29 and 30 of the statement of Ms. Nazir identify the particular problem in the system referred to in paragraph 26 above. The third party providers of accommodation have to source and reserve it when they propose an address to the s.4 Bail Team. This means that they incur costs even when the property is found to be unsuitable or where a bail application is refused. A new system has been introduced by the Immigration Act 2016 (which repeals s.4 from a date to be appointed) but the ways in which that will be implemented have not yet been resolved.

34. It therefore seems that there is agreement between the parties that the current system needs to be improved. Paragraph 1 of Part 1 of Schedule 11 to the Immigration Act 2016 repeals s.4 from a date to be appointed. No-one contends that the system is working well. The question about which there is disagreement is whether it is currently unlawful in dealing with applications by persons assessed as unsuitable for Initial, or Level 1, accommodation by reason of the risk they pose to the public.

The three cases

35. The pro forma was completed in the present cases in 35 days, 20 days and 37 days respectively. In each case this is in excess of the 10 days required by the UKVI and Home Office s.4 Policies. In each case proposals for accommodation were made by COMPASS providers which were deemed unsuitable after consultation with NOMS and/or the police. Delays occurred in sourcing further proposals of accommodation and the end result was very long detention without a bail address being offered. A Table summarising the facts of the 3 cases was prepared by the claimants' legal team and is attached as Annex 3 to the judgment. The narrative which follows is a summary of that.

Sathanantham

36. This claimant is a national of Sri Lanka and was detained under immigration powers between 10th September 2013 and 3rd May 2016 pending removal. He is the subject of a signed deportation order. The evidence of Ms. Nazir is that he has frustrated removal by failing to co-operate in the efforts to secure an ETD. Eventually he was released without any address given. Nearly two years elapsed between his s.4 application and his release.

37. He sought and obtained indefinite leave to remain in the UK many years ago, but was convicted at Southwark Crown Court on 29th January 2007 of assault occasioning actual bodily harm and sentenced to 2½ years imprisonment. On 16th November 2012 at Warwick Crown Court he was convicted of sexual assault on a female and sentenced to 1 year, 7 months and 20 days imprisonment and required to sign the Sex Offenders Register for 5 years.[7] It is a consequence of that order that he is required to inform the police of his address and of any other place where he resides or stays for more than 7 days in any 12 month period. He had other relevant convictions as well, including other violent offences and 2 offences of failing to surrender at the appointed time. He has a MAPPA Category 1 rating and is assessed as presenting a high risk of serious harm to the public, including females, children and others who are at risk of

[7] This is what the evidence says. However the appropriate period would appear to have been 10 years, see Sexual Offences Act 2003 s.80.

unprovoked and random acts of violence and also of sexual assault. He is assessed as presenting a high risk of absconding.

38. The period of licence under his latest sentence expired on 5th July 2014. On 29th July 2014, while in immigration detention, he was served with deportation letters and on 4th August 2014 a request for an ETD was made to the Sri Lankan consulate. He was interviewed for that purpose on 21st August 2014 but his identity was not established and the High Commission asked for further evidence. On 2nd October 2014 he applied for s.4 bail accommodation. His case was referred to a "Case Owner" for a risk pro forma to be completed. This was returned on 7th November 2014 and he was found not to be suitable for Initial Accommodation, but Level 2 accommodation was required. A request for accommodation was made to a provider on 10th November 2014 and accommodation was offered on 22nd January 2015. This property was not approved by the police because there were two schools within 500 yards and a parade of shops at the end of the street. The Criminal Casework group reported this result on 11th June 2015. A further property was identified by a provider on 11th September 2015 and on 21st April 2016 the police reported that it was not suitable. There were already two registered sex offenders living there and young females were known to be visiting. These proceedings were issued in December 2015. In the end, he was released by the Strategic Director of UKVI without any fixed abode.

VO

39. VO is a national of Nigeria who is the subject of a signed deportation order. Her appeal against that was dismissed on 30th December 2015 and she became appeal rights exhausted on 1st March 2016. Her continued detention was authorised on 28th April 2016 because of the risk of absconding, re-offending and harm. She has now issued another asylum application and another judicial review. It is that second judicial review which is the remaining bar to her deportation, removal directions having been set for 22nd March 2016 but stayed by the Upper Tribunal.

40. She was convicted of causing grievous bodily harm with intent at Woolwich Crown Court on 17th April 2013 and sentenced to 4 years imprisonment. She had denied her guilt but had been convicted. In sentencing her, the judge made significant findings about her dishonesty. Her Offender Manager assessed the risk she posed of serious harm to those she would live with as high. She did not complete any offending behaviour programmes while in custody. She is subject to licence and there is, therefore, no point in sourcing accommodation which will not be approved as suitable by her Offender Manager because she is required to live where s/he directs.

41. She applied for s.4 accommodation on 19th November 2014 and the pro forma was completed by 9th December requesting Level 3 accommodation. On 24th February 2015 the s.4 Bail Team wrote to her solicitors saying that this kind of accommodation was limited and hard to find and that they had no control over the length of time the providers took to propose a property. The first such proposal was eventually received on 22nd July 2015 but NOMS said on 26th August 2015 that it was not suitable because it was not self-contained and in multiple occupancy. It transpired later that it was also only for men. The next proposal was received on 30th October 2015 and found unsuitable on 17th December 2015 by NOMS. The problem on this occasion was neither the police nor the social services because they were happy that the address was suitable. This time it was the Senior Probation Officer who objected because the

premises were not approved by the Probation Service. A third address was found on 22nd January 2016 and as at the date of the hearing a decision on whether it was suitable or not is still awaited.

