SUPREME COURT

BRITISH INDIAN OCEAN TERRITORY

BIOT SC 15 and 16 2023

Before:

Margaret Obi

ACTING JUDGE OF THE SUPREME COURT

B E T W E E N:

In the matter of an application for permission to apply for Judicial Review

THE KING (on the application of)

VT (Sri Lanka) and others

Claimants

-and-

THE COMMISSIONER FOR THE BRITISH INDIAN OCEAN TERRITORY

Defendant

Representation

Helen Law (via video-link) instructed by Wilsons Solicitors on behalf of the First and Sixth Claimants

Chris Buttler KC and Jack Boswell instructed by Duncan Lewis Solicitors on behalf of the Second to Fifth Claimants

Ben Jaffey KC and Natasha Simonsen instructed by Leigh Day Solicitors on behalf of the Seventh to Twelfth Claimants

John McKendrick KC, William Irwin and Anisa Kassamali instructed by the Defendant

Dates of hearing: 16-19 September 2024 (in person on Diego Garcia and via video-link)

Written submissions (following hearing): 25 September 2024 (Defendant's Response to Claimants' Oral Closing Submissions), 30 September 2024 (Claimants' Submissions in Reply) and 5 December 2024 (Claimants' Update)

Date of Judgment: 16 December 2024 (circulated on 12 December 2024)

Margaret Obi:

Introduction

1. The British Indian Ocean Territory ('BIOT' or 'Territory') lies halfway between Tanzania and Indonesia. The Territory comprises more than 50 islands known as the Chagos Archipelago and is one of the most remote island groups in the world. Diego Garcia, the largest and most southerly island, has an area of approximately 12 square miles. It is an atoll with a ribbon of land formed by coral reefs enclosing a lagoon. The mouth of the lagoon is in the north. The terrain is flat and low-lying, and the surrounding waters, in shades of turquoise and blue, wash up on white sandy beaches. The climate is tropical. As is typical of tropical islands, the untamed parts of the island have dense forests of coconut palms and other coastal flora. Diego Garcia is a military facility.

2. The islands were formerly part of the British colony of Mauritius and have a complicated and disputed history. Diego Garcia was once inhabited by a group of people ('the Chagossians') who are descendants of African slaves, indentured labourers, and others who were brought to the islands during the late 18th century. In the lead up to Mauritian independence (which took place in 1968), the UK separated the Chagos Archipelago from Mauritius to form the BIOT. The Chagossians were compulsorily removed between 1967-1973. On 30 December 1966, the UK and the US governments signed an agreement ('the 1966 Exchange of Notes') to make the BIOT available for defence purposes. A supplementary agreement was signed in 1976 ('the 1976 Exchange of Notes') which states that:

   > *"Access to Diego Garcia shall in general be restricted to members of the Forces of the* [UK] *and of the* [US]*, the Commissioner and public officers in the service of the* [BIOT]*, representatives of the Governments of the* [UK] *and of the* [US] *and, subject to normal immigration requirements, contractor personnel."*

   The 1976 Exchange of Notes also states that the US has the right to develop the Naval Support Facility ('the facility') and will bear the cost of developing, operating, and maintaining it. Diego Garcia has since served as a key strategic location for military operations in the Indian Ocean region.

3. BIOT is administered from London by the Commissioner who carries out the functions of both government and legislature. The Territory is uninhabited, save for a transient population on Diego Garcia made up of service personnel, public officers of the BIOT Administration ('BIOTA'), support staff for the defence facilities, and independent contractors. There are approximately 2,500 non-military personnel on Diego Garcia. All military postings and civilian contractors serve without their families and/or dependents. They either work directly for the UK Ministry of Defence, the US Department of Defence or for companies that provide operations and maintenance services. The companies are required to ensure that their staff are subject to appropriate checks and have the relevant permits. There are no commercial flights to or from the Territory. The supplies required to maintain the facility are brought in via military aircraft or by sea.

4. In keeping with its military function Diego Garcia has a port, airfield, fuel depot and other classified installations in various locations. Some of these sensitive areas are fenced off; some are not. There are clusters of utilitarian accommodation along the highway ('DG1')

for contractors and no-frills accommodation blocks for military personnel in the area colloquially known as 'Downtown'. There are amenities to support the military and non-military staff. These include a bus service, a launderette, a small supermarket, restaurant, bars, and recreational facilities. All amenities, with the exception of the Brit Club and the NAAFI shop, are operated and financed by the US government. The Brit Club, is a social venue, located in the marina area. It is operated by a UK naval committee who run the club when off-duty. However, the building is maintained by KBR - the US' main contractor.

5. Close to the airfield runway is an area known as Thunder Cove. It is currently an encampment ('the Camp') which accommodates a group of asylum seekers. The Claimants are 12 of the 64 asylum seekers who have been accommodated on Diego Garcia since October 2021 (save for those medically evacuated to Rwanda) and RG who arrived in April 2022. At the time of the hearing the majority of the Claimants had been in the Camp for over two years and 11 months. RG had been in the Camp for two years and five months.

6. In judicial review proceedings it is rare for a court to hear oral evidence, and it is even rarer for a site visit to take place. Both have occurred in this case which reflects the unique status of Diego Garcia as a sensitive military facility. The site visit took place on Day 1 of the hearing and encompassed the Camp, the adjacent beach, the nearby *barachois*, the Chapel, the Nature Trail (a maintained and signposted 1.5km track through a woodland area which leads to a beach), and a walk along a substantial part of the bail route (see below). In Downtown (approximately five miles from the Camp) the Court and the parties visited the BIOT police station and the Short-Term Holding Facility ('STHF'). There was also a visit to the Brit Club and the ruins of the East Point plantation in the eastern half of the island. The hearing took place in the Chapel which is located about 200m from the Camp.

