Neutral Citation Number: [2014] EWCA Civ 1634

Case No: C4/2014/2638

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Hon. Mr Justice Ouseley
[2014] EWHC 2245 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/12/2014

Before :

LORD JUSTICE BEATSON
LORD JUSTICE FLOYD
and
LORD JUSTICE FULFORD

- -

Between :

The Queen on the application of Detention Action	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

Nathalie Lieven QC and Charlotte Kilroy (instructed by **Migrants Law Project, Islington Law Centre**) for the **Appellant**
Cathryn McGahey (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 30 October 2014

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Approved Judgment

Lord Justice Beatson :

I. Introduction

1. This appeal concerns a challenge to the Secretary of State for the Home Department's policy, practice and procedure in respect of the detention of applicants for asylum in the fast-track system ("the DFT process") after the refusal of asylum by the Secretary of State and pending an appeal against that decision. The DFT process is designed to facilitate the expeditious determination of applications for asylum and of appeals. It involves the detention of all applicants for asylum whose claims the Secretary of State considers can be determined quickly and a tight timetable for decisions on applications and appeals against a refusal of asylum to the First Tier Tribunal and the Upper Tribunal. Those who meet what I describe as the "quick processing criteria" in the Secretary of State's *Detained Fast-Track Processes Guidance* (the "*DFT Guidance*") are detained even if they do not meet the more stringent general detention criteria in her *Enforcement Instructions and Guidance* ("EIG"). The "general detention criteria" require all reasonable alternatives to be considered before detention is authorised and focus, for example, on whether a person poses a risk of absconding.

2. In these proceedings, Detention Action, a charity set up in 1993 to support individuals in immigration detention and to campaign on matters relevant to immigration detention, challenged a number of aspects of the DFT process. Before Ouseley J, its challenge was partially successful. The judge held that the way the Secretary of State operated the DFT process in the period until she determines an application for asylum was unlawful. He concluded that the very tight timetable created an unacceptably high risk of unfairness for those who are or may be vulnerable applicants who did not have access to lawyers sufficiently soon after detention in the DFT to enable advice to be given to them before their substantive asylum interview. His order dated 25 July 2014 reflects his decisions in two judgments, "the main judgment" ([2014] EWHC 2245 (Admin)), handed down on 9 July, and "the relief judgment" ([2014] EWHC 2525 (Admin)), handed down on 25 July after oral and written submissions on relief and ancillary matters. Unless otherwise indicated, my references to Ouseley J's judgment are to his "main" judgment.

3. There are two matters on which Detention Action's challenge did not succeed and on which it appealed against the judge's order. The first matter (appeal grounds 1 and 2) concerned relief. Detention Action sought an order requiring the Secretary of State to stop processing individuals in the DFT and not to remove individuals who had already been processed in the system from the jurisdiction before they had had a proper opportunity to seek legal advice, but the judge granted only declaratory relief. The second matter on which Detention Action did not succeed (appeal ground 3) was that the judge refused to rule on the legality of detention in the DFT system after the Secretary of State's decision refusing asylum and pending appeal against that decision.

4. Detention Action's appeal was heard by Longmore, Patten and Ryder LJJ on an expedited basis on 29 August. There was, however, only time for the court to consider the appeal against the refusal to grant prohibitory and mandatory relief. That was dismissed in a judgment handed down on 9 October: see [2014] EWCA Civ 1270. On the question of relief, it therefore suffices to record that the judge refused to make the prohibitory and mandatory orders sought by Detention Action in the light of evidence

filed on behalf of the Secretary of State after the main judgment. In three statements, Mr Simm, who, at the material times, was the head of Asylum Detained Casework in the UK Visas and Immigration Directorate of the Home Office, stated that steps had been taken in the light of the main judgment to allow 4 clear working days between the allocation of a lawyer to those in the DFT process and their substantive interview. The judge stated these steps had the potential to remedy the unlawfulness he had found and made it clear that he expected applicants in the DFT process to have 4 clear days between allocation of a lawyer to them and their interview without any formal order.

5. The adjourned appeal concerning detention in the DFT process pending an appeal against the Secretary of State's decision to refuse asylum now comes before a differently constituted court. There were, at the time of the judge's decision, well over 2,000 appeals a year in the DFT of which an estimated 6% were removed from the process by the Tribunal: see [2014] EWHC 2245 (Admin) at [78] and [187]. Detention Action's case is that the Secretary of State's practice of applying the quick processing criteria and detaining individuals in the DFT system pending their appeal rather than only detaining those who meet the general detention criteria is unlawful for three reasons. The first is that the practice is in breach of the Secretary of State's own policy. The second is that, whether or not the practice is in breach of her policy, it is unlawful because the policy is insufficiently certain and transparent. The third is that the policy is unlawful because there is no lawful justification for it.

6. The judge (at [79] – [80]) gave two interrelated reasons for his refusal to rule on the legality of detention in the DFT system after the decision refusing asylum and pending appeal to the tribunal. He considered that an attack on the lack of detailed justification of detention in the DFT process pending appeal was not (or was not clearly) the basis of the challenge in Detention Action's grounds of claim. He also considered that the evidence filed in support of the Secretary of State's case did not provide any separate rationale for including the appeal stage in the DFT and detaining all those in it, rather than only detaining those who met the general detention criteria. The judge stated that the complaint about the lack of detailed justification for detention pending appeal was only made "rather more explicit" in Detention Action's skeleton argument. Until then, the Secretary of State may have reasonably thought that the policy justification for the inclusion of the appeals process in the DFT was not controversial, that by 2008 the policy of detaining at that stage by reference to the DFT criteria was also clear and not controversial in law, and that this may have explained the state of the evidence.

7. Ms Lieven QC, on behalf of Detention Action, criticised the judge's refusal to rule on this matter. She stated in §9(4) of her skeleton argument and in her oral submissions that it was clear from §65 of the detailed grounds that the inclusion of the appeals stage in the DFT process was challenged. Ms Lieven also submitted that the reason the evidence did not include a separate justification for the inclusion of a DFT appeals process was that the Secretary of State did not consider any separate justification was needed. But she and Ms McGahey, on behalf of the Secretary of State, agreed that the focus at the hearing and of our decision should be the question of substance. That question is whether the Secretary of State's practice complies with her policy and, whether or not it does so, whether it is lawful. Accordingly, it is not necessary for me

to decide whether the judge was right not to rule on the point and to give the Secretary of State an opportunity to file evidence justifying detention at a later stage.

8. The evidential position has changed since the two judgments below. On 27 August 2014, shortly before the hearing before this court on 29 August, further evidence on behalf of the Secretary of State, in the form of Mr Simm's seventh witness statement, was filed. On 31 October 2014, the day after the hearing before us, a statement of Daniel Smith, who has been Head of the Detained Fast Track in the Home Office's UK Visa and Immigration Directorate since 1 September 2014, was filed. Mr Smith deals with a specific matter which arose during the hearing, and I refer to it at [89] below.

9. Mr Simm's seventh statement mostly deals with questions relevant to the dispute about what relief should be ordered. It sets out the action taken by the Secretary of State to address the insufficiencies in the process identified by the judge. It addresses the position of detention in the fast-track process pending appeal in three paragraphs which I consider at [75] ff. below.

10. The remainder of this judgment is divided into five sections. Section II ([11] – [22]) summarises the legislative background and the approach taken by the courts. Section III ([23] – [26]) and Section IV ([27] – [41]) deal respectively with the relevant ministerial statements and policy guidance about the DFT process. What the judge stated about detention pending appeal is summarised in Section V ([42] – [46]). Section VI contains my analysis of the submissions and conclusions. I have concluded:-

(a) The DFT policy changed in 2008: see [50] – [54] below.

(b) Since 2008 the Secretary of State's policy in what is now the *DFT Guidance* has been that the "quick processing" DFT detention criteria apply to the appeal stage: see [54] – [63] below.

(c) The way the policy of detaining all those who satisfy the "quick processing" criteria pending their appeal is dealt with in the *DFT Guidance* does not meet the requirements of clarity and transparency: see [14] and [64] – [70] below.

(d) My conclusion on (c) means it is not necessary to decide whether the policy is justified as necessary for the purposes for which detention is authorised by the Immigration Act 1971 and not for a period that is longer than is reasonable in all the circumstances. But as there was full argument on this matter, I consider it at [71] – [96] below. In my judgment, on the fairly limited evidence that has been put before the court, after the Secretary of State's decision and pending appeal, detention in the fast-track by the application of the "quick processing" criteria cannot be said to be justified and is therefore not lawful: see [71] – [96] below. Accordingly, the state of the evidence means that I would have decided that detention in the fast-track is not lawful at that stage of the process unless the general detention criteria (summarised at [31] – [32] below) are met.

I add that, in the interests of clarity, in the remainder of this judgment, where it is necessary to avoid breaking up sentences with references to legislation, policy documents, and cases, I use footnotes. References to paragraphs in this and other

judgments are indicated by square brackets, and references to paragraphs in other documents by "§".

II. The legislative background and the approach of the courts

11. The right to personal liberty and to freedom from arbitrary detention is deeply embedded in the common law. It is a fundamental constitutional principle traceable to clause 39 of Magna Carta (1215) which provides that "no freeman shall be seized or imprisoned … except by the lawful judgment of his equals or by the law of the land". The fundamentality of the right to freedom from arbitrary detention at common law has been recognised in recent cases.[1] At common law any deprivation of liberty is thus *prima facie* unlawful, but it may be justified according to law. The right to personal liberty is now also protected by Article 5 of the European Convention on Human Rights ("the ECHR").