Barzai Ali

42. Mr. Ali is the subject of a signed deportation order and awaits only the issue of an ETD by Algeria. An ETD was refused by the Algerian authorities on 15th May 2015 and efforts have continued since then to secure one. Mr. Ali has failed to convince them that he is Algerian and the SSHD suspects that this is because he is not trying very hard. He made a bail application with a s.4 bail address on 25th January 2016 which failed. He was then released by the SSHD on 26th January 2016 to a private address in Cardiff subject to reporting restrictions and electronic monitoring. He is now regarded as an absconder having failed to be present at the address to enable monitoring to be installed. He says that he told the SSHD that the address they used was not available to him, but that is disputed. It is not material to my task to resolve that.

43. He has multiple convictions for violence and failing to surrender to bail. He has been sent to prison on a number of occasions. He has travelled to Sweden and Germany without being documented and is assessed as presenting a high risk of absconding. A number of his offences have been committed while on bail.

44. He was detained in immigration detention most recently on 15th August 2014 on completion of his latest custodial sentence. He asked for s.4 accommodation on 23rd September 2014 and his pro forma was returned on 3rd November 2014 identifying a need for level 2 accommodation and saying that it would require approval by NOMS. The first property was proposed on 5th November 2014 but this was not suitable, refusal being communicated by NOMS on 17th February 2015. It was in a high crime area. Another property was proposed on 23rd February 2015 and refused on 11th March 2015. The third was proposed on 13th March and refused on 7th May 2015. He was refused bail at a hearing on 27th October 2015, but apart from that nothing happened until January 2016 because of an oversight. That period of delay is unjustifiable on any view.

Current status of claimants

45. VO remains in immigration detention. She appears to be reaching the end of her ability to postpone deportation and I have asked for up to date information about her current attempts to do so. Sathanathan and Ali are not in immigration detention and, as failed asylum seekers, may make new applications for accommodation under s.4(2) of the 1999 Act which, because of the Regulations, will succeed if they can show they are eligible for accommodation under that provision. I am told that Ali has made an application which has been sent back to him because it has not been signed. These considerations may be relevant to remedy but not to the issues I address in this judgment.

The Claimants' submissions

Ground 1: the Padfield point

46. A critical issue is the existence and definition of any duty owed by the SSHD in exercising her power under s.4(1) of the 1999 Act. The claimants submit that the power must be construed consistently with the fundamental right to liberty and protection from arbitrary deprivation of liberty at common law and Article 5 of the European Convention on Human Rights. This, they say, involves access to independent scrutiny of administrative action where persons are detained. It is common ground that immigration detention may be reviewed as to its lawfulness by the Administrative Court by judicial review and the FTT may grant bail.

47. The claimants then make a submission based on the *Padfield* principle which requires powers to be exercised in a way which is consistent with the statutory purpose of the provision which conferred them. The principle was recently re-stated and applied in *M v. Scottish Ministers* [2012] UKSC 58, [2012] 1 WLR 3386. The claimants submit that the statutory purpose is the provision of release accommodation where it is necessary to protect the right to liberty and to enable proper judicial oversight of detention. A bail address is regarded as a virtual necessity by the judges of the FTT when dealing with FNOs who provide a risk to public safety and a risk of absconding. Therefore, the power can only be exercised in accordance with the statutory purpose if it is treated as a duty to provide accommodation to those who are eligible. The use of the word "may" appears simply to ensure that the SSHD can refuse to provide accommodation for those who do not need it.

48. On that foundation the claimants then submit that if the provision of release accommodation is a duty, then there is a duty to provide it quickly. They then submit that the system is in breach of the provision in s.4(1)(c) whether it is a power, or as a duty coupled with a power. This is because the delays are so long and systemic.

49. The claimants submit that scarcity of resources is not a relevant consideration if the SSHD has a duty to provide accommodation. They cite well known authority for this.

50. The claimants rely on the power under s.4(5) of the 1999 Act to make regulations specifying criteria to be used in determining whether or not to provide accommodation under s.4. The *Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005/930* provide criteria of eligibility in those cases. Paragraph 66 of the claimants' Skeleton says this:

> "Likewise, the statute does not contemplate, and proceeds on the basis that, if the applicant is assessed as eligible under s.4(1), the accommodation will be provided and as such is an entitlement: *Salih v. SSHD* [2003] EWHC 2273 (Admin) at [49]."

51. *Salih* was a challenge to the decision of the Home Secretary not to inform failed asylum seekers of his policy on hard cases support which Stanley Burnton J held was unlawful and must be reconsidered. At [49] as part of his reasoning towards that conclusion, the judge said:-

> "Furthermore, although the hard cases policy defines eligibility for, rather than a right to, support, in practice all those who are eligible and claim section 4 accommodation receive it, and there is nothing to suggest that any factors are taken into

account that are not stated in the policy itself. In other words, as in the case of Part VI support, eligibility is in practice treated as an entitlement."