Issues to be determined

7. There are two issues before the Court:

    i Are the Claimants detained?
    ii If so, has the Commissioner proved that at all times he had (and currently has) lawful authority to detain them?

8. The Claimants submit that they are detained, and that their current and past detention is unlawful. The Commissioner submits that the Claimants are not detained and, if they are (or have been), it is lawful on grounds of necessity and/or has been validly authorised by the Restriction of Movement Orders 2023 and 2024 ('RMO 2023', 'RMO 2024' or 'the RMO(s)'). There is no dispute between the parties that past lawfulness is concerned with determining liability for the tort of false imprisonment, whilst current lawfulness relates to whether the Claimants are entitled to judicial review and/or a writ of habeas corpus.

9. The remedies sought (as set out by Mr Jaffey KC during his oral closing submissions) are: (i) a declaration that the Claimants are being unlawfully detained; (ii) confirmation of the start date; and (iii) a writ of *habeas corpus*.

10. Before addressing the issues in this case, I will set out the background circumstances in detail. The events set out below are not materially in dispute.

Background

Arrival on Diego Garcia and status

11. The Claimants are Sri Lankan nationals of Tamil ethnicity. On 3 October 2021, a boat containing each of the Claimants (apart from RG) fell into distress close to BIOT whilst *en route* from Sri Lanka to Canada where they had intended to claim international protection. The Royal Navy came to the rescue and escorted the vessel to Diego Garcia. RG arrived on a boat with other asylum seekers on 10 April 2022. Since then, five further boats have arrived in BIOT; the most recent arrival was on 29 December 2022. In total 349 asylum seekers arrived in BIOT between October 2021 and December 2022. To date 285 migrants have left voluntarily, either on flights arranged by the Commissioner, or in their own boat with the assistance of the Commissioner. At the time of the hearing BIOTA remained responsible for 64 asylum seekers (including 16 children): 56 on Diego Garcia and 8 in Rwanda on a medium-term basis for medical care.

12. There is no right of asylum on BIOT and neither the Refugee Convention nor the European Convention on Human Rights apply. However, there is no dispute that as a matter of customary international law the asylum seekers cannot be refouled to Sri Lanka if they would be at risk of persecution, torture, or ill-treatment. RG and KP have received positive non-refoulement decisions (on 30 March 2023 and 1 August 2024 respectively). Therefore, they cannot be sent back to Sri Lanka. The other claimants have outstanding claims for international protection either as the main applicant or as a dependant.

The Camp

13. The Camp, prior to the arrival of the asylum seekers, was designated as a "*surge capacity*" camp for use during military contingency operations. It was an open area with military tents on concrete base pads. The asylum seekers are housed in these tents. The tents are air conditioned and measure 9m x 5m. Individual tents accommodate family members or groups of single men. They all sleep on military cots/camping beds. For privacy, sheets are used to make partitions.

14. There are rudimentary ablution blocks in the Camp with showers, toilets, and a former laundry room ('the Laundry Room'). There are no cooking facilities. KBR are contracted to provide housekeeping facilities, maintenance, and dining facilities on Diego Garcia and also provide meals for the Camp three times a day. Following the arrival of the first group of asylum seekers, very basic schooling was provided by UK military personnel in their spare time. However, in mid-July 2022, two teachers were deployed to BIOT: a UK-trained secondary school maths teacher and a junior doctor to tutor the primary school-aged children. The lessons take place in the Chapel. Medical services at the Camp are provided by a team from Response Med, which includes two doctors (an emergency medicine specialist and a GP), as well as paramedics, registered nurses, and mental health professionals. Outside of regular hours, an emergency physician, duty nurse, or paramedic is on call. An interpreter is always on standby. The US military medical facility can undertake basic tests but, if advanced or emergency medical care is required, BIOTA facilitates evacuations. Those asylum seekers who had mobile phones on arrival have

retained them. However, they do not have local SIM cards or access to Wi-Fi networks, and so cannot connect to the internet or make calls. There are three telephones in the Camp which the asylum seekers can use to call family and friends. The first was installed on 21 November 2021, the second on 22 March 2022 and the third on 4 May 2022. The asylum seekers are able to pre-arrange phone calls and video calls (using iPads provided by BIOTA) with their legal representatives. These calls take place in the Chapel.

15. The Camp was originally 100m x 100m but in April 2022 was extended to 140m x 100m to accommodate a second toilet block following the arrival of more asylum seekers. The only part of the Camp which is not fenced-off is the side bordered by thick bushes and trees. A fence made of plastic-mesh was initially used to define the perimeter. This was replaced in November 2021 by mesh wiring suspended by posts. At first, US military kept a 24/7 'watch' over the Camp from a vehicle but from 12 March 2022 onwards it has been guarded by G4S officers. On 2 September 2022, undergrowth was cleared to facilitate access to the beach adjacent to the Camp. Prior to the Court order agreed on 21 December 2023, beach visits did not take place on a daily basis as they were subject to when the weather and tide conditions were deemed to be safe and when the visits did not clash with other G4S escorting duties (e.g. lawyer calls or medical appointments). The asylum seekers are escorted when they leave the Camp to attend the Chapel, the adjacent beach, medical appointments in Downtown, or when the bailed Claimants access the bail route.