12. In this appeal Detention Action did not rely solely on Article 5. I accept Miss Lieven's submission that the test for the lawfulness of immigration detention at common law is substantially the same as that in Article 5. Notwithstanding the different starting points of analysis under the *Wednesbury* regime requiring rationality or reasonableness and the ECHR's regime requiring justification and proportionality, in the context of this case, the tests are substantially the same. In my judgment, the principle is that no-one shall be deprived of his or her liberty save where he or she is lawfully arrested or detained to prevent an unauthorised entry into the country or because action is being taken with a view to deport or extradite that person. Under both regimes the test for lawfulness is whether detention is necessary to achieve the stated and lawful aim.

13. Looking first only at purely domestic law, the statutory basis for the detention of those who may not enter the United Kingdom without leave, including those who have applied for asylum, is paragraph 16 of Part 1 of Schedule 2 to the Immigration Act 1971 ("the 1971 Act"). In broad terms, this provision authorises the detention of persons pending (a) their examination by an immigration officer, (b) a decision to give or refuse them leave to enter, (c) a decision to give directions to remove them, and (d) their removal pursuant to such directions. Turning to the ECHR, one of the cases in which Article 5 permits the state to deprive a person of his liberty is that, in Article 5(1)(f), "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

14. The conferment of statutory power on the executive to detain without trial does not, however, in itself conclude the question of legality. This is because there is a right, sometimes described as fundamental or constitutional, not to be detained arbitrarily in the sense of being detained capriciously on the basis of random choice. The way a broadly worded statutory power such as that in the 1971 Act must be exercised in

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1 The notable instances in the last decade are Lord Bingham's statements in *R (von Brandenburg) v E. London & City NHS Trust* [2003] UKHL 58, [2004] 2 AC 280 at [6]; *A v Secretary of State for the Home Department* [[2004] UKHL 56 [2005] 2 AC 68 at [36]; and those by Lord Dyson and Lord Collins in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 at [32] and [219].

order to be lawful and to save a detention from "the vice of arbitrariness"[2] has been considered in a line of decisions originating in that of Woolf J in *R v Governor of Durham Prison, ex p. Hardial Singh* [1984] 1 WLR 704. The principles were restated by Dyson LJ, as he then was, in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888 at [46], and his formulation was accepted by the majority of the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.[3] For present purposes, it suffices to state that the detention must be for the statutory purposes of making or implementing a deportation order and for no other purpose; and that in any event the detention cannot continue for longer than a period which is reasonable in all the circumstances. In *Lumba's* case Lord Dyson JSC stated (at [34]) that "the rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised" to detain a person. Transparency involves clarity, and Lord Dyson emphasised (at [36]) the particular importance, where personal liberty is at issue, of such policy statements being formulated in a sufficiently defined manner to enable individuals to know the criteria being applied to detain them.

15. *Lumba's* case concerned an unpublished policy. In these proceedings, the question is whether the practice of applying the "quick processing" criteria at the appeal stage is a breach of the relevant policy statements and documents concerning the DFT process, and, if it is not, whether the policy is lawful. Those statements and documents are set out or summarised in section III below. Before turning to them, it is necessary to refer to the introduction of the DFT process and to the decision of the House of Lords in *R (Saadi) v Secretary of State for the Home Department* [2002] UKHL 41, [2002] 1 WLR 3131. The DFT process was first introduced in 2000 because of the large number of applications for asylum. Ouseley J's main judgment at [25] - [67] contains a clear account of the reasons for introducing it, the number of applicants involved, the way the system operates, and the reasons it was found to be lawful by the House of Lords in *Saadi*'s case, by the Strasbourg Court in *Saadi v United Kingdom* (2008) 47 EHRR 17, and by this court in *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [2005] 1 WLR 2219.

16. For present purposes it suffices to make five points about *Saadi*'s case. First, detention in the fast-track process pending the decision of the Secretary of State on the application for asylum was held to be justified on common law principles as falling within the powers contained in paragraph 16(1) of Schedule 2 to the 1971 Act and was thus lawful under domestic law, and under Article 5(1)(f) as a proportionate response to the reasonable requirements of immigration control. Secondly, the House of Lords was heavily influenced by the shortness of the period of detention at that time. The timetable was three days to substantive interview and two further days to decision, with the total period of detention averaging seven to ten days.[4]

17. Thirdly, the justification for detaining all those whose applications appeared capable of rapid resolution was the large number of applicants whose cases had to be

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2 The phrase is that of Laws LJ: see *R (SK (Zimbabwe)) v Secretary of State for the Home Department* [2008] EWCA Civ 1204, [2009] 1 WLR 1527 at [33].

3 See [22] (Lord Dyson), [170] - [171] (Lord Hope), [218] (Lady Hale), [189] (Lord Walker), and [250] (Lord Kerr).

4 [2002] UKHL 41 at [14] – [18]. By 2013 the period to decision had risen to 10 – 14 days: [2014] EWHC 2245 (Admin) [82] – [83], see [85] below.

considered intensively and in a short period, and who had to be interviewed within the timetable. Up to 150 interviews a day had to be scheduled, and this required tight structuring and management. Lord Slynn stated that "[i]f people failed to arrive on time or at all the programme would be disrupted and delays caused not only to the individual case but to dealing with the whole problem": [2002] UKHL 41 at [24]. See also [20], and [46]. Lord Slynn stated (at [47]) that:-

> "It is regrettable that anyone should be deprived of his liberty other than pursuant to the order of a court but there are situations where such a course is justified. In a situation like the present with huge numbers and difficult decisions involved, with the risk of long delays to applicants seeking to come, a balancing exercise has to be performed. Getting a speedy decision is in the interests not only of the applicants but of those increasingly in the queue. …"

18. The fourth point is that at the time of the decision of the House of Lords in *Saadi*'s case in May 2002 the DFT process did not extend beyond the Secretary of State's decision accepting or rejecting the application for asylum. A "fast track" appeal process was first introduced on a "pilot" basis in April 2003 at Harmondsworth Immigration Removal Centre for single males from certain countries in the light of the decision in *Saadi*'s case: see the Immigration and Asylum Appeals (Fast Track Procedure) Rules SI 2003 No. 801 ("the 2003 Tribunal Fast Track Rules"). A fast-track appeal process was subsequently established at four specified Immigration Removal Centres[5] in 2005 by the Asylum and Immigration Tribunal (Fast Track Procedure) Rules SI 2005 No. 560 ("the 2005 Tribunal Fast Track Rules").

19. The last point about *Saadi*'s case concerns the judgment of the European Court of Human Rights. The court held that the DFT process in force at that time did not violate Article 5(1) of the Convention, and stated (at [70]) that "the detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe, measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained". The court also stated (at [74]) that "to avoid being branded as arbitrary…the length of the detention should not exceed that reasonably required for the purpose pursued".

20. The 2005 Tribunal Fast Track Rules make provision for a Tribunal procedure for those detained under the 1971 Act at the specified places. The timetable is highly expedited. Rule 8(1) provides that the applicants must serve their notice of appeal within two days of being served with the immigration decision against which they wish to appeal. Rule 8(2) makes provision for an extension of time only where circumstances outside the control of the applicant or his legal representatives mean that it was not practicable for the notice to be served within the time limit. By rule 9, the respondent is to be served by the Tribunal immediately it receives a notice of appeal, and rule 10 provides that she must file the documents required by the Rules within two days. Rule 11 provides that hearings are to be listed not later than two days after the respondent has filed her documents. The First Tier Tribunal's ("FTT") determination and reasons must (see rule 14) be served on the parties within two days

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5 Campsfield House, Colnbrook House, Harmondsworth and Yarls Wood were the IRCs originally listed in the 2005 Tribunal Fast Track Rules. Oakington Reception Centre, the original location of expedited decision-making, was later added to the list until it was closed in 2008.

of the end of the hearing. There is also a similar very short timetable for appeals from the FTT to the Upper Tribunal: see rules 15 – 18.

21. Rule 30 provides that in certain circumstances the Tribunal "must" order that an appeal be removed from the fast track appeal process. It is obliged to do this "if it is satisfied by evidence filed or given by or on behalf of a party that there are exceptional circumstances which mean that the appeal or application cannot otherwise be justly determined". It is also obliged to remove an appeal from the fast track if the Secretary of State has failed to comply with the Rules or a direction of the Tribunal, and "the Tribunal is satisfied that the appellant would be prejudiced by that failure if the appeal or application were determined" under the fast track timetable.

22. The position of Detention Action is that, while the 2005 Tribunal Fast Track Rules apply automatically to persons who are detained at one of the specified places at the time they are served with an immigration decision, it makes no provision as to the basis for that detention. In short, the submission is that the Rules themselves are neutral as between the application of the general detention criteria or the more stringent regime under which all those in the DFT process are detained. From 20 October 2014, the 2005 Tribunal Fast Track Rules were replaced by a Schedule to the Tribunal Procedure (First Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 SI 2014 No. 2604. The 2014 Tribunal Fast Track Rules set out in that schedule also provide for a highly expedited timetable, with minor variations. The equivalent rules in the 2014 Tribunal Fast Track Rules to the rules referred to in this and the last paragraph are Rules 14 and 2.