52. The claimants also rely on the terms of s.103 of the 1999 Act which allows an appeal against a decision that the applicant "does not qualify for support" as implying that a decision on eligibility determines whether or not accommodation will be provided. A similar point is made on the powers of the FTT (Social Entitlement Chamber) on hearing such an appeal. In fact this argument is based on a misreading of s.103 and a proper reading supports the contrary view. The key words "does not qualify for support" are used only in respect of the power under s.95 and not in respect of the power under s.4, as I point out at paragraphs 2 and 3 above. On ordinary grounds of statutory construction, by which different words have different effects, the terms of s.103 (2A) are to be given a different meaning from those of s.103(1). In the first provision eligibility is treated as determining entitlement. In the second it is not. I shall return to this below.

Ground 3: the Bail Application

53. The claimants allege that the failure to provide accommodation causes an unacceptable risk of unfairness in practice, and in the individual cases actual unfairness in applications for release on bail. The FTT judges are unwilling to grant bail without a bail address, at least in cases such as the present. It is also submitted that this creates an unfair litigation advantage in that the SSHD secures her success in resisting the bail application by failing to provide s.4 accommodation. This is said to create an inequality of arms. It is not submitted that the decisions in any of these three cases were taken with the collateral motive of continuing the detention of the claimants and preventing them from getting bail. It is accepted that the applications were accepted as being eligible for accommodation and that efforts were made to find bail addresses.

54. The history of the bail applications actually made in this case is set out and relied upon:-

i) Sathanantham made 3 applications for bail in 2014 without success when he had no bail address. He had made no application at all after his application for s.4 accommodation in October 2014. He was released in May 2016 because his detention had become unlawful, in that his deportation could not be achieved within a reasonable period because of the lack of an ETD.

ii) VO has never made a bail application.

iii) Ali made 2 applications, both unsuccessful. The second was on 25th January 2016 when he had been offered s.4 accommodation. He was released on the following day by the SSHD despite the failure of the application.

Ground 5: delay as a breach of a duty to act reasonably

55. On ground 5 the claimants submit that even if there is only a duty to make reasonable efforts to supply accommodation the delays are unreasonable and show a systemic failure. Whether that is so or not, they submit that the facts of the individual cases

show a breach of the duty to make reasonable endeavours to provide them with accommodation. In the cases of the two claimants who have now been released, it was submitted that the SSHD is wrong to treat their s.4 applications as lapsed on the ground that they can no longer be bailed and do not therefore qualify for s.4(1)(c) accommodation. This last submission was not pressed in oral submissions. They are both eligible to make s.4(2) applications.

The SSHD's submissions

Ground 1

56. In a skeleton argument received on 28th June 2016 the SSHD sets out her case in full for the first time by way of submissions. In *Razai* counsel on her behalf accepted that the case should be decided on the assumption that she was under a duty to use reasonable endeavours to provide accommodation on an application under s.4(1)(c) by a person who fulfilled the statutory criteria of eligibility. At [26] Nicol J decided to consider that claim on that basis although he commented that further consideration may have to be given to the issue in later cases. That concession (as I shall call it although Mr. Tam QC who appears for the SSHD did not so describe it) is withdrawn before me and I am required to decide whether the SSHD is under any duty to provide accommodation under s. 4(1)(c) and, if so, what that duty is.

57. It is submitted that the SSHD has not refused accommodation in any of these cases. A refusal may be appealed to the FTT and this has not happened. Ms. Nazir, quoted above, says that cases may be refused if no accommodation is available, but this has not happened since 2010. Therefore, in respect of a failure and not a refusal to provide accommodation the SSHD contends that it must be shown that she has failed to act when she had a duty to act. She accepts that there may be cases where it might be shown that a failure to act by exercising her discretionary power to provide accommodation was irrational and thus unlawful, but not that the statutory power can ever be converted into a duty.

58. When I asked Mr. Tam what the SSHD now says her duties are, he did not resist the suggestion that there must at least be a duty to determine any application for s.4 accommodation fairly and rationally.

Ground 3

59. It is accepted that the absence of a bail address is often fatal to a successful bail application before the FTT. It is submitted that having a bail address is not a guarantee of success in such an application. It is therefore submitted that the right of access to the FTT is not infringed by a failure to provide accommodation. The right to make the application may be exercised at any time and if an applicant can source accommodation outwith s.4, then the FTT will consider the application on that basis. It is submitted that the circumstances of the claimants militate against bail in each case, and that this is the real reason why they were detained. It is submitted this is really another way of putting ground 1, because that the submission really asserts that the claimants' procedural rights in respect of the FTT operate to convert a statutory power into a duty.

60. The SSHD submits that the suggested duty would be a duty on her to assist the applicants in providing material which assists the merits of their applications and goes far beyond the kind of duty to provide a fair system recognised in *Saleem v. SSHD* [2001] 1 WLR 443, *R(Q) v SSHD* [2004] QB 36 and *R(RLC) v. SSHD* [2004] EWCA Civ 1481. There is, it is said, a difference between a duty to ensure that a party's case can be fairly presented and heard, and a duty to supply the case itself.