16. The impact of life in the Camp is illustrated by the account provided by SE in his witness statement dated 15 December 2023. SE is a 46-year-old man. He arrived on Diego Garcia with his wife and two children (now aged 12 and 6). He states as follows:

> *"31. My family and I are forced to live in a prison, but worse. A prisoner would know how long his sentence is for, but we do not. We do not know when we will be released from this prison, and how long we will be trapped here for. We have no control over our lives here; if we are commanded to stand, we stand, if we are commanded to sit, we sit. Our lives are entirely in their hands. We can do nothing without their permission. Nothing can reach us without their permission.*
>
> *32. I feel like a bird being kept in a cage. We cannot wait for the cage to be opened and to finally be free from this place. But right now, we have no choice but to stay here. I cannot take my family back to Sri Lanka or India because I fear that my family and I will be attacked by the Sri Lankan government."*

The Grant of Bail

17. On 22 April 2024, I granted bail by way of interim relief to 11 claimants ('the Bail Order'). The application had been opposed by the Commissioner on the grounds of US security concerns. The Bail Order permitted the bailed Claimants "*to access a specific route along the east side of DG1 and attend any of the beaches, where safe to access, along that route*" between the hours of 9am and 5pm. The Commissioner was entitled to limit each bailed Claimant to four hours outside the Camp each day if such limits were communicated by 5pm the day before. The Bail Order is dated 23 April 2024.

18. On 24 April 2024 (in the evening), the Commissioner informed the Claimants' solicitors that the "*logistical arrangements take time and so we will be unable to facilitate access to the specified route tomorrow, 25 April 2024.*" Shortly after 9am on 25 April 2024, when the bailed Claimants approached the exit of the Camp, they report that they were instructed by G4S officers not to leave. Additional officials arrived in a Jeep to secure the exit. Later that day, the Commissioner informed the bailed Claimants that they would be permitted to access the bail route between 1pm and 5pm on 26 April 2024.

19. On 26 April 2024, the Commissioner's Representative (Commander Roger Malone) stated in an email timed at 07.09.42 that:

> "…
> - *The US position remains that they are not content to grant the migrants access through the US-controlled facilities at this stage until a comprehensive risk assessment and security plans have been completed.*
> - *Given this,* ***we are no longer able to facilitate access to the specified route at the times advertised****.*
> - *We are continuing to work on a pragmatic solution to enable the Bailed Claimants to have access to areas of Diego Garcia in compliance with the Court Order.*
>
> *However, if the claimants subject to the bail order decide that they want to leave we have* ***no powers to legally stop them and any use of force would be assault****. BIOTA are submitting an application for a variation this morning, requesting the start date be 4 May to allow the security, safeguarding and safety concerns to be addressed* [emphasis added]."

Commander Malone noted that G4S would have their six-strong Quick Reaction Force ('QRF') (also referred to as the Rapid Reaction Force ('RRF')) in the Chapel with a vehicle and he would also have a QRF at the Camp consisting of three vehicles and six personnel. He stated that even if the bailed Claimants were to leave "*in small groups or as individuals at irregular intervals to place as much strain on the monitoring personnel as possible … this should be manageable*."

20. On 26 April 2024 at 1pm, the bailed Claimants gathered at the exit of the Camp. Uniformed soldiers arrived. The bailed Claimants report that the Migrant Information Coordinator, informed them that they would not be permitted to leave the Camp. That evening, the Commissioner applied for a stay of the Bail Order, "*such that it comes into effect on 13 May 2024, subject to US approval of BIOTA's proposals*". The Claimants objected and applied for bail variations, without prejudice to their position that the Bail Order was workable and that the Commissioner was in contempt of court.

21. None of the bailed Claimants exercised their right to access the bail route until 2 May 2024. The five that left the Camp did so after being informed that the Commissioner could not, and would not, use force to prevent them from leaving. The bailed Claimants report that the Commissioner intentionally made leaving the Camp an unpleasant experience. They were prohibited from taking watches or mobile phones, making it difficult for them to keep track of time; they were not allowed to refill their water bottles from the taps along the route; they were denied access to toilets on the route; and they were instructed not to sit

down, as the Bail Order did not expressly permit it. The Commissioner, in his Re-Amended Detailed Grounds of Defence ('RADGD'), states that there has been insufficient time to plead to these allegations. However, it was made clear that the bailed Claimants' allegations are not accepted, save to the extent that they are evident from the documents in the bundles, or expressly admitted. The express admissions include: (i) the asylum seekers are not permitted to take mobile phones out of the Camp at any time (not just those accessing the bail route); (ii) the G4S escorts offered to make the bailed Claimants aware of when it was time to return to the Camp and this was accepted; (iii) they were informed that they did not have permission to use US toilet facilities and that public urination was an offence. They were advised to use the toilets in the Camp before setting off; (iv) they sat under a gazebo to discuss whether to go on the walk. This is not on the path and therefore not strictly part of the bail route. They were advised that they could sit there for a short while but if their conversation was going to continue, they would need to return to the Camp. This was because they were not setting off on their walk and therefore were deemed to be in breach of the RMO.

22. On 4 May 2024, I refused the Commissioner's application for a stay. I granted the bailed Claimants' application to vary the bail route and ordered the Commissioner to pay their costs on the indemnity basis. On 26 July 2024, the bailed Claimants were granted extended bail conditions ('the Revised Bail Order') which included access to the Nature Trail and 29 new bailed Claimants were granted bail on the same terms. The new conditions were effective from 1 August 2024. At all times, the bailed Claimants have been escorted by G4S officers when exercising their right to bail.