III. Ministerial statements about the DFT process

23. In March 2003 the Minister for Citizenship and Immigration, Ms Beverley Hughes MP, made a written statement about the proposal which became the 2003 Tribunal Fast Track Rules and the fast-track appeal process. The material parts of this stated:

> "The new fast-track procedure rules…will enable us to pilot fast-track decisions and appeals based on co-location of key elements of the asylum process. …detention will initially be for about 2 – 5 days to enable claimants to be interviewed and an initial decision made. …<u>detention of asylum seekers for a short period for the purposes of making a speedy decision on their claim</u> was upheld last October as lawful by the House of Lords. <u>If the claim is refused</u> or for any reason cannot be dealt with accordance with the pilot timescales, <u>a decision about further detention will be made in accordance with existing detention criteria</u>. Detention in this category of cases will therefore normally be <u>where it has become apparent that the person would be likely to fail to keep in contact with the Immigration Service or to effect removal</u>." (emphasis added)

24. The Minister also stated that the new pilot would enable the Home Office to process and remove failed asylum seekers from the United Kingdom within about a month of their arrival, that the power to detain asylum seekers for the purposes of making a speedy decision had been upheld as lawful by the House of Lords, and that the new Tribunal Rules would enable the Home Office "to also pilot a much faster appeals process". She stated that "in order to effect this new procedure, we will detain straightforward claimants to enable a quick decision and swift removal after any appeal, providing they meet the criteria for detention". A similar statement was made in the House of Lords by the Asylum Appeals Minister, Baroness Scotland.

25. In evidence to the Home Affairs Select Committee on 10 November 2003 (not before the judge below), Beverley Hughes MP described the fast-track procedure as "taking the claimant from arrival to decision through appeal…". She stated that "wherever possible the same officer interviews the asylum applicant, makes the decision and presents the appeal", and that "…the members of the dedicated fast-track team take case ownership of both the initial decision and the appeal process…". She also referred to the "built in access to legal advice appointed by the Legal Services Commission" in the new process, and stated that the 2003 Tribunal Fast Track Rules enabled the government "to fast track decisions and appeals based upon co-location of key elements of the asylum process".

26. On 16 September 2004 further statements about the DFT process, in identical terms, were made by Baroness Scotland and Desmond Browne MP, the Minister for Citizenship and Immigration. They stated that the aim was to make "decisions" within 10 – 14 days, although there would be occasions where it would be quicker. The Ministers stated:

> "However, we will continue to detain for the purpose of deciding the claim quickly, even beyond the 10 – 14 day timescale, unless the length of time before a decision will be made looks like it will be longer than is reasonable in all the circumstances. Continued detention may also be merited in some cases irrespective of decision timescale, where our general detention criteria apply. We may also detain claimants after we have made and served a decision in accordance with our general detention criteria." (emphasis added)

IV. Policy Guidance: the OEM, the EIG and the DFT Guidance

27. Since 2008 the policy governing the DFT process has been set out in a document, since March 2013 the "*DFT Guidance*" to which I have referred, and before then named *DFT & DNSA – Intake Selection (AIU Instruction)*.[6] The material parts of earlier policy documents are, however, part of the background, and I first summarise them. Between 2003 and 2008 the policy on what is now the DFT process was in chapter 38 of the Secretary of State's *Operational Enforcement Manual* ("the OEM"), the document setting out her instructions to her caseworkers. In 2008 the OEM was re-named the *Enforcement Instructions and Guidance* ("EIG"). Detention and temporary release, including what I have referred to as the "general detention criteria", are dealt with in chapter 55.

28. *(a) The OEM:* Before the September 2005 edition of the OEM, what is now dealt with by the DFT process applied to applications for asylum which met what were known as the "Oakington Criteria" because the claim appeared straightforward and capable of being decided quickly. Those who met the criteria were detained "for a short period of time to enable a rapid decision to be taken on an asylum/human rights claim": see, e.g., §38.3.1 of the July 2005 edition of the OEM.

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6 The DFT process also applies to a category of cases known as "DNSA" cases. "DNSA" is the acronym for "Detained Non Suspensive Appeals", i.e. those applicants whose application for asylum is refused and certified under section 94 of the 2002 Act and who do not have an in-country right of appeal. DNSA cases do not arise in this appeal because it is only concerned with the position pending an in-country appeal.

29. The September 2005 edition of the OEM referred to the ministerial statements made on 16 September 2004: see §§38.1 and 38.4. The opening paragraph of §38.4 referred to detention "where it appears that…claims are capable of being decided quickly" and "detention for a short period of time to enable a rapid decision to be taken…". The second sub-paragraph referred to the introduction of a fast-track process at Harmondsworth in April 2003 "which includes an expedited in-country appeals procedure" and states that "[c]laimants in the latter detained fast-track process may be detained only at sites specified in the relevant statutory instrument…", a reference to the 2005 Tribunal Fast Track Rules. This section of the document also identified Oakington and Harmondsworth as designated places of detention and stated that any person "could be detained there under immigration powers for any of the published reasons for detention". It is also stated that detention "other than for fast-track processing" must be arranged via the normal process. There are no material differences in the April 2006 and August 2007 editions of the OEM.

30. Other than the reference to the inclusion of an expedited in-country appeals procedure in the fast-track process at Harmondsworth, there is no indication in these editions of the OEM that detention after the decision on the asylum/human rights claim and pending an appeal was to occur other than by the application of the general detention criteria. Indeed, the heading to §38.3, which stated "Factors influencing a decision to detain (excluding pre-decision fast-track cases)" and appeared as §55.3 in the OEM from the September 2005 edition, before the creation of a separate document for DFT policy, and was unchanged in the March 2008 edition or at the time of the hearing below, also suggested that it was only those fast-track cases before the Secretary of State's decision which were taken out of the general detention criteria.

31. *(b) The EIG:* The general detention criteria are set out in §§55.1.1 and 55.1.3. 55.1.3. They state that "detention must be used sparingly, and for the shortest period necessary" and that "a person who has an appeal pending or representations outstanding might have more incentive to comply with any restrictions imposed, if released, than one who is removable". §55.1.4 states *inter alia* that detention must be for one of the statutory purposes for which the power to detain is given and must accord with the limitations implied by domestic and ECHR case law, and "must also be in accordance with stated policy on the use of detention". I have stated that until recently (and at the time of the hearing before the judge) the heading to §55.3 was the same as that in OEM §38.3, i.e. "excluding pre-decision fast-track and CCD cases." §55.3 states that "there is a presumption in favour of temporary admission or temporary release", "there must be strong grounds for believing that a person will not comply with the conditions of such admission or release for detention to be justified", and "all reasonable alternatives to detention must be considered before detention is authorised".

32. The factors which must be taken into account when considering the need for initial or continued detention under the general detention criteria are set out in §55.3.1. Decision-makers are asked to consider all relevant factors but a number are listed. These include the likelihood of the person being removed, and, if so, the timescale, any evidence of previous absconding or failure to comply with conditions, the risk of the person offending or harming the public, whether the person has taken part in a determined attempt to break the immigration laws, ties to the United Kingdom, and physical and mental health. A factor relied on by Ms Lieven is the statement in

§55.3.1 concerning "the individual's expectations about the outcome of the case", where the decision-maker is asked to consider whether there are factors "such as an outstanding appeal, an application for judicial review or representations which afford incentives to keep in touch". This reflects the more general statement in EIG §55.1.3 that a person who has an appeal pending might have more incentive to comply with restrictions if released than one who is removable. The DFT process is dealt with in §55.4. Sub-paragraph (2) of this states that the process "includes an expedited in-country appeals procedure". The last sub-paragraph of this section of the EIG states that the policy concerning the suitability of applicants for detention in fast-track processes is set out in the *DFT Guidance*. It is common ground that before 2008 the EIG did not refer to detention pending appeal: Simm, first witness statement, §9.

33. *(c) The DFT Guidance:* Save where otherwise stated, I refer to the current version of the guidance which has applied since 11 June 2013, when what the then Head of Asylum Policy at the Home Office described as clarifications were made. Section 2 of the guidance sets out the policy for determining the suitability of a case for entry to and continued management within the DFT, including screening processes and operational considerations which may prevent a case being treated as a DFT case or which would justify the removal of a case from the DFT process. §2.1 states:

> "An applicant may enter into or remain in DFT/DNSA processes only if there is power in immigration law to detain, and only if on consideration of the known facts relating to the applicant and their case obtained at asylum screening (and, where relevant, subsequently), it appears that a quick decision is possible and none of the detained fast-track suitability exclusion criteria apply.
>
> DFT/DNSA suitability has no requirements as to nationality or country of origin and no other bases of detention policy need apply (see chapter 55 of Enforcement Instructions and Guidance (EIG)). There is no requirement that an application be late and opportunistic."

§2.1.2 states that states that assessment of suitability of a case for the DFT process must take place at the time of referral and "at all stages of ongoing case management within DFT".

34. The criteria for assessing whether a quick decision is possible are set out in §2.2 of the policy. It is stated that the assessment is a fact-specific one and "must be made based on the facts raised in each individual case". The policy sets out examples of cases where a quick decision may be possible, but makes it clear that this is a list of examples and that a quick decision may be possible in other cases. The examples are where: (a) it appears that no further enquiries by the Home Office or the applicant are necessary in order to obtain clarification, complex legal advice or corroborative evidence; (b) it appears likely that any such enquiries can be concluded to allow a decision to take place within the normal indicative timescales; (c) it appears likely that it will be possible to fulfil and properly consider the claim within normal indicative timescales; (d) it appears likely that no translations are required in respect of documents presented by an applicant, or that translations can be obtained to allow a decision within normal indicative timescales; and (e) the case is one that is likely to be certified as "clearly unfounded" under section 94 of the 2002 Act.

35. The criteria for determining whether individuals are unlikely to be suitable for entry or continued management in the DFT process are in §2.3 of the policy. The persons

who are unlikely to be suitable are: (a) women who are 24 or more weeks pregnant; (b) family cases; (c) children whose claimed date of birth is accepted by the Home Office; (d) those with a disability which cannot be adequately managed within a detained environment; (e) those with a physical or mental medical condition which cannot be adequately treated or managed in such an environment; (f) those who lack the mental capacity or coherence to understand the asylum process and/or cogently present their claim; (g) applicants about whom a competent authority has decided that they are a victim of trafficking or that there are reasonable grounds for regarding them as a potential victim of trafficking; and (h) those in respect of whom there is independent evidence of torture.