Ground 5: delay

61. Ground 5 is resisted on the ground that systemic delay, on its own, is not justiciable. Such delays are not necessarily the result of an unlawful system, but are affected by a large number of factors some of which are beyond the control of the SSHD. The availability of suitable accommodation and the demand for it are matters which the SSHD has to consider when deciding what sort of system to establish. She has also to take into account public safety considerations. Delays may also be the result of maladministration and muddle which is not the same thing as systemic unlawfulness. It is submitted that the only part of the process which is directly under the control of the SSHD is the pro forma system, see paragraph 16 above. The failure to meet the 10 day target in each of these cases does not involve any unlawfulness, and the delays thereafter are attributable to the intractable problems posed by the task of finding safe accommodation for FNOs with the risk profiles of these three claimants. In truth, the complaints in ground 5 (both parts) involve complaints about resource allocation rather than any legal challenge to the exercise of a statutory power.

Discussion

62. It seems right to start with a firm expression of the importance of the right to liberty, and to a speedy determination of the propriety of administrative detention by an impartial court. Article 5 of the European Convention on Human Rights identifies key principles of the common law in this regard. The common law history is outlined in *A v. SSHD* [2005] 2 AC 68 [36]. Lord Bingham there sets out the submission made by counsel for the claimants in that case but does so in a way which makes it clear that he accepts the common law origin of the fundamental importance of the right to personal freedom. This approach to Article 5 and Article 5.4 in particular is mandated by *R (Osborn) v. Parole Board* [2014] AC 1115 [57]-[63]. I start from the proposition that the claimants' right to liberty is a fundamental one which the courts will protect to ensure that any restrictions are lawful, proportionate and subject to judicial oversight.

63. This starting point affects a number of aspects of the case. The importance of the right requires proper protection by fair procedures and judicial oversight. Where detention has no defined duration its impact may be particularly damaging to the detainee. I was supplied with the *Review into the Welfare in Detention of Vulnerable Persons* CM 9186 January 2016 by Stephen Shaw to illustrate this observation. In the case of immigration detention, the length of the detention is constrained always by *Hardial Singh*[8] principles which do not require a certain release date to be known at the start of the detention. The lawfulness of detention is determined when challenged on that basis by the High Court in judicial review proceedings, and in damages actions. There is, therefore, judicial oversight of detention. The present claims

[8] See *R (Lumba) v. SSHD* [2012] 1 AC 245 [22] per Lord Dyson JSC for the statement of these 4 principles.

concern bail prior to the *Hardial Singh* end point which is an important safeguard against unnecessary detention.

64. I do not accept that s.4(1)(c) should be construed as a statute which authorises detention as submitted by Ms. Harrison QC for the claimants. She made this submission in order to persuade me that I should construe the provision with "extreme jealousy" so as to constrain a claim by the state to be entitled to detain these claimants without trial, see *Tan Te Lam v. Tai A Chau Detention Centre* [1997] AC 97, at 111D-E and 113H-114A. The provision permitting detention has been construed authoritatively in the statement and restatement of the *Hardial Singh* principles. I do accept that the functioning of immigration bail is a matter of great importance and that the courts should consider with anxious scrutiny the way in which the system works. It is to be recalled that the FTT is, for these purposes, a court[9] and is the ultimate decision maker on whether or not bail is allowed. The statutory scheme places the FTT as the judicial body with oversight of immigration detention. It may grant bail and may allow appeals against refusals of applications for accommodation. There is no challenge in these proceedings to the way in which it fulfils its function.

Ground 1

65. *Padfield v. Minister of Agriculture* [1968] AC 997 requires the court to construe the limits of the breadth of a power by reference to the statutory purpose of the Act which conferred it. The decision was explained in *M v. Scottish Ministers* [2012] 1 WLR 3386 [46]-[47]. It is to be noted that both these cases concerned the exercise of a power in a way which would run counter to a clearly identifiable statutory scheme. The statutory scheme is to be considered as a whole to determine whether the power is, in reality, a duty or whether it is "coupled with" a duty, see the passage from *Julius v. Bishop of Oxford* 5 App Cas 214 quoted by Lord Reed JSC in the *Scottish Ministers* case at [46].

66. The power in s.4(1) is one of a collection of powers to provide support in an immigration context. The purpose of the powers under s.95 and s.4(2) and (3) is to provide support for those who are making or have made a claim for asylum while it is being determined and before they are removed if it ultimately fails. Those are powers which exist against the background of the obligations to refugees in international law and the prevention of asylum seekers in the UK from working. The power under s.4(1) may be exercised in the case of an asylum seeker if granted temporary admission or detained in immigration detention, but may also be exercised in other situations where a person who is not an asylum seeker has been detained under the Immigration Acts. It is part of a statutory scheme which includes the power to detain and the power to release on bail. It exists to enable those who are destitute to be granted bail in appropriate cases. This is in the interest of the detainee, but also in the interest of the taxpayer. Initial Accommodation costs an average of £32.35 per person per night. Dispersal accommodation costs an average of £9.45 per night. Detention costs an average of £89.93 per night. Bail, subject to conditions, is a means of protecting public safety as well as the public purse. When considering the adequacy of the system of review of claims that detention should continue on public safety grounds, it should be recalled that no-one applying for immigration bail is required to be detained by an order of a criminal court. Those on licence have a right to be

[9] See paragraph 72 below.

released from their sentence, and those whose terms have expired altogether are *a fortiori* cases. The criminal justice system, which is the principal protector of public safety against dangerous offenders, does not require any of these people to be detained. This does not, of course, mean that people cannot be detained under the Immigration Acts on public safety grounds. The court (principally the FTT) will anxiously scrutinise a claim that detention is required on public safety grounds because it is not safe to house the detainee in any of the accommodation which can be found. Bail on terms is often in the interest of all concerned and the statutory purpose is to ensure that it is available when it is appropriate.