The Specific Circumstances of KP and VT

23. On 2 July 2023, KP left the Camp, and walked naked along DG1. On being returned to the Camp he attempted to cut himself with a razor and went into the sea. G4S intervened. Later that evening (around 8pm), reports were received that KP was being aggressive towards other asylum seekers and at 8:34pm it was reported that he had a blade. KP was restrained and relocated from the tent he shared with other single males to the Laundry Room. KP was informed that he had been taken there for his own safety and was kept under 24-hour observation. The Laundry Room is approximately 3m x 6.5m in size with a "*rigid steel mesh*" on one side. It is located close to the male ablution block which often becomes hot and smelly during the day. It has no curtains and it is not air conditioned. On 3 July 2023, KP was transferred to the Immigration Removal Centre ('IRC'), now known as the STHF (a 12m x 12m 'pod' under constant surveillance by G4S officers) purportedly because of the risk he posed to others and himself. On 5 July 2023, KP was returned to the Laundry Room. KP was detained in the STHF again from 12-14 July 2023 following the negative determination of his non-refoulement claim. On 16 July 2023, KP was returned to the Laundry Room.

24. On 18 August 2023, KP was charged with arson in connection with an attempted suicide by self-immolation. Subsequently, he was also charged with sexual assault. On 26 October 2023, he was granted bail in the criminal proceedings, with a condition "*not to deliberately or intentionally contact*" the complainant in the sexual assault case. Between 16 July 2023 and 9 March 2024, KP remained in the Laundry Room albeit with supervised access to

other parts of the Camp. On 9 March 2024, KP was returned to tented accommodation within the Camp. On 13 June 2024, KP was removed from the Camp and taken to the STHF purportedly for his safety and the safety of others.

25. Until interim relief was granted in the form of bail, KP was permitted one hour per day to speak on the telephone with his friends or family in India. He was not permitted to associate with VT, who was also in the STHF, in a separate pod. On 24 June 2024, having been in the STHF for 11 days, KP was permitted to exercise his right to access the bail route (as one of the bailed Claimants). G4S officers drove him to an area near the Camp, so that he could access the route with the other bailed Claimants. However, since 26 June 2024, KP has only accessed the bail route alone; G4S drop him off at the Brit Club and he is then permitted to walk along DG1 towards the Camp.

26. On 21 March 2024, VT was arrested for criminal damage and held at the BIOT police station. On 30 May 2024, VT pleaded guilty to criminal damage. The following day, he was sentenced to time served and was taken to a tent outside the Camp on his own. He has been accommodated outside the Camp since his conviction. On 11 June 2024, VT was arrested on suspicion of sexual offences and taken to the BIOT police station. Two days later, on 13 June 2024, he was released from the police station on bail and taken to the STHF. On 14 June 2024, VT appeared before the Senior Magistrate and was remanded on bail on condition that he remain at the STHF unless accompanied by a Royal Overseas Police Officer. On 29 June 2024, VT appeared before the Chief Justice. His bail was varied to include an additional condition not to contact the complainant directly or indirectly.

27. Following the grant of interim relief on 23 July 2024, VT has been permitted to associate with KP. Since 31 July 2024, KP and VT have been accommodated in the same pod. They have since been joined by a third individual.

UNHCR Report

28. The United Nations High Commission for Refugees ('UNHCR') conducted a monitoring visit to Diego Garcia from 18 to 26 November 2023. The concerns of the UNCHR team included: (i) the inappropriateness of Diego Garcia as a place of residence for asylum seekers beyond initial emergency reception; (ii) the failure of the current arrangements to meet international standards; and (iii) the policy of holding asylum seekers in a closed camp on a "*mandatory and indefinite basis*."

29. The final version of the report is dated 16 February 2024, and the conclusion includes the following paragraph:

> *"…UNHCR is concerned that asylum seekers are being held in conditions amounting to* ***arbitrary detention****. The cumulative impact of* ***prolonged detention*** *in conditions of close surveillance, mistrust in asylum procedures and the BIOT authorities, lack of agency and uncertainty about the future, are having significant consequences for the mental health and overall welfare of asylum-seekers and refugees. Self-harm and suicidal ideation are prevalent, gender-based violence is not being adequately*

addressed, and communal tensions are evident. ***The detention of and associated impact on children is of particularly grave concern*** [emphasis added]."

Recommended Transfer to the UK

30. The conditions in the Camp are untenable and the children, in particular, are at risk of serious harm. This is not in dispute. In a Ministerial Submission, dated 26 June 2024, the former Commissioner – Mr Paul Candler stated:

> *"*[The] *needs* [of the children] *cannot be addressed sufficiently on BIOT and there are no immediately operational alternative locations for doing so other than the UK; and this is therefore a formal request for the Foreign Secretary to ask the Home Secretary to allow affected migrants to be* ***transferred to the UK immediately*** *on the basis of exceptional humanitarian considerations* [emphasis added]*."*

31. In a safeguarding report, dated 25 July 2024, the Camp was described as being "*in a complete crisis*". It was understood, within the Camp, that the families would be moved to a safe country (possibly the UK) which led to a disturbance as the implication was that the single men would be left behind. There was a demonstration followed by several incidents of self-harm (at least seven migrants cut themselves and 18 claimed to have swallowed something). On the same date, in a letter to the then Minister of State for Europe, North America and the Overseas, Mr Candler stated:

> *"I am writing to request that you urgently ask the Home Office to agree to the transferral of all 64 migrants from the Territory to the UK, on the basis of the dangerous and unsustainable situation which now seems to me to exist in the Territory."*

Legal Framework and Law on Detention

The application of English law on BIOT

32. Section 3(1) of the Courts Ordinance 1983 provides that the law of England applies in BIOT: (i) unless there is inconsistent specific law already in force in the Territory; (ii) insofar as it is applicable and suitable to local circumstances; and (iii) with such modifications, adaptations, qualifications and exceptions as rendered necessary by local circumstances.