36. Under the heading "timescales, §2.2.3 of the policy gives the indicative timescales from entry to the DFT process in the appropriate Immigration Removal Centre to service of the decision. It states these are "usually … quicker" than around 10 – 14 days, but they are not rigid. §2.2.3 also states that they must be varied when fairness or case developments require it, and that cases receiving uncertified refusal decisions in the DFT process are subject to a fast-track appeal process which is governed by the 2005 Tribunal Fast Track Rules, the timescale for which is summarised at [20] above. The last sub-paragraph of §2.2.3 states:

> "[a]pplicants whose appeal rights are exhausted or lapse in the DFT process and do not qualify [for any form of leave] will be liable for removal. Any decision to maintain detention pending removal must be in accordance with law and policy, and must be subject to regular review (See Chapter 55 of [EIG]".

37. Section 3 of the guidance sets out the process for referring cases for consideration for the DFT process and describes the screening process and section 5 deals with the operational considerations which may mean that a case which is in principle suitable for the DFT process is not entered into it. The operational considerations in section 5 include the availability of detention space, whether obtaining travel documentation is likely to be a lengthy process, and where there is a legal bar to the removal of the individual because, for example, the individual is from a country to which enforced removals are suspended. One of the sub-sections of §5.2.1 of the guidance has the heading "Travel Documentation for Removal". The first sub-paragraph of this sub-section states that "it is not necessary for removal to be imminent or for there to be an absconding risk to detain for DFT …". The third sub-paragraph states that if "an asylum claim is unsuccessful (a DFT case becoming appeal rights exhausted, or a S94 refusal decision being served)", detention may continue "under the general detention policy". These matters, and the consideration of potential DFT cases after screening, were summarised by the judge at [43] – [52].

38. In the 2008 and 2009 versions of the DFT policy (then called *DFT & DNSA – Intake Selection (AIU Instruction)*, in section 5, also under the heading "Travel Documentation for Removal", it is *inter alia* stated:

> "Once a decision has been made however, detention policy requires that removal be imminent. The decision may be regarded as including the time during which an individual has extant appeal rights … "

39. At this stage it is convenient to refer to two matters. The first is the 2008 Best Practice Guide on the Detained Fast-Track Process produced by the Immigration Law Practitioners' Association, which states "an appeal will only take place in fast-track if your client meets the general detention criteria."[7] This was relied on by Ms Lieven to show the general understanding of practitioners in the field. The second is the request made by the European Commission to the United Kingdom authorities in 2012 and the response to it. The request is in a letter dated 28 August 2012 from Stefano Manservisi, a Director General in the European Commission's Home Affairs Directorate. He stated that he considered that there was a general presumption in the Secretary of State's policy that all cases were suitable for "fast-tracking" and expressed concern about the adequacy of the examination of the application in such cases. The concern arose because of the very short time limits and the fact that the criteria for including an applicant in the DFT process and detaining that person were subject to a large margin of interpretation. Mr Manservisi asked for the observations of the United Kingdom authorities as to how the DFT process ensured compliance with the obligations resulting from EU law. He referred in particular to Articles 6 and 52(3) of the Charter of Fundamental Rights and the provisions of Directives 2005/85/EC (the "Asylum Procedures Directive") and 2003/9/EC (the "Reception Conditions Directive").

40. The Director of the National Asylum Command at the UK Border Agency replied to this request in a letter dated 5 November 2012. He stated that the *DFT Guidance* clearly stated that cases would only be subjected to the DFT process if the evidence demonstrated that a quick decision would be possible. Accordingly, individuals were not detained only because they claimed asylum. The letter set out the criteria for entry to the DFT process and for monitoring cases within it. In a letter dated 30 May 2013, following a meeting between the Head of Asylum Policy at the Home Office and the Director of the EU Commission's Directorate on Migration and Asylum the United Kingdom authorities provided further information about asylum processes. Neither letter referred to detention in the DFT after the decision refusing asylum, and pending an appeal against it.

41. As a result of the EU's concerns, the policy was clarified in the June 2013 version of the *DFT Guidance*. At about the same time, in a letter dated 18 June 2013, the Head of Asylum Policy at the Home Office wrote to the relevant Director at the EU, stating that less than 12% of asylum applications were "routed into the DFT/DSNA process". The letter was mainly concerned with the Commission's concerns about timescales. It is relevant to the issue before this court because it stated:

> "The indicative timescales in the policy only relate to the time of entry into the process until the time of [sic] the decision is served on the applicant. We wanted to clarify this more in the policy, <u>because it is not entirely clear that the DFT process includes a fast-track appeals process</u>. This means that the overall timescales of the whole process is longer when you take the appeals into account, but is still much shorter than the normal timescales in the non-detained process." (emphasis added)

The letter also stated that the government had sought to clarify in the policy that when an applicant exhausted all his or her appeal rights, he or she is then subject to removal and that "detention after that point is outside the DFT/DNSA process…".

[7] Chapter 4, pp. 292 and 302.

V. The judgment below

42. I have stated (at [6] above) that the judge refused to rule on the legality of detention in the DFT system after the Secretary of State's decision and pending appeal. I here summarise what he did say about detention after the decision and pending appeal of all those who meet the "quick processing criteria".

43. The judge rejected the evidence of Mr Simm[8] that it was "clear" at the time of the ministerial statements in 2003 and 2004 (set out in part at [23] and [25] above) "that the DFT process was not to stop after the initial decision had been made and it was always intended to include a detained fast-track appeals process". He stated (at [57]) that these ministerial statements left no room for doubt: "the DFT detention criteria did not apply to the appeal stage; the general detention criteria did".

44. As to the position from 2008, the judge stated (at [59]) that the words from the third sub-paragraph of §5.2.1 of the current *DFT Guidance* set out in [37] above have:

> "the clear implication that until appeal rights are exhausted or a section 94 refusal decision is served, it is the DFT detention policy that applies to someone whose application was refused by the Secretary of State, whose appeal rights have not yet been exhausted."

He considered that this was consistent with the statement in the policy documents from 2008 that is set out at [38] above and concluded that this "now clearly implies that the SSHD's policy is that the decision on appeal is part of the decision-making process to which the principle governing detention set out in *Saadi*'s case applied". He also stated:

> "The DFT detention policy applies now, and has done so <u>expressly</u> for some years, to the appeal stage of the decision-making process." (at [60], emphasis added)

He stated that as he read the policy, it changed, but also stated that "it may just have been badly expressed in the past" but "it is clear now".

45. The judge rejected the suggestion that the inclusion of the appeal process in the DFT is unlawful as a matter of principle. He stated (at [60]) that applying what he called the DFT detention criteria and I have called the quick processing criteria to the appeal stage was lawful. He reiterated his view later in his judgment. He stated (at [77]):

> "The statutory power to detain pending a decision on the grant or refusal of leave to enter clearly covers the power to detain while a statutory appeal right is exercised against refusal. It is also clear now, at any rate, and in my view has been clear since 2008, that it is the SSHD's policy to exercise that power on DFT criteria, and not on general detention criteria: the fact that a case is in the DFT is sufficient as a matter of policy for it to remain in the DFT unless either the SSHD or judiciary remove it as not or as no longer suitable for the fast-track appeal process. There is nothing unlawful about such a policy. On the face of it, I see no reason why, if the criteria are otherwise lawful, that should be an unlawful policy."

46. The judge then turned to the rationale for detention at that stage of the process. He stated (at [78]) that the evidence adduced in support of the Secretary of State's case

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[8] First witness statement, 11 November 2013, §§ 7 – 15.

did not provide any "separate rationale for the appeals process to be included in the DFT process for those who do not fit the general detention criteria". He continued:

> "…The number of appeals, and the need for the appellant to be in detention so that the appeal process runs smoothly is not explained, though the data suggests that there are well over 2,000 appeals a year in the DFT. [After referring to the eight fast-track courts, each of which aims to hear two appeals a day, he continued] Ms McGahey spoke of the difficulties of hearing the appeal of someone released from the DFT on the fast-track timetable: they would need accommodation near one of the three hearing centres for ease of access; the lawyers would have to be nearby as well for meetings; they would have to arrange meetings although just released to new accommodation in what might be a strange place; there would be plenty of opportunities for travel arrangements and meetings to go awry. The proper operation of the fast-track appeals process would be undermined."

He accepted that Ms McGahey may well have been speaking of the logistics and resource problems which the Secretary of State "would expound to justify continuing detention other than on general detention criteria during the appeals process", but stated that there was no evidence from Mr Simm expressing those or other reasons. He then gave the reasons for refusing to rule on this matter, which I have summarised at [6] above. I have referred to the evidence filed after his main judgment at [8] and [9] above, and deal with it in the next section of this judgment.

VI. Discussion

47. The determination of the issues in this appeal requires the court to consider four questions.

(a) Was the judge correct in deciding that DFT policy changed in 2008 and before then the "quick processing" DFT detention criteria did not apply to the appeal stage?

(b) Was the judge correct in deciding that, since 2008, the Secretary of State's policy contained in the DFT Guidance is that the "quick processing" DFT detention criteria apply to the appeal stage?

(c) After 2008, whether or not the practice of detaining all those who satisfy the "quick processing" criteria pending their appeal was a breach of the Secretary of State's policy, does it meet the *Lumba* requirements of clarity and transparency?

(d) Is there a lawful justification for the policy or practice of detaining all those who satisfy the "quick processing" criteria pending their appeal?