67. The power to provide accommodation in s.4(1)(c) is a power to provide it to those who have been released on bail. The SSHD has established a system for its exercise which I have explained above. She has not decided not to exercise it. If she adopted a policy of declining ever to accommodate those who were released on bail this may perhaps violate the rule in *Padfield's* case, but that is not what has happened here. What has happened here is that the system which the SSHD has established is trying, but failing, to offer suitable bail accommodation to the small number of high risk bail applicants within a reasonable period of time. The policy which she has established is not irrational or unreasonable, it is simply not working very well. There are several reasons for this which include the complex nature of the task in difficult cases and maladministration. The complex nature of the task includes the difficulty in sourcing accommodation for asylum seekers generally in what is sometimes a hostile climate. That difficulty is magnified when the detainee is dangerous to a degree which requires the accommodation to be of a particular kind and in a particular location. In one of these cases accommodation was said by the police to be unsuitable because there is a row of shops at the end of the street. In another the probation officer rejected the address because it was not approved by the probation service. These reasons may require some further explanation, but the SSHD cannot compel either the police or the probation service to approve premises. She could perhaps refuse the application which would allow an appeal, or she could offer the accommodation and let the FTT decide whether the police or probation objection to the address was well-founded. Neither of those steps would assist in the case of an offender subject to licence where there is a different statutory regime which gives powers to NOMS to direct where an offender may live. In another of these cases accommodation was offered to a female in a male only residence by the COMPASS provider. The SSHD does have control over the providers to the extent that they have entered into contracts with her. The nature of the problem in this case is not the same as that in *Padfield* and the *Scottish Ministers* cases. It is unintended delay which is the problem, not a deliberate decision to delay as in the latter case, see [13] and [19].

68. Further, the statutory purpose is not that everyone who applies for bail must have it. The purpose of detention is to prevent offending and to prevent absconding. That is part of the statutory purpose of the scheme of which s.4(1)(c) is a part. Only where those risks are adequately addressed by bail conditions can it be granted. The decision rests with the FTT, but like all courts when considering bail the FTT relies on advice from those who are responsible for evaluating risks. The President's Bail Guidance quoted above makes it clear that the FTT will not grant bail unless an address has been considered and approved by the Immigration Authorities. This is not a provision made by the SSHD but by a Tribunal. The SSHD operates a system for the provision of accommodation to those applying for immigration bail,

presumably because she considers that she has a duty to do so for *Padfield* reasons. If she is right about that, this does not mean that every bail applicant must be offered accommodation. The UKVI s.4 Policy makes it clear that the Bail Team do not consider the merits of the bail application in deciding whether to offer accommodation. However, by operating the pro forma system and seeking a risk assessment and NOMS approval of addresses offered by COMPASS providers they do engage with factors which may be determinative of the application. There will be some applicants for bail for whom no approved address will meet the risk they pose and that will lead to a refusal of bail accommodation and, even if an offer is made, to a refusal of bail. For this reason I do not accept the submission that eligibility to accommodation means entitlement to it, which was supported by reference to the observation by Stanley Burnton J as he then was in *Salih & Rahmani v. SSHD* [2003] EWHC 2273 (Admin) [49] which I set out at paragraph 51 above. Whatever may be the position in asylum support cases generally, in high risk bail cases the applicant is not entitled to accommodation generally but only to occupy particular premises which have been identified and assessed for suitability. Eligibility to accommodation generally simply starts the search. No entitlement arises until the search is successful. An entitlement is the other side of a duty and equally no duty to provide accommodation arises until the same point. This is supported by the different description of the decision on an application under s.4(1)(c) in s.103 of the 1999 Act when describing the right of appeal as opposed to the description given there of a s.95 decision, see paragraphs 1, 2 and 51 above.

69. I do nevertheless conclude that the statutory power in s.4(1)(c) is a power coupled with a duty. It is unnecessary to decide whether the duty extends to the existence of a policy of the kind I have been describing because there is one. The policy itself is not challenged as being unlawful. In my judgment, as Mr. Tam was inclined to accept[10], there is a duty to operate that policy fairly and rationally. That involves a duty to determine applications fairly and rationally and to apply the relevant policy. Unusually for an application for assistance, the task of assembling all relevant material falls not on the applicant but on UKVI under the UKVI s.4 Policy. If there is a duty to deal with applications fairly and rationally, this must extend to all the parts of the process for which the SSHD is responsible. The duty to deal fairly and rationally with an application in these circumstances is not merely confined to adjudicating on material supplied by the applicant. This is not, in practice, a materially different duty from a duty to make reasonable efforts to provide accommodation. I prefer the formulation of the duty as a duty to act fairly and rationally and in accordance with the policy when confronted with an application because it seems to me to arise from very clear public law principles which regulate the exercise of powers. The argument which Nicol J summarises in *Razai* at paragraph 25 by analogy with s.117 of the Mental Health Act 1983 was not advanced before me and is not entirely convincing because s.117 in terms creates a duty whereas s.4(1)(c) in terms confers a power. The route I prefer leads to a very similar result.