33. There is no inconsistent specific law in force in BIOT and the law of England is applicable and suitable subject to modification. Therefore, the English common law applies.

Common Law: False Imprisonment

34. The tort of false imprisonment is established on proof of the fact of imprisonment and the absence of lawful authority to justify that imprisonment (see *Lumba v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245, §65).

35. In R (Jalloh) v Home Secretary [2021] *AC 262,* Lady Hale defined imprisonment at §24:

> *"**The essence of the imprisonment is being made to stay in a particular place by another person**. The methods which might be used to keep a person there are many and various. They could be physical barriers, such as locks and bars. They could be physical people, such as guards who would physically prevent the person leaving if he tried to do so. They could also be threats, whether or force or legal process* [emphasis added]."

36. The question of whether there is lawful justification for imprisonment has to be determined at the time of the imprisonment. It is irrelevant whether or not the defendant honestly and reasonably believed that he had the necessary authority to detain the claimant if, in fact, no such authority existed (see - R v Governor of Brockhill Prison, ex p Evans (No 2) [2001] 2 AC 19 - 32F and 35A-F).

Oral Evidence

37. Over the course of two days (Day 2 and Day 3) the Court heard oral evidence from four witnesses: RG (client of Duncan Lewis), AAB (client of Leigh Day), Ms Becky Richards and Mr Nishi Dholakia. RG and AAB gave evidence in person through an interpreter. Mr Dholakia also gave evidence in person whilst Ms Richards gave evidence remotely via video-link. The evidence of these witnesses is summarised below.

RG

38. RG provided two witness statements dated 18 December 2023 and 17 June 2024. In his first witness statement he stated:

> *"When I was younger, my family kept a pet parrot in a cage. We would provide it whatever we thought it needed but we had taken its freedom. I did not understand then the reality of this, but I truly understand the value of liberty now that I do not have it. I feel just like that parrot, trapped in a cage."*

39. During examination in chief, RG stated that when he first arrived on Diego Garcia the group, as a whole, was offered voluntary repatriation. He stated that he was tortured by the Security Services in Sri Lanka for his political activities and cannot return. On 30 March 2023, he was made the subject of a non-refoulement decision. He has not been provided with any update as to when he may be removed from Diego Garcia and transferred to a safe country. He has never deviated from the bail route. He is longing to live somewhere else, and more freedom would make him "*very happy*."

40. Under cross-examination RG doubted the purpose of the G4S officers was to provide protection to the asylum seekers. He was aware that the few that had tried to leave the Camp had been brought back; he was not sure whether force had been used. However, all the Camp residents were made to stand outside their tents under the sun. He expressed doubt that this was for the purposes of a roll call to ensure that everyone was safe. He stated that they were informed that their "*weekly shopping*" – (i.e. privileges such as coffee and

cigarettes) would be "*stopped*." He accepted that the withdrawal of privileges (in 2022) may have been to encourage people not to leave the Camp without supervision. He also accepted that the information he received from the other asylum seekers about being "*shot by American soldiers*" ('US soldier comment') was a rumour. He stated that he did not believe the rumour. In respect of the attempt to access the bail route on 26 April 2024, RG stated that he assumed that the cars and military personnel were there to stop the Camp residents from leaving. When it was put to RG that the purpose was to escort anyone who left, he stated: "*No. I do not think so*."

AAB

41. AAB provided a witness statement dated 14 June 2024.

42. AAB stated, during examination in chief, that his initial claim for international protection had been rejected but that decision was subsequently overturned. He is still waiting for a final decision on his asylum claim. AAB described life in the Camp as "*hell*" but stated that initially it was worse. He informed the Court that he has respected the bail conditions and has never tried to leave the Camp without permission. He referred to an occasion when the officer in charge of the Camp advised them not to leave the Camp and made the US soldier comment. Shortly afterwards a notice was put up in the Camp ('the Camp Notice') "*which said they had the right to shoot us*." When a "*mentally affected*" resident left the Camp to access the beach he was brought back "*handcuffed and greatly traumatised*." AAB had registered for voluntary repatriation but had changed his mind after his initial asylum claim decision was overturned. He fears death in his own country but "*here it is a slow death every day*." He stated that he has no means to return to India (where he had lived from the age of 5) as his family are "*struggling in India even for food*". His father passed away last year and his mother is unwell.

43. During cross-examination, it was suggested that the initial plastic fencing was a "*flimsy barrier*" and was not used to keep the Camp residents in, but to demarcate the area of the Camp. AAB did not accept this. He stated that he did not leave the Camp because the Commissioner has regulations in place, and he felt threatened. He was scared. When asked why he had not mentioned the Camp Notice in his witness statement, he stated that there are many things he did not mention in his witness statement. That does not mean that he is telling lies. He stated that he told his solicitors that he had urinated in a bottle (as the bailed Claimants were not permitted to use any toilets on the bail route). However, he had been too embarrassed to also tell them that he had drunk his urine. When pressed by Mr McKendrick KC about the Camp Notice, AAB corrected his account and apologised. He stated that the US soldier comments were made in two meetings, but the Camp Notice stated that "*legal proceedings*" would be initiated if they tried to leave.