There is an overlap between the points that are relevant to answering questions (b) and (c), and therefore an overlap in the analysis. The judge did not rule on questions (c) and (d). His view that it is <u>clear</u> that after 2008 the policy is to detain in the DFT pending appeal and that, there is nothing objectionable in principle in applying the "quick processing" criteria to the appeal stage, however, suggests that he considered that the *Lumba* requirements were met.

48. I summarised the three limbs of Detention Action's case that detention pending appeal within the fast-track process and on fast-track criteria is unlawful at [5] above. On

behalf of the Secretary of State, Ms McGahey invited the court to uphold the judge's findings that detention in the DFT process pending appeal does not breach the policy and is not inherently unlawful. She submitted that not only was the judge's interpretation of current policy correct, but that no other meaning can possibly be given to the statement in the third sub-paragraph of §5.2.1 of the *DFT Guidance*[9] that, on "a DFT case becoming appeal rights exhausted", general detention provisions apply. Accordingly, the policy satisfied the requirements of clarity and thus certainty stated in *Lumba's* case.

49. As to justification, Ms McGahey submitted that the justification for detention pending appeal is the same as it is for detention pending the Secretary of State's decision. "[D]etention [is] imposed to make the scheme workable, rather than imposed because it was necessary to prevent absconding", and "the reason for extending the policy to include appeals is to create a swift, workable system that covers the entire asylum application process from beginning to end": skeleton argument, §§5 and 21. The Secretary of State also relied on the approach in *Saadi's* case (see [15] ff. above). Ms McGahey stated[10] that "detention during a fast track appeals process has exactly the same justification" because "an accelerated process could not work if those who were subject to it were not readily available to participate in it".

50. ***(a) Did the DFT policy change in 2008?*** The judge rejected the evidence of Mr Simm[11] that it was "clear" at the time of the ministerial statements "that the DFT process was not to stop after the initial decision had been made and it was always intended to include a detained fast-track appeals process". He stated (at [57]) that the ministerial statements in 2003 and 2004[12] left no room for doubt: "the DFT detention criteria did not apply to the appeal stage; the general detention criteria did".

51. There is no appeal against the judge's decision on this point. The reason may possibly be that the judge's decision that the DFT policy changed in 2008 is not reflected on the face of the order and because the judge did not rule on the legality of post decision DFT detention pending appeal. The position of the Secretary of State on the point was, however, not entirely clear from the written and oral submissions. Ms McGahey was correct in stating that what needs to be decided is the meaning and legality of the current policy rather than exploring what she accepted were past uncertainties. But she appeared to seek to challenge the judge's decision that the policy changed in 2008, and, at a number of points relied on earlier ministerial statements and superseded versions of the DFT policy.

52. The first way in which it appeared that the decision of the judge that, before 2008, the DFT detention criteria did not apply to the appeal stage was challenged was the submission that, while the position had been badly expressed in March 2003 and September 2004, it had become clear by November 2003 when Beverley Hughes MP gave evidence to the Home Affairs Select Committee.[13] Ms McGahey submitted that Ms Hughes's evidence, which was not before the judge below, made it clear that appeals were an integral part of the DFT process and that detention pending appeal

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9 See skeleton argument, §12. The material parts of §5.2.1 are set out at [37] above.
10 Skeleton argument, §24.
11 First witness statement, 11 November 2013, §§7 – 15.
12 See [23] – [24] and [26] above.
13 See [25] above.

would be maintained as part of that process. I reject that submission. Even assuming this had become clear to Beverley Hughes MP by November 2003, what she then said is simply inconsistent with the clear meaning of the statements subsequently made by Desmond Browne MP and Baroness Scotland in September 2004.

53. The second way in which it appeared that the decision of the judge on this point was challenged is that the thrust of the arguments on behalf of the Secretary of State sought to show that it is possible to infer from the inclusion of the appeal procedure in the fast-track process and the 2005 Fast Track Rules that all those awaiting an appeal in the fast-track process were to be detained. The problem with this is that there is no support for this in the policy documents between 2005 and 2008. I agree with the judge (at [58]) that there was nothing in the March 2008 version of the OEM which made the position clear or suggested that the Secretary of State disagreed with views expressed by the Immigration Law Practitioners' Association that the criteria for detention under the fast-track appeal process were the general detention criteria and not the specific criteria for the DFT process by analogy, that is cases suitable for a quick appeal decision.

54. Although what has to be decided is the meaning and legality of the current policy, it cannot be said that the policy background is irrelevant. As to the position before 2008, I also respectfully agree with the judge's conclusions. The ministerial statements in 2004 left no room for doubt that at that time the general detention criteria and not the DFT "quick processing" detention criteria applied to the appeal stage. There was nothing in the March 2008 version of the OEM which made the position clear or suggested that the criteria for detention under the fast-track appeal process were not the general detention criteria. Indeed, the heading to §55.3 of the EIG (see [31] above) "Factors influencing a decision to detain (excluding pre-decision fast-track cases)", although only a heading to a provision about the general detention criteria and not one dealing with the DFT process, suggested that the general detention criteria applied to all other cases including post-decision fast track cases.

55. ***(b) Has the Secretary of State's policy contained in the DFT Guidance since 2008 been that the "quick processing" DFT detention criteria apply to the appeal stage?*** Ms Lieven submitted that since the Secretary of State's case and Mr Simm's evidence are that the policy since 2003 had been to include detention pending appeal, the judge was wrong to conclude[14] that the policy in fact changed in 2008. The first stage of this submission was that the judge was correct to conclude that the ministerial statements (the material parts of which are set out at [23] – [24] and [26] above) left no room for doubt that the DFT detention criteria did not then apply to the appeal stage. The second stage was that, since the Secretary of State's case was that the policy never changed, this must still be the position. Accordingly, the practice is in breach of the policy.

56. Ms Lieven also submitted that, as the judge recognised, it is not clear from the language of the *DFT Guidance* that detention on the "quick processing criteria" applies to the appeal stage, and it was not open to him to rely on implication for concluding that such an important extension to the DFT policy had been made. She primarily deployed this argument as part of her submission that reliance on implication for a change of so fundamental a nature meant the policy did not meet the

[14] For the reasons summarised at [43] – [44] above.

Lumba requirements of certainty and transparency, but it is also material in relation to the determination of the prior question, the meaning of the policy.

57. My starting point in determining the answer to question (b) is to make three observations about how a court should approach the determination of the meaning of a policy document such as the *DFT Guidance*. The first is the well-known point that, while the determination of the meaning is a matter for the court, it is not appropriate to subject the language of a policy document to fine analysis and to interpret it like a statute: see e.g. *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983 at [18] – [19] *per* Lord Reed (planning policy); *R (Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72, [2008] QB 836 (*ex gratia* compensation policy for those who lost their liberty as a result of a miscarriage of justice); *R v Secretary of State for the Home Department, ex p. Ozminnos* [1994] Imm AR 287, 292 *per* Auld LJ (immigration policy).

58. Secondly, although Lord Dyson in *Lumba's* case[15] stated that there are particular requirements of the rule of law for transparency and certainty when considering a policy document dealing with detention, it should not be forgotten that *Lumba's* case did not concern the interpretation of a published policy but the effect and legality of unpublished policies. Thirdly, the meaning of a policy document concerned with detention should in my judgment be determined in a practical common sense way so as to give effect to its obvious intent and purpose. However, the more difficult it is to ascribe a meaning to the document by this process, the more likely it is that the document will not meet the requirement of transparency and certainty.

59. Ms Lieven's arguments are undoubtedly powerful. She was entitled to rely, for instance, on the implication from the words in the heading to EIG §55.3 (set out at [31] above) which suggested that only "pre-decision fast-track cases" were excluded from the general detention criteria and the absence of a provision in the *DFT Guidance* explicitly providing for post-decision detention in the DFT process pending appeal provided the "quick processing criteria" continue to be met. Ms McGahey had to rely on indications from §§2.2.3 and 5.2.1 of the *DFT Guidance*, the two provisions set out at [36] and [37] above, and the words in earlier versions of the DFT policy which are set out at [38] above. §2.2.3 is a provision under the general heading "timescales", and §5.2.1 is a provision under the general heading of "operational considerations" and the sub-heading "travel documentation for removal". The earlier versions of the DFT policy state that the "decision" until which DFT detention is authorised where the "quick decision" criteria are satisfied "may be regarded as including the time during which an individual has extant appeal rights".

60. Despite the force of Ms Lieven's submissions, and the serious textual limitations of the *DFT Guidance*, I have concluded that the judge was correct in deciding that, since 2008, the DFT detention policy has applied to the appeal stage of the decision-making process. It thus applies to a person whose application was refused by the Secretary of State but whose appeal rights have not been exhausted and whose appeal is pending. I do not base this on Ms Lieven's criticism based on the judge's use[16] of the phrase "it is the clear implication" that until appeal rights are exhausted it is the DFT detention policy that applies, because in the very next paragraph of his judgment the judge

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15 [2011] UKSC 12, [2012] 1 AC 245 at [34], see [13] above.

16 [2014] EWHC 2245 (Admin) at [59], see [44] above.

stated that the DFT detention policy "applies now and has done so expressly for a number of years". As far as the heading to EIG §55.3 at the material time is concerned, it was, as Ms McGahey emphasised, a heading to a section about the general detention criteria in a policy document that is not concerned with the DFT process. Bearing in mind the approach, albeit in the different context of planning policy documents, of Lord Reed in *Tesco Stores Ltd v Dundee City Council,* I do not consider that the heading can bear the weight Ms Lieven seeks to place on it in determining the meaning of a different policy document. It was probably the result of an error made when the DFT policy changed in 2008 and a separate DFT policy document was first published. The heading to the present version of §55.3 does not contain the term "pre-decision".