70. Therefore, the first ground of challenge fails. The SSHD was not under a duty to provide accommodation and her failure to do so was not, of itself, unlawful.

[10] See paragraph 58 above.

Ground 3

71. The attempt to create a duty to provide accommodation out of the need for procedural fairness in the bail system is ingenious but doomed to fail.

72. I accept that a right of access to a tribunal is just as important and fundamental as a right of access to the ordinary courts *R v. Home Secretary ex p Saleem* [2001] 1 WLR 443, 458A per Hale LJ. But what is in issue in these cases is not the right of access to a court, but the right to advance a better case.

73. Ms. Harrison relies on a number of decisions where courts have held that a system of decision making was unlawful because it involved an unacceptable risk of injustice. The rules themselves created a risk that a party's true case would not be heard. *Osborne v. the Parole Board* [2013] UKSC 61 was such a case. The claimants alleged that procedural fairness required that their cases should be considered at an oral hearing. The Supreme Court held that the court would consider for itself whether the procedure adopted was fair rather than simply review the reasonableness of the decision under consideration. The issue in each case was whether the case of the claimant was such that fairness required an oral hearing. The case was about procedural fairness which is necessary to improve the quality of decision making, to avoid a sense of injustice in someone who has not been heard and to uphold the rule of law. In *R (Detention Action) v. First-tier Tribunal (Immigration and Asylum Chamber) and others* [2015] 1 WLR 5341 the Court of Appeal held that the Fast Track Rules governing appeals to the FTT where an asylum claim had been refused by the SSHD were unlawful because they were unfair. An appeal could not be heard within 7 days of the decision without an unacceptable risk that an appellant's case could not be properly presented and heard by the FTT. The only time when an application could be made to adjourn was at the hearing. The appellant would seek an adjournment explaining that his case was weak without further time. If the adjournment was refused the Tribunal to which he had explained the weakness in his case would then determine it. The system was therefore structurally unfair and unjust and the Rules were *ultra vires*. At [22] Lord Dyson MR cited Sedley LJ in the *Refugee Legal Centre* case [2005] 1 WLR 2219 [8] with approval. That passage makes it clear that procedural safeguards were under consideration, and that the court has power to decide whether a system is procedurally fair given the individual interest at issue, the benefits to be derived from additional procedural safeguards and the costs to the administration of compliance. The relevant general principles are set out at [27].

74. It does not devalue the importance of her function to observe that the SSHD's role in providing accommodation under s.4(1)(c) is not a matter of procedural fairness. If she identifies and proposes suitable bail accommodation, the bail application will be strengthened and if she does not it may be doomed. This goes to the substance of the applicant's case before the FTT and not the fairness of the procedure by which it is determined. Once it is accepted that there is a duty coupled with the power to exercise it fairly and rationally, it is unnecessary as well as contrary to principle to strain the concept of procedural fairness so that it gives rise to a substantive duty on the SSHD to provide accommodation.

75. This ground is also argued in an alternative way. It is submitted that the SSHD obtains a litigation advantage in resisting a bail application where she does not

provide a bail address. I have already observed that the UKVI Bail Team is required by the UKVI s.4 Policy to leave the merits of the proposed application out of account when performing their functions under the Policy. They are bound to have regard to factors relevant to their decisions which are also relevant to the bail decision, but they do not form any view about whether bail should be granted or not. If that is adhered to it is hardly realistic to suggest that the decision makers are the opposing party to the applicant in adversarial litigation. There is no allegation of bad faith here, in the sense that it is not suggested that the SSHD or UKVI have ever actually failed to find accommodation deliberately so as to prevent someone from being granted bail. If that were to be found then the conduct would undoubtedly be unlawful, see *L1 v. SSHD* [2015] EWCA Civ 1410 [21] per Laws LJ as authority for the proposition that this proposition needs no authority. In the absence of any such finding, this submission is without any real foundation. It is a little like the submission dealt with by Lord Dyson MR in the *Detention Action* case at [48], and unfounded for similar reasons.

Ground 5

76. Delay in processing an application whose outcome will affect the liberty of the applicant may require the intervention of the court. *R v. Home Secretary ex.p Phansopkar* [1976] 1 QB 606, 626B-G per Scarman LJ is authority for this, if any were needed. This is a principle of the common law. That was a case where the right to family life under Article 8 was engaged rather than the right to liberty, but the common law has always protected the right to liberty. Habeas corpus and bail are creations of domestic law in England and Wales. In *R (Noorkoiv) v. SSHD and another* [2002] EWCA Civ 770 the Court of Appeal held that the obligation to avoid delay in determining a person's right to be released is a more intense obligation than the duty to try criminal cases within a reasonable time. Lack of resources and administrative necessity do not justify such delays. This was a decision framed in terms of Article 5. It is authority for the need for public authorities to have effective systems for taking steps which are designed to affect the release from detention of any person.

77. There was, in each of these cases, unacceptable delay. The question is whether it was unlawful delay, and whether the system is being operated unlawfully because it permits such delays in such a high proportion of high risk bail cases.