44. AAB did not accept that when the Camp residents were made to gather outside their tents this was for the purposes of a headcount and was not a form of punishment. He stated that if this applied to adults only it would be "*understandable*;" but G4S also made the children stand in the sun. He also referred to coffee and cigarettes being stopped. He stated that on

26 April 2024, the QRF attended to prevent the Camp residents from leaving; not to escort them. He reiterated that the Camp was "*hell on earth*."

Ms Richards

45. Ms Richards was the Deputy Director for Overseas Territories Strategy within the Foreign, Commonwealth and Development Office ('FCDO'), and Deputy Commissioner for BIOT between 21 March 2022 and 19 October 2023, save for a period between 23 June 2023 and 18 September 2023 when she was the Acting Commissioner.

46. During cross-examination, Ms Richards stated that she has only been to Diego Garcia once. This was in November 2022. During this visit, she attended the Camp and spent some time with the women's group. She recalled requests for turmeric, coconut oil and an address so that sponsors could send things. Their main request was "*more money for voluntary returns*." However, they were also concerned that if one received a negative refoulment decision, they would all receive negative decisions. She reassured them that all cases would be considered on their merits. As far as Ms Richards could recall there were no concerns about liberty. Ms Richards stated that the core intention of the RMO 2023 was not to create a criminal penalty but to preserve the security of the facility and protect the arrangement with the US. The safety of the asylum seekers was most important. Ms Richards stated that the openness of the area was one of the positives and neither she, nor the Commissioner, nor those who worked with the Camp residents wanted to put in a "*hard fence*." She denied that the openness was an illusion.

47. Ms Richards did not know if the asylum seekers could be given more freedom and still remain safe. She expressed concern that the Nature Trail presented a risk of injury and although she was able to walk around Diego Garcia, at any time of her choosing, it was not the same for the Claimants. She did not want to create a detention facility. Ms Richards denied that overnight "*accommodation*" in the then IRC (now STHF) was a euphemism for detention. She was aware that the water pipes in the ceiling of the STHF presented a self-harm risk but could not recall if mitigations were put in place whilst she was the Commissioner. She stated that available options were very limited as there was no accommodation fit for purpose. She also stated that balancing KP's interest with the interests of the other asylum seekers was very difficult.

48. Ms Richards stated that she directed Commander Osborn to issue the RMO 2023. She was aware that there was a long delay before it was published in the Gazette. This was due to the team being "*very stretched*." She agreed that the reasonable excuses for leaving the Camp were limited. She did not know if a teacher would have a reasonable excuse to take children to the "*nature reserve*." However, she thought this was an unlikely hypothetical as the teacher would understand the importance of safety.

Mr Dholakia

49. Mr Dholakia was the Deputy Commissioner for BIOT from 19 October 2023, until his appointment as the Acting Commissioner on 19 August 2024, following the resignation of

Mr Candler. Mr Dholakia provided 14 witness statements for the purposes of these proceedings dated between 19 January 2024 and 11 September 2024.

50. Mr Dholakia stated, during cross-examination, that the effect of the RMOs was to keep the asylum seekers "*out of the military facility*." He acknowledged that BIOTA is required to comply with the law and give effect to the order of the Court. However, when bail was granted, the US Commander stated that he would not permit the asylum seekers to traverse the land that he was authorised to regulate. Mr Dholakia stated that this presented BIOTA with a "*dilemma*." BIOTA did not give immediate effect to the Bail Order, and this was "*the incorrect decision*." He stated that BIOTA had learnt from that. Mr Dholakia conceded that the RRF did not attend the Camp on 26 April 2024 to escort the asylum seekers but did not accept there was an intention to make the situation as difficult as possible. However, he could understand why the asylum seekers may have come to that conclusion.

51. Mr Dholakia acknowledged that SP, ME, RG, and JS (clients of Mr Buttler KC) had complied with the RMOs and with their bail conditions. He also acknowledged that there was no evidence to indicate that they lacked the mental capacity to follow instructions or would disobey instructions for any other reason. He was unaware that the bailed Claimants' access to DG1, the beaches, or the Nature Trail, had posed any risks to the operation of the facility. He did not anticipate that access to the Brit Club would pose any obstruction to the military facility or present a safety risk. However, it was a private enterprise, and he did not believe that he had the power to issue a direction; but he would have no objection if the naval committee were content. Mr Dholakia accepted that there were 10 asylum seekers in the Camp who had not been granted access to DG1 or the Nature Trial in the last 3 years. He stated that BIOTA was "*looking to facilitate bail for the non-bailed Claimants save for one individual who was in the STHF*."

52. Mr Dholakia accepted that the STHF is a detention facility and moving an asylum seeker to the STHF, without lawful authority, would constitute detention. He accepted that KP and VT were physically detained in the STHF. Mr Dholakia was aware that KP had a positive non-refoulment decision. He stated that discussions with regard to the way forward was the "*highest priority*." He did not know if KP was able to see anyone other than staff face to face whilst in the STHF, until after interim relief was granted, but was willing to accept that is what occurred. He acknowledged that BIOTA has no formal review process. No non-refoulement decision had been reached in respect of VT. Mr Dholakia thought the outcome of VT's pending trial would make a "*significant difference*."