61. I consider that when the DFT policy refers to detention pending a speedy decision, the "decision" now includes both the Secretary of State's decision and the decision of the Tribunal on an appeal. This, in my judgment, follows from the structure and the words of §§2.2.3 and 5.2.1 of the *DFT Guidance*. It also follows from other indications, such as the references to and the applicability of the 2005 Tribunal Fast Track Rules, provisions enacted by secondary legislation, and the provision in *DFT & DNSA – Intake Selection (AIU Instruction)* which I have set out at [38] above.

62. This conclusion, in my judgment, is also supported by the structure and scope of the 2005 Fast Track Rules. Those rules only apply to those who have been detained continuously at one of the places specified in the Schedule to the 2005 Fast Track Rules since being served with notice of the immigration decision against which the appeal is made. The places specified are the same places referred to in the *DFT Guidance* and listed in the glossary as places where those detained in the fast track may be detained. I also observe that rule 30 of the 2005 Fast Track Tribunal Rules[17] and the evidence before the judge (see [187]) as to the way it works is consistent with there being a single fast track. This suggests that the cases removed by the Tribunal from the fast track appeals process pursuant to its duty under rule 30 are cases which no longer meet the "quick processing" criteria because of the submission of new evidence or because time is needed to instruct an expert or to enable a witness to attend. Ms Lieven's submissions involve accepting that when Parliament enacted the 2005 Fast Track Rules creating a fast-track appeal process, it was introducing a different fast track with different criteria to the established DFT although it only applied to the immigration removal centres specified for the detention of those detained in the DFT.

63. Accordingly, despite the elusive way this emerges from the text of the *DFT Guidance*, I have concluded that, until a person's appeal rights are exhausted, if he or she continues to satisfy the "quick processing criteria" the policy empowers the Secretary of State to detain pursuant to those criteria rather than the general detention criteria. For these reasons, despite the force of the submissions on behalf of Detention Action, I have concluded that where the "quick processing criteria" continue to be met, post-decision DFT detention pending appeal does not breach the Secretary of State's policy in the *DFT Guidance*.

64. ***(c) Does the practice of detaining all those who satisfy the "quick processing" criteria pending their appeal meet the Lumba requirements of clarity and***

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[17] See [21] above.

transparency? I have referred to Ms Lieven's submission that if the Secretary of State's policy after 2008 included DFT detention after the decision and pending an appeal, the policy was unlawful because on no reasonable view could it be judged to meet the requirement for certainty and transparency set out by Lord Dyson JSC in *Lumba*'s case.[18] She submitted that it was quite wrong, as the judge had done, to identify an important change in policy such as this only "by implication".

65. Ms Lieven pointed to the fact that there was no consultation on the change from what had previously been stated in clear terms, no impact statement, and the Secretary of State did not offer any separate justification for detaining all those in the DFT process pending appeal. Although the way the second and third of these points were deployed appear to relate more to the question of justification than uncertainty, Miss Lieven's case on uncertainty was ultimately that an unpublished policy of blanket detention, or at best a policy of blanket detention identified only by "implication", did not meet the criteria set out in *Lumba*'s case.

66. Miss Lieven also relied on the recognition by the judge (at [53]) that "there has been persistent uncertainty" over the basis of detention after the Secretary of State's decision and pending appeal and whether the general detention criteria or the "quick processing" criteria applied, and that on two occasions counsel instructed for the Home Office submitted that the post-decision detention criteria were the general detention criteria and officials had not picked up what Mr Simm described as a "mistake".[19] She placed considerable emphasis on the statement in June 2013 by the Head of Asylum Policy at the Home Office in a letter to the European Commission (see [41] above) that "it is not entirely clear that the DFT process includes a fast-track appeal process".

67. The fact that there was no consultation on the change from the previous DFT detention policy which applied until the Secretary of State's decision and no impact statement does not affect the clarity or the legality of the new policy: on consultation, see for example *Bates v Lord Hailsham* [1972] 1 WLR 1373. Moreover, although it is noteworthy that on two occasions counsel instructed for the Home Office have submitted that the general detention criteria apply after the Secretary of State's decision and pending an appeal, I do not rely on that. As Ms McGahey observed, the circumstances in which this happened and the reason that those instructing counsel did not pick up the point are unknown. The language of the policy could have been far clearer in relation to the post-decision stage when an appeal is pending and the location of the words which I consider have this effect could have been more appropriate. But for the reasons I have given (at [61] – [62] above), I do not consider that the inclusion of detention on the basis of the "quick processing" criteria is only within the policy as a result of an implication.

68. My conclusion that the objective meaning to be derived from the language of the *DFT Guidance* is that post-decision DFT detention pending appeal falls within and does not breach the Secretary of State's policy does not fit comfortably with the

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18 The essential parts of Lord Dyson's judgment are summarised at [14] above.

19 See [2014] EWHC 2245 (Admin) at [53] and [58]. Mr Simm's First Witness Statement, §11 described the failure of officials as "regrettable".

statement by the Home Office's Head of Asylum Policy in his June 2013 letter to the European Commission that "it is not entirely clear that the DFT process includes a fast-track appeal process". That statement, in a letter written about eight years after the 2005 Tribunal Fast Track Rules, five years after the publication of a separate DFT policy in 2008 and about three months after the publication of the March 2013 edition of the *DFT Guidance* is a significant and troubling factor. Putting the matter at its lowest, the terms of the letter suggest an absence of clarity or confusion as to its content by those responsible for administering the policy. If in 2013 a senior official within the system considered that it was not entirely clear that the DFT process included a fast-track appeal process, how can it be said that this was clear to applicants outside the system and to those advising them?

69. The Secretary of State's case is that her department's policy has consistently been that the appeal stage is included in the DFT process, and certainly was after 2008. If this is so, it is surprising that in June 2013 the Head of Asylum Policy in the Home Office stated to the EU Commission that it was not entirely clear that the DFT process included a fast-track appeal process. It is perhaps even more surprising, in the light of the Secretary of State's position, that at a time when other clarifications were made to the DFT policy to address the EU concerns, the clarifications did not include an explicit statement making it absolutely clear that, where the "quick processing criteria" continue to be met, post-decision DFT detention pending appeal is within the policy.

70. I have not found the determination of this question an easy matter. It is important to remember that this case differs from *Lumba*'s case because it concerns the interpretation of a published policy, and not the effect and legality of unpublished policies. However, although I have concluded that the objective meaning of the DFT Guidance is that it is now policy to detain pending appeal under "quick processing" criteria, the elusive way this emerges from the language of the policy means that it cannot be said that the policy has been clearly published. I stated (at [58] above) that the less easy it is to ascribe a meaning to a policy document by the ordinary process of interpretation, the more likely it is that the document will not meet the requirement of transparency and certainty. I have concluded that the fact that this can only be understood from the sections of the *DFT Guidance* dealing with "timescales" and "travel documentation for removal",[20] together with the fact that, in June 2013, the Home Office's Head of Asylum Policy wrote a letter in the terms that he did,[21] means that the policy does not meet the required standards of clarity and transparency. I am fortified in my conclusion by the fact that, notwithstanding the previous position and the general understanding of practitioners in the field from ILPA's guide, there was no clear statement by government or the UK Border Agency of the change of policy. The reason for this may be because the Secretary of State considered that this has always been the policy, although the ministerial statements in September 2004 and that by the Head of Asylum Policy in the 2013 letter means that even this is questionable.

71. ***(d) Is there a lawful justification for the policy of detaining all those who satisfy the "quick processing" criteria pending their appeal?*** In view of my conclusion on (c), it

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[20] See *DFT Guidance*, §§2.2.3 and 5.2.1, discussed at [36] – [37] above.

[21] The judge referred to the concern of the EU Commission ([2014] EWHC 2245 (Admin) at [40]), but did not refer to this letter.

is not necessary to decide this question. As there has been full argument on the matter, I deal with it. I have stated that at both common law and under Article 5 of the ECHR any deprivation of the fundamental constitutional right to liberty is *prima facie* unlawful and requires justification. Justification is, as the judge stated, a matter of evidence not submission. The approach of the Supreme Court in *Lumba's* case shows that in the context of the right to liberty, although the court does not review the merits of the policy or of a decision to authorise detention, the approach to justification involves a greater intensity of review than in other contexts. In the light of the principles in the *Hardial Singh* line of cases as encapsulated in *I's* case and in *Lumba's* case which I have summarised at [14] above, the question is whether it is reasonable to detain a person who poses no risk of absconding in the period between the Secretary of State's decision and the dismissal of his appeal.

72. In *R* (*Chapti and Bibi) v Secretary of State for the Home Department* [2011] EWHC 3370 (Admin) at [78],[22] in the context of considering the justification of an interference with rights under the ECHR, I stated that it is an objective value judgment or evaluation by the court by reference to the circumstances prevailing at the relevant time and the evidence before it, and bearing in mind the need for "appropriate respect" for the Secretary of State's views, in the light of her governmental responsibility for making the judgments where she has addressed her mind to the relevant matters. In *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 Lord Wilson stated at [44]) that "in an evaluation which transcends the matters of fact it is not…apt to describe the requisite standard of proof as being, for example, on the balance of probabilities". This case involves the deprivation of the liberty of persons who pose no risk of absconding. The question is whether on the evidence before the court, it can be said that the interference with their rights by the application of the "quick processing" criteria to detain them pending an appeal against the Secretary of State's refusal of their claim to asylum is justified. Is it necessary for the purposes for which detention is authorised by the 1971 Act? Is the detention pending appeal of those who pose no risk of absconding for a period which is reasonable in all the circumstances?