78. I have already determined the duty which was placed on the SSHD when these three applications for bail accommodation were made. The same duty arose in respect of many other similar applications which were also dealt with far too slowly. The evidence is that since 2010 there have been no refusals of these applications and therefore the appeal route to the FTT under s.103 of the 1999 Act has not been used by any of those affected by the slowing of the system. The evidence is that a bail address is an essential pre-requisite for a successful application, see Makhlouf's statement at [17]-[20], and the Guidance issued by the President of the FTT(IAC) referred to above.

79. The result of this is that applicants are detained for very long periods of time when they may be eligible for bail if accommodation had been found. When what I have called the *Hardial Singh* end point comes they must be released without restrictions. This state of affairs is in no-one's interest.

80. I note that as long ago as 2003 in *Salih* cited above at [65]-[67] Stanley Burnton J held that delays in the provision of s.4 accommodation (for failed asylum seekers before Regulations 2005/930 were in force) were unlawful. He said this at [66]

> "The court cannot however specify what resources must be devoted to administering the scheme, or what delay in general is lawful and what delay is not. A further consideration is that the court must avoid making a declaration that does not respond to changes in circumstances or the facts of individual cases."

81. Mr. Tam submits that the cause of the delays in the three cases before me, and in many others no doubt, is not unlawfulness but, at worst, maladministration. He also submits that the systemic delay question is not justiciable. The remedy for maladministration is by accountability to Parliament and the Ombudsman. This is really because a complex multi-agency system such as the present involves many decisions and many components. I reject the submission that the court has no ability to determine the lawfulness of the operation of a system which is relevant to the length of administrative detention. It appears to me that this is one of the more important functions a court may have to fulfil. The authorities which I have cited above are all to the like effect. I have quoted Stanley Burnton J above as an example of a case where the court did just that, but exercised appropriate restraint in deciding what remedy was appropriate. The Master of the Rolls in the *Detention Action* case cited above when dealing with the Fast Track Rules (FTR) for asylum appeals said:

> "For the reasons that I have given the FTR are systemically unfair and unjust. The appeal must, therefore, be dismissed. The object of the SSHD in placing appeals in the fast track is the entirely laudable one of dealing with them quickly…….But the consequences for an asylum seeker of mistakes in the process are potentially disastrous. That is why section 22(4) of the 2007 Act recognises that justice and fairness should not be sacrificed on the altar of speed and efficiency….It is too heavily weighted in favour of [speed and efficiency] and needs to be adjusted. Precisely how that is done is a matter for the Tribunal Procedure Committee and Parliament."

82. The Fast Track Rules were rules for speedy determination of appeals and the court is very well placed to assess their fairness. That was a different kind of exercise from that which is involved in this case. The fairness of procedural rules is obviously justiciable, but the SSHD made a somewhat similar submission at [28] which was rejected. The court should respect the rule making process, but that must not be taken too far. The court guards its jurisdiction in cases involving liberty jealously. Where the lawfulness of a system is under consideration, the court will not seek to design a better system or to impose any targets on the executive. If the system is unlawful, the court will say so and leave it to the executive and Parliament to remedy the position: see as an example, the approach of Elias J in *R (Mersin) v. SSHD* [2000] INLR 511 at pages 3 and 4 when the judge rejected out of hand a submission that the court ought to supervise the remedial process.

83. On that basis the operation of a system of this kind is justiciable.

84. In relation to maladministration Mr. Tam relies on *R (S) v. SSHD* [2007] EWCA Civ 546 [39]-[41] per Carnwath LJ as he then was, and *Moussaoui v. SSHD* [2016] EWCA Civ 50 [21]-[26] per the Master of the Rolls. The court is concerned with illegality and not maladministration.

85. The s.4 bail system does not work for high risk offenders. The timescales set for herself by the SSHD (and included in the policies and COMPASS contracts) are routinely not met, and missed by substantial margins. Each of these delays builds on others to amount to lengthy inactivity. In itself that does not amount to illegality. It may simply be that the timescales are hopelessly optimistic for these difficult cases. A failure to meet these deadlines is not evidence of unlawfulness. I agree with Thirlwall J that ground 2 was not arguable. That ground sought to say that each time a deadline, or target, was not met this was unlawful delay.

86. In an intractable case it seems to me that Ms. Nazir is right to say that the "least worst" solution should, with hindsight, have been adopted earlier than it was: see paragraph 30 above. She does not expressly attach this sensible observation to the three cases before the court, but by implication I understand her observation to relate to the subject matter of the proceedings. Whether that is right or not, I find that an offer of "least worst" accommodation or a refusal of the application should have been communicated to each of these three claimants. In the cases of Sathanantham and Ali this should have occurred long before their release. In the case of VO it should have occurred long before now. As Ms. Nazir says:

> "This would have enabled resources to have been concentrated more effectively, rather than on what often turned out to be nugatory work, since alternative addresses offered by COMPASS providers were often objectionable to either NOMS or the police……..The point at which it becomes clear that further attempts to identify satisfactory accommodation are unlikely to be successful, however, is in my view very difficult to assess."