Summary of Submissions

53. The submissions made on behalf of the parties are outlined below. Analysis of relevant aspects of these submissions is addressed under the heading 'Discussion' (see below).

On behalf of the Claimants

54. Mr Jaffey KC drew the Court's attention to the suggestion that BIOTA was dependent on the goodwill of the US authorities, and the concern that facilitating the Bail Order had to

be balanced against the objections of the US Commander. Mr Jaffey KC submitted that history has taught us that in small remote places people persuade themselves that the rule of law does not apply to them; the rule of law should be reintroduced to BIOT.

55. Mr Jaffey KC submitted that the Claimants have been detained since their arrival on Diego Garcia and are continuing to be detained. The 1966 Exchange of Notes did not take away the right of liberty and cannot authorise a breach of peremptory norms such as freedom from torture or arbitrary detention. The Commissioner's defence based on security and health and safety grounds is fundamentally flawed as a matter of fact and law. Mr Jaffey KC acknowledged that it was entirely appropriate for the Claimants to be prohibited from accessing important military sites, but that does not require them to be detained in the Camp. The Court can test the lawfulness of past and present detention by asking whether the Commissioner is justified in preventing the Claimants from visiting the beach, the *barachois*, DG1 etc "*at will*". The Claimants would accept reasonable restrictions on their liberty having regard to the nature of the island, including proportionate conditions attached to a lawful RMO. Mr Jaffey KC submitted that the RMO 2023 was a nullity and conferred no power to detain. It was also *ultra vires* because it was an unreasonable and unlawful exercise of the Commissioner's legislative power, in all the circumstances. The RMO 2024 is also *ultra vires* for the same reasons.

56. Mr Buttler KC adopted the submissions made by Mr Jaffey KC in their entirety. Mr Buttler KC made additional submissions in relation to the reasonableness of the RMOs. He submitted that a legislator is to be taken to have intended that a power of administrative detention cannot exceed an objectively reasonable period. The second *Hardial Singh* limit (see below) is an example of the application of that principle. Mr Buttler KC further submitted that the conditions in the Camp are "*deplorable*." The asylum seekers are under constant observation; until July 2023 children shared tents with single men; the tents are infested with vermin, including rats; they are not empowered to do productive things for themselves; and detention has had a profoundly damaging effect on the mental health and well-being of the Camp residents. He also referred the Court to the evidence of Ms Shirley Wainwright (a social worker who served as the BIOT Families Advisor), Ms Stamp (FCDO Overseas Territories Safeguarding Advisor) and Mr Candler all of whom stated that the Camp is an unsuitable environment for children.

57. Ms Law adopted the submissions of Mr Jaffey KC and Mr Buttler KC. In addition, she submitted that until recently, both KP and VT have been subjected to periods of indefinite solitary confinement, with no regular ability to associate with anyone, not even each other, causing both to suffer from acute deterioration in their mental health. The only regular contact they had in those periods was with the G4S officers. The conditions are particularly harsh when considered against the background of their prior lengthy detention in the Camp and pre-existing mental ill-health.

On behalf of the Commissioner

58. Mr McKendrick KC acknowledged that the rule of law unquestionably applies to BIOT and must be seen to apply. He described the circumstances in respect of bail in April and

May 2024 as "*deeply regrettable*" and apologised to the Court and the Claimants for the challenges that arose.

59. Mr McKendrick's primary submission was that the Claimants are not detained and never have been. He invited the Court to consider the context which includes the need to protect the security of the military facility and the safety of the Claimants. There is not a complete deprivation of the Claimants' liberty as they are free to leave Diego Garcia, and they have never been *intentionally* confined. It is, on their own case, their fear of persecution that causes them to remain in the Camp; it is not caused by the Commissioner.

60. Mr McKendrick KC further submitted that even if the restrictions amount to detention, it is lawful for the following reasons. First, the restrictions are *necessary* to safeguard the security of the military facility and for the safety of the Claimants (and others) in light of the particular circumstances on Diego Garcia. This includes the absence of a developed mental health system with mental health hospital, approved mental health professionals and the infrastructure that comes with the English Mental Health Act 1983, the English Mental Capacity Act 2005, and related Codes of Practices. Operating such systems is neither practical nor possible. Secondly, the RMOs were lawfully made. The 1976 Exchange of Notes shapes the reality of the situation on the ground. An appreciation of that reality is essential to determining whether the Commissioner is exercising his powers reasonably. Mr McKendrick KC further submitted that the *Hardial Singh* principles are not applicable to the Claimants' situation. Even if they are applicable, there has been no breach of those principles as the restrictions have not exceeded a period which is reasonable in all the circumstances.

61. The situation of KP and VT highlights the challenges faced by the Commissioner in accommodating the Claimants on Diego Garcia. There is an imperative to reduce the risk they pose to themselves and others in addition to the demands of military security and health and safety. KP and VT are not and have never been held in solitary confinement. Whilst they remain on Diego Garcia, the Commissioner has done, and is doing, what is necessary to balance their needs against those of the other Claimants (including their victims and the vulnerable members of the Camp).

62. The Court was invited to dismiss the claim. However, it was submitted that the Commissioner is willing to agree to a final order, by consent, providing relief for all those accommodated in the Camp on the same terms as the Revised Bail Order.

Discussion

Are the Claimants being detained?