73. ***(i) The Secretary of State's case:*** Ms McGahey's submissions to the judge (summarised by him at [78], set out at [46] above) suggest two possible linked justifications. The first possible justification is that the reasoning used in *Saadi's* case is applicable to detention at the appeal stage and can be applied analogically. The fact that the *DFT Guidance* makes it clear that entry into and exit from the DFT process is governed by what I have referred to as the "quick processing" criteria could be deployed to provide support for such a justification.

74. The second possible justification arises from the information Ms McGahey gave the judge in submissions about the number of fast-track appeals a year (2,000), the number of tribunals hearing them (8) and the limited number (3) of fast-track tribunal hearing centres. The judge stated that such information might be expounded in evidence as "logistics and resource problems" justifying continuing detention other than on general detention criteria during the appeals process, but that there was no evidence from Mr Simm expressing this or other justifications.

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[22] Affirmed [2013] EWCA Civ 322. An appeal to the Supreme Court in *Bibi's* case is pending.

75. The Secretary of State took the opportunity given to her by the judge to file evidence about the justification for detention within the DFT process of those who satisfy the "quick processing" criteria after the refusal of their application for asylum and pending their appeal. Mr Simm's seventh witness statement (at §14) stated that the submissions made by Ms McGahey at the hearing[23] about the difficulties of hearing an appeal within the fast-track appeal timetable if the appellant is released from detention were "accurate" and that he had approved her skeleton argument before it was served. He went on to state:

> "15 In my view the application of the quick decision detention basis to the DFT appeals process is logical. It ensures that a quick and fair decision to refuse asylum is made, the case will, subject to ongoing suitability, continue to be quickly and fairly considered in the accelerated appeals process. The key determining factor throughout is quickness (and with it, fairness). Alternative approaches do not provide the same common-sense continuity.
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> 16 If the appellant's absconding risk was the sole reason for post-decision detention, there would inevitably be some who could not be detained if they chose to exercise their appeal right. This would reduce the overall number of decisions being determined through the DFT appeals process, which would undermine the end-to-end intention of the overall DFT process."

76. The position of the Secretary of State in the light of the evidence appears to be that, because there is a need to process approximately 2,000 appeals per annum in the fast track, the opportunities for travel arrangements and meetings to go awry means that, the reasoning in *Saadi*'s case applies at the appeal stage. Ms McGahey submitted that detention when within the DFT process is needed in order to facilitate the expeditious conclusion of all stages of a person's application, including not only the Secretary of State's decision but also the scrutiny of that decision by the Tribunal in an appeal. She relied in particular on [24], [46] and [47] of the speech of Lord Slynn in *Saadi*'s case. She stated that the examples she had given during the hearing before the judge of practical difficulties avoided through detention (e.g. the need for accommodation near an appeal centre, the risk of travel plans going awry) were not intended to amount to a separate justification but were examples that apply equally to justify detention under DFT at the asylum interview and decision-making stage.

77. Ms McGahey also relied on three other matters. One is that, while recognising that those who are detained find it more difficult to obtain access to legal advice and have practical difficulties such as booking a room and ensuring the availability of an interpreter, she states that these difficulties would not be addressed by releasing detainees pending their appeal. The second is the fact that "wherever possible, the same officer interviews the asylum applicant, makes the decision and presents the appeal". The third is the provision for taking cases out of the DFT process to provide extra time.

78. ***(ii) Detention Action's case:*** Ms Lieven submitted that detention pending appeal is unlawful because it has not been justified and that the argument that the justification given to the House of Lords in *Saadi*'s case for detention pending decision could simply be extended to the appeals stage is flawed. This she maintained was because the justification for detaining all those whose applications appeared capable of rapid resolution which the House of Lords accepted was the Home Office officials' need for

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[23] Referred to by the judge at [78], and set out at [46] above

tight structuring and management and ready access to applicants when up to 150 interviews a day had to be scheduled.[24] There is, she argued, no need for the Secretary of State's officials to interview an appellant who is awaiting his or her appeal. Indeed, the evidence of Mr Blakely, a partner at Wilson Solicitors LLP was (see statement dated 5 June 2013, §103) is that detaining all appellants may itself create practical difficulties because of the need to book rooms in detention centres for meetings with lawyers, often together with interpreters, which do not apply if the individual is not detained. Ms Lieven also relied on the greater difficulty a detained person faces in obtaining evidence to address an adverse credibility finding by the Secretary of State.

79. The next strand of Miss Lieven's submissions on this matter was that there is no requirement that an appellant attends the hearing before the First Tier Tribunal. It is open to the Tribunal to proceed in the absence of an appellant who does not attend, and a number of Tribunal hearings outside the fast-track process occur in the absence of the appellant. She submitted that it cannot rationally be suggested that an appellant needs to be detained in order for the Tribunal to conduct the hearing.

80. Ms Lieven also relied on the statements by the judge (at [87]) that, although there is nothing in the nature of the appeal process which suggests that the suitability criteria for entry to the DFT process are unsuitable for application at the appeal stage, he recognised that the same criteria "may require a different answer in the light of the decision under appeal, the evidence required and its possible duration, and it should receive separate consideration". She submitted that at the appeal stage there is a need for a new decision to be made about DFT detention because of the different considerations which may apply at that stage. For example, the Secretary of State's own policy states that the fact of an ongoing appeal is likely to reduce a risk of absconding.[25]

81. Finally, Ms Lieven relied on what she described as "a very significant constitutional issue". This is that, at the appeal stage, the Secretary of State is appellant's opponent in the proceedings, the respondent to the appeal. The effect of detaining an appellant is to make the appellant's conduct of the appeal more difficult because of practical difficulties such as those mentioned at [17] above. She submitted that those practical considerations give rise to the constitutional question. Should one party to an appeal be entitled to detain the other party to the appeal when the effect of detention is to make the other party's conduct of the appeal much more difficult and therefore to make it less likely that he or she will be successful.

82. ***(iii) Analysis:*** I agree with the judge (at [80]) that "the policy is not so obviously unlawful that no reasoning could save it". In considering the submissions, my starting point is to consider whether the approach of Lord Slynn in *Saadi*'s case can be applied analogically to detention pending appeal in the way Ms McGahey submitted it could. What Lord Slynn said has to be assessed against the evidential background in that case. It is instructive to consider the evidence on behalf of the Secretary of State given by Mr Ian Martin, an experienced Immigration and Nationality Directorate Inspector, so far as it can be ascertained from the parts set out or summarised by Lord Slynn.

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24 See the summary at [17] above.

25 See EIG, §55.3.1, summarised at [25] above.

83. Mr Martin stated that detention at Oakington was not based on a fear of absconding. It was in the interests of speedily and effectively dealing with asylum claims to facilitate the entry into the United Kingdom of those who are entitled to do so, and the removal from the United Kingdom of those who are not. He also stated that it was an important consideration that no detention should be longer than reasonably necessary and that the Oakington process had been designed to keep the length of detention "to an absolute minimum – a matter of a few days": see [2002] 1 WLR 41 at [18]. His third witness statement (ibid. at [20]) addressed the suggestion that applicants be granted temporary admission under section 4 of the Immigration and Asylum Act 1999 subject to the condition that they be required to stay at Oakington but not detained there. He stated that the Home Office's view was that people would be less readily available at short notice if they could move about even without absconding, and that with up to 150 scheduled interviews a day, tight management and structuring were important. There is no indication from the extracts from and references to Mr Martin's evidence by Lord Slynn that Mr Martin addressed the position after the Secretary of State's decision and pending appeal. This is not surprising. As the appeal stage was not at that time part of the fast track, it was not necessary for him to consider it.

84. Secondly, Lord Slynn's reasoning that detention of those who did not pose a risk of absconding at that stage of the process was justified as reasonable depended on the fact that the period of detention was very much shorter at that time in part because it did not encompass the appeal stage. The judge stated (see [82] – [83]) that at that time, it was seven to ten days before the initial decision was made. That period had become ten to fourteen days by the hearing before him, and the average period from entry into the DFT until appeal rights were exhausted was 23.5 days, and varied between 16 and 33 days. As to the proportionality of the period after the decision and pending appeal, the judge stated (see [84]) that, absent the particular circumstances of a case, he found it difficult to see why the period should be greater than 20 days.

85. The assumption is made on behalf of the Secretary of State that, because there is a need to process approximately 2,000 appeals per annum in the fast track at eight fast track courts at three hearing centres, *Saadi*'s reasoning applies to the appeals stage. Why is this so although the reasoning in *Saadi* was tied to the need for on-the-spot availability for interviews and the much shorter period? The evidence on which Ms McGahey relied is in §§14 – 16 of Mr Simm's seventh witness statement. Mr Simm confirms the figures and the accuracy of Ms McGahey's submission before the judge that there would be plenty of opportunities for travel arrangements and meetings to go awry and that this would undermine the proper operation of the fast track appeal process. He states in §15 that the policy ensures that a "quick and fair decision to refuse asylum is made" and that thereafter "the case will, subject to ongoing suitability, continue to be quickly and fairly considered in the accelerated appeals process". He also states that "alternative approaches" to detention on by reference to the "quick processing" criteria "do not provide the same common sense continuity".

86. Mr Simm's evidence gives no further particulars and gives no factual basis for his confirmation of Miss McGahey's submissions. He does not, for example, comment on the difficulties detained persons have in seeing their lawyers and obtaining evidence. He does not explain why, since it is possible for the appeal to proceed in the absence of the appellant and in fact a number of appeals do so, not detaining those who do not

pose a risk of absconding would "reduce the overall number of decisions being determined through the DFT appeals process". It may be that he in fact has in mind the advantage of having persons in detention at the time their appeal rights are exhausted and removing them rapidly thereafter because even those who previously have not posed a risk of absconding may do so once their appeal rights are exhausted, but he does not say so. In any event, once their appeal rights are exhausted, the policy states that the ordinary detention criteria apply.