87. The advantage of the "least worst" solution, or of a refusal under the paragraphs in the policies quoted at paragraphs 16 and 17 above, is that the problem is transferred for a decision to the FTT. Refusals apparently never happen. The "least worst" solution was not adopted in any of these three cases. The FTT can be fully informed of the problems with the "least worst" address and can decide whether to grant bail nevertheless. This means that a court, and not NOMS or the police, ultimately takes the decision. This is in accordance with principle. If UKVI refuse the application there can be an appeal to the FTT in which UKVI may be required to justify its failure to provide an offer of accommodation and again the FTT can decide whether the rejected addresses were acceptable, if not ideal. It seems to me that a system which denies the applicant access to the FTT by one or other of these routes and allows detention for a long period without any effective recourse to a court is not fair. I have held that there was a duty to determine applications fairly and rationally and I consider that a failure to determine an application at all within a reasonable period of time breaches that duty. It is not that the system as established is unlawful in this respect, but that the way in which it is operated is unlawful. I accept the evidence of Ms. Nazir that this comes from good motives. The UKVI team wishes to keep trying to solve the case, rather than to do anything which means that bail is unlikely to be

granted. However difficult it is to assess when that should come to an end, that is an assessment which must be made. That is what gives the detainee a right of access to the FTT either by appealing a refusal or by making a bail application relying on the "least worst" offer.

88. I do not think that it is right to characterise the failure I have just identified as maladministration nor is it non-justiciable. It is a failure to determine an application in accordance with a policy either within a reasonable time or, actually, at all. This is plainly reviewable on public law grounds.

89. Instead of determining the applications the UKVI Bail Team made renewed efforts to identify an address which was approved as suitable. In doing this they were attempting to maximise the claimants' chances of success at a bail application. For some applicants it is possible that no accommodation will be identified within the scheme which satisfies NOMS and/or the police. Such an outcome would be a little surprising because each of these claimants has been subject to licence on release from a prison sentence. If they had not been in immigration detention, they would have had to live somewhere while on licence and NOMS generally directs where that should be as a condition of the licence. The *Criminal Justice (Sentencing) (Licence Conditions) Order 2015* requires a standard condition to be included in licences by prison governors prior to release when which requires the offender to:

> "(e) reside permanently at an address approved by the supervising officer and obtain the prior permission of the supervising officer for any stay of one or more nights at a different address;"

90. I am not sure why it suddenly gets so difficult when they are in immigration detention and the evidence before me does not assist on that question.

91. It is not appropriate to seek to analyse the facts of each case to identify individual decisions which caused delay because that would involve the court in an impossible task and would not result in any finding of illegality in any event over and above the one I have already made. The reason why it would not result in any finding of unlawfulness is that this exercise would be an enquiry into maladministration of the kind identified and precluded in the authorities at paragraph 83 above. It does appear that there was maladministration in each case in that the chronologies show a lack of vigour in pursuing COMPASS providers and NOMS and the police and, perhaps, a too ready acceptance of objections to addresses by the latter two agencies. In the case of Ali there was a significant period when his case was simply overlooked and nothing was done. That maladministration was not of itself illegal, but there came a time in each case where it put the SSHD in breach of her legal duty which I have identified. The process simply took so long in each case that it was not being conducted fairly or rationally.

92. I hold that in each case the time taken to resolve the application amounted to a breach by the SSHD of her duty to deal with the applications fairly and rationally. I cannot allocate that unlawfulness to particular decisions or to particular periods of delay for the reason I have explained. In effect, my finding is similar to that of Stanley Burnton J in *Salih.* It is therefore essential that the system is overhauled and entirely appropriate that there is to be a pilot by NOMS of a system designed to reduce delays

for which it is responsible. When arrangements come to be made under the Immigration Act 2016 the failures of the existing system must be addressed.

93. I am not able to find that greater energy on behalf of the UKVI team and more rapid progress by COMPASS providers, NOMS, the Home Office Criminal Casework team and the police would have resulted in an offer of an address which was approved as suitable in accordance with the three s.4 Policies in these cases. That would require input from those agencies and is a question of fact which judicial review proceedings are not constituted to determine.

94. It follows from paragraph 90 above that there is no easy way of determining in each case when the search for an approved address should have been called off and the matter brought to a head so that judicial oversight by the FTT could occur. That may not be necessary in any event, because I am not prepared to find that these claimants would have been granted bail if that had been done. Ali was actually refused bail on the day before he was released even though an address had been found for him.

95. There is also no easy way to determine in each case the point at which the processing of the s.4 application had gone on so long that it became unlawful. That is a fact specific decision of the kind required when considering whether any particular period of detention was unlawful under the *Hardial Singh* principles. The Court of Appeal in *Fardous v. SSHD* [2015] EWCA Civ 931 explained the nature of that kind of decision and made it clear that there are no rules of thumb by which an answer can be produced. As I have said, I am not prepared to find that an approved address would ever have been offered or that, even if it had, the FTT would have granted bail. It therefore does not follow from this judgment that any claimant was detained because of the failure of the SSHD to operate her policy fairly and rationally.

96. Determining the time by which the process should have been brought to a conclusion or the time by which it became unlawful by reason of delay is relevant only to any claim for damages which may be pursued by any of these claimants. I have directed that there will be a further hearing at which I will consider remedies and I will hear submissions on how that issue might proceed in the light of this decision. Sathanantham and Ali have been released. The SSHD will have to decide how to deal with the case of VO in the light of this judgment and VO's current circumstances.