63. Some of the factual matters raised by the Claimants are disputed (e.g. the behaviour of G4S officers towards the asylum seekers and some of the conditions in the Camp etc) but need not be resolved to determine this claim. Furthermore, I have resisted the temptation to address every point that has been raised; concentrating only on such matters as have enabled me to conclude whether the claim (or part of the claim) should succeed.

64. The "*Statement of Service Requirement*" in the contract between BIOTA and G4S (signed in February 2022) states:

> "*The* [asylum seekers] *are* ***not being detained*** *but they are also not free to roam the Island due to security and safety considerations*.
> …
> *It should be emphasised that we are* ***not detaining*** *the* [asylum seekers] *or running a* ***detention facility****, but because of sensitivities on Diego Garcia and the unprecedented nature of this situation, the Administration is obligated to restrict the movement of the* [asylum seekers]*."*

The stated objective is to provide 24/7 supervision of the asylum seekers within the Camp for their safety, and for the security of the US/UK facility, until a decision is made on their future. The supervision requirement includes ensuring that the asylum seekers do not leave the Camp without permission and therefore under the terms of the contact G4S is to provide personnel with "*detention management*, *immigration management, and/or refugee management*". The contract envisages that G4S contractors would only be required to exercise moderate to reasonable force in the event of a "*disturbance*", to allow time for the BIOT Police to arrive. It is stated that the powers exercisable by G4S personnel would be very similar to those held by security guards in England and Wales.

65. The Commissioner suggests in his RADGD that the detention of the Claimants "*is not caused nor intended by the Commissioner… It is a consequence of the interlocking geographical and security situation on Diego Garcia, not the actions of the Defendant*." I am unable to accept that submission. At all times, the Camp has been administered by BIOTA personnel and contractors under the authority of the Commissioner. The Claimants are not permitted to leave the Camp without the approval of the Commissioner, his officers, or agents. It was made clear to the Claimants from the outset that military personnel or G4S officers would prevent any attempt to leave and, if necessary, force would be used to ensure compliance. The confinement was direct and intentional. Leaving to one side, the legality of the RMO 2023, that order reflected the reality of the restrictions placed upon the Claimants from the very beginning.

66. Since the enactment of the RMOs (again, leaving aside their legality) any asylum seeker who leaves the Camp (or Secondary Accommodation) without a reasonable excuse may be liable to a criminal sanction. The Commissioner has implemented a procedure in the event an asylum seeker leaves the Camp without permission. This includes a thorough search of personal bed spaces, tents, and surrounding buildings, a comprehensive search of the Camp and perimeter, and further searches by US Navy, BIOT Police or UK military, if necessary. There is a requirement for all asylum seekers to return to their tents and a full head count will be conducted. The asylum seekers will be required to remain in the vicinity of their tents until further notice. Once found, the absconder will be searched at the scene before being returned to the Camp. The procedure states that consideration should be given to: (i) where the absconder should be housed; and (ii) the possibility of further absconding. Records from G4S show that absconding has other consequences. Those that leave the Camp without permission may be deprived of their "*privileges*." On at least one occasion,

seven individuals who were believed to have been fishing illegally were deprived of their privileges for two weeks, and the entire Camp was subject to a ban for four days.

67. The Commissioner submits that the Claimants are not detained because they are "*free to leave*" at any time either to Sri Lanka or any other place that would be willing to accept them. This submission ignores the reality of the Claimants' situation. Some asylum seekers chose to leave BIOT, but it does not that mean the Claimants are not being detained. A Hobsonian choice between a very poor option and no option at all is not a genuine choice. As submitted, on behalf of the Claimants, it is akin to saying that a person imprisoned on the edge of a cliff is free to jump. The Claimants say they cannot return to Sri Lanka because they have a well-founded fear of persecution in that country. This concern has been accepted as valid in respect of RG and KP. The other Claimants each have an unresolved international protection claim, and there has been no declaration that these claims are unfounded. The outcome of these claims cannot be pre-determined.

68. In *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, the claimant could not leave the country for fear of torture abroad, nonetheless he was detained. Lord Nicholls stated at §81:

> *"It is true that those detained may at any time walk away from their place of detention if they leave this country. Their prison, it is said, has only three walls. But this freedom is more theoretical than real. This is demonstrated by the continuing presence in Belmarsh of most of those detained. They prefer to stay in prison rather than face the prospect of ill treatment in any country willing to admit them."*

In *Lumba (supra)* at §127 Lord Dyson held:

> *"It is necessary to distinguish between cases where return to the country of origin is possible and those where it is not. Where return is not possible for reasons which are extraneous to the person detained, the fact that he is not willing to return voluntarily cannot be held against him since his refusal has no causal effect. But what if return would be possible, but the detained person is not willing to go? Here it is necessary to consider whether the detained person has issued proceedings challenging his deportation. If he has done so, then it is entirely reasonable that he should remain in the United Kingdom pending the determination of those proceedings (unless the proceedings are an abuse). In those circumstances his refusal to accept an offer of voluntary return is irrelevant. The purpose of voluntary return is not to encourage foreign nationals to return to their countries of origin where, if their legal challenges succeed, it is likely to have been demonstrated that they would face a risk of persecution… . Rather, it is to facilitate removal where that is justified because the [foreign national prisoners] have not proved that they would face the relevant risk on return. In accepting voluntary return, the individual forfeits all legal rights to remain in the United Kingdom. He should not be penalised for seeking to vindicate his…rights and