87. There is no evidence from the Tribunal that it would be unable to deal with appellants as quickly without them being in detention and no evidence from the Home Office that it is not possible to place those released near centres with fast-track appeal tribunals. One of the matters canvassed in *Saadi's* case was a regime granting a person temporary admission subject to the condition that he or she is required to stay at the detention centre but not under conditions of detention. The explanation in Mr Martin's third witness statement in that case of why this would impede the operation of the DFT process was tied to the need for availability for interviews at short notice. Mr Simm does not explain why at the appeal stage, when there are no interviews with Home Office officials, an arrangement of this sort would not meet the need. Given the centrality to the Secretary of State of the applicability of the approach in *Saadi's* case to detention at the appeal stage, and the discussion of this aspect of Mr Martin's evidence in Lord Slynn's speech, this is unfortunate. There is also no evidence as to why, given that the individuals concerned are, by definition persons who do not pose a risk of absconding, not having them in detention pending the outcome of their appeals would delay their removal if their appeals are unsuccessful. At that stage, even though removal may be "imminent", detention has to be justified under the general detention criteria: see DFT Guidance, §5.2.1.

88. I have referred to Miss McGahey's submission that the practical difficulties faced by detainees in obtaining access to legal advice would not be addressed by releasing them pending their appeal. There was no evidence from a Home Office witness to support this submission. Ms McGahey relied on the evidence given on 5 June 2003 to the Home Affairs Select Committee by Mr Best, who worked for one of the NGO's involved in immigration work, and Ms Lally, of the Refugee Council. Their evidence concerned the DFT at Oakington, which, at that time, did not include a detained appeal process. They stated that once their clients had been released after the Secretary of State's decision they experienced difficulties in maintaining contact with their clients and preparing an appeal. I have derived only very limited assistance from this evidence. It was given in another context and over a decade ago. Ms Lally stated that "it is a wider problem about how we handle dispersal in the country". It is unfortunate that, notwithstanding the wish of the Secretary of State to rely on this point, this question is not addressed in Mr Simm's seventh witness statement and that there is no more up-to-date evidence on it. As it is, there is nothing to gainsay Miss Lieven's submission that the difficulties that arose in 2003 did so because of the Secretary of State's dispersal policy rather than simply because the individuals were released from detention.

89. I turn to the "single officer" point. This appears to have arisen from Beverley Hughes MP's evidence to the Home Affairs Select Committee in November 2003, to which I referred at [25] above. The current position is, however, not entirely clear. During the hearing, Ms Lieven drew the court's attention to the Seventh Report of the Home

Affairs Select Committee in 2013/14 HC 71, published on 11 October 2013 which stated of the "Asylum Operating Model" and, after referring to DFT cases, that "there is no longer a single case-owner who handles the application at all stages".

90. After the hearing a statement of Daniel Smith, now head of the detained fast-track in the Home Office's UK Visa and Immigration Directorate, dated 31 October 2014, was filed. This stated (§3) that the practice described by Beverley Hughes MP in 2003 "is still the same practice that is applicable to the DFT process today". Mr Smith also stated that, wherever possible, taking into account different work-shift patterns of staff, a single case-owner will process the same case from the time the case is allocated to a case-owner, before the substantive asylum interview takes place, until the case is appeal rights exhausted or the applicant is released from the DFT. He stated that "this means that in practice the same case-owner within the DFT … will conduct the asylum interview, make the asylum decision and monitor the progress of the case through the DFT process" and that "this may also include presenting the same case before the First Tier Tribunal" but that "this will not always be true in practice if the case-owner is assigned another duty on that day". Even where the original case-owner does not present the case at the appeal, Mr Smith stated that "he or she will still maintain ownership of the case": see §§4 – 6.

91. Mr Smith stated that the statement in the Seventh Report of the Home Affairs Select Committee to which our attention was drawn by Ms Lieven is factually correct in relation to non-detained casework but not in relation to practice in the DFT. Since the words in the report of the Home Affairs Committee clearly refer to those detained in the DFT, Mr Smith's evidence must be that the report is mistaken. Leaving aside the way the point emerged and the timing of the Secretary of State's evidence about it, at its highest this evidence is that the "case-owner" who has interviewed the applicant and made the decision will present the case before the Tribunal "if he or she is not assigned another duty on that day". Moreover, although, given the timing of Mr Smith's evidence, it has not been possible for Detention Action to file evidence in response, as Ms Ghelani, its solicitor, stated in a letter dated 31 October 2014 to the court, there are steps other than detention that the Secretary of State could take to ensure that the same person who has interviewed an applicant for asylum also presents that person's appeal before the Tribunal. Additionally, Ms Ghelani referred to enquiries made of practitioners dealing with cases in the DFT process and states "based on what they have reported, the factual position is that, generally, the Home Office Presenting Officer who presents the appeal is not the same as the person who interviews the asylum applicant".

92. The last of the particular matters relied on by Ms McGahey was the provision for taking cases out of the DFT process to provide extra time for instructing lawyers, receiving advice and obtaining evidence. There is a mandatory requirement in Rule 30 of the 2005 Tribunal Fast Track Rules to do this (see [21] above]) where the Tribunal is satisfied by evidence that there are exceptional circumstances which mean that the appeal or application cannot otherwise be justly determined. §2.1.2 of the *DFT Guidance* states that assessment of suitability of a case for the DFT process must take place "at all stages of ongoing case management within DFT". Mr Simm's seventh statement does not provide further information as to how many cases are taken out at the appeal stage. The evidence before the judge (see [5] above) was that 6% were removed from the process at that stage, in Mr Simm's view largely because of the

submission of the new evidence on or immediately before the day of the appeal hearing or because time was needed to instruct an expert or for a witness to attend: see [2014] EWHC 2245 (Admin) at [187]. The evidence on behalf of Detention Action, given by Mr Blakeley, was that the Secretary of State rarely takes cases out of the DFT fast-track appeal process.

93. At the core of the Secretary of State's case is the submission that the approach and reasoning of Lord Slynn in *Saadi's* case is applicable and justifies detention at the appeal stage. I do not consider that without further evidence it is possible to take a conclusion reached in a particular context and against a particular factual background and conclude that it applies in another context or at a different stage of the same process. I have carefully borne in mind the need for "appropriate respect" for the Secretary of State's views in the light of her governmental responsibility for making the judgments when considering the evidence given about the individual matters relied on in the three paragraphs of Mr Simm's seventh statement and in Mr Smith's post-hearing statement. But I have also borne in mind the statements by Baroness Hale and Lord Mance in *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19 at [37] and [47] that the evaluation of the person who the legislature has given primary responsibility for a decision is given "some weight" if that person has addressed his or her mind to the relevant matters in an appropriate way. Where the primary decision-maker has not done so, or has not done so properly, they stated that his or her views are bound to carry less weight and the court has to strike the balance for itself, giving due weight to the judgments made by the primary decision-maker on such matters as he or she did consider.

94. I observe that looked at in the round the evidence before the court on behalf of the Secretary of State does not provide the sort of substantial fact-based justification that the Supreme Court in *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621 indicated would be needed to justify an interference with a fundamental right. Such evidence was given in *R* (*Chapti and Bibi) v Secretary of State for the Home Department* [2011] EWHC 3370 (Admin), affirmed [2013] EWCA Civ 322, in which it was held that the interference was justified.

95. What the Home Office stated in its letter to the European Commission in June 2013, to which I refer at [68] – [69] above, is also of some relevance at this stage of the discussion. In that letter the Head of Asylum Policy at the Home Office stated that "it is not entirely clear that the DFT process includes a fast-track appeals process". In the light of this fairly recent statement by the Head of Asylum Policy at the Home Office about a policy which it is said has been in place since 2008, it is perhaps not surprising that the evidence on behalf of the Secretary of State is in relatively general terms and has not dealt with a number of the matters addressed by Ms McGahey in her submissions.

96. Although, as Lord Wilson stated in *Quila*'s case, justification involves an evaluation "which transcends the matters of fact", it requires a basis in fact, evidence or expertise. I stated (at [71] above) that in the light of the principles in the *Hardial Singh* line of cases as encapsulated in *I's* case and in *Lumba's* case summarised at [14] above, the question is whether it is reasonable to detain a person who poses no risk of absconding in the period between the Secretary of State's decision and the dismissal of his or her appeal. For the reasons I have given in respect of the individual factors, I do not consider the evidence in Mr Simm's seventh statement and Mr

Smith's post-hearing statement suffices to show that the approach and reasoning in *Saadi's* case means that, after the refusal of an application for asylum and pending an appeal against that decision, detention of a person who does not meet the general detention criteria by the application of the "quick processing" criteria is justified and reasonable in the *Hardial Singh* sense. Accordingly, had it been necessary to decide the question of justification, I would have concluded that, whether by application of heightened *Wednesbury* principles[26] or by reference to Article 5 of the ECHR, the evidence put before the court does not justify the policy at the appeal stage.

VII. Conclusion

97. For the reasons in section VI, I have concluded that detention in the fast-track by the application of the "quick processing" criteria, after the Secretary of State's decision and pending appeal is not objectionable in principle and does not breach the *DFT Guidance*. I have, however, also concluded that it does not satisfy the requirements of clarity and transparency. Had it been necessary to decide the point I would also have concluded that, on the evidence before the court, it cannot at present be said to be justified. The order of Ouseley J therefore needs to be varied to reflect this decision on a matter on which he did not rule.

Lord Justice Floyd:

98. I agree.

Lord Justice Fulford:

99. I also agree.

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[26] See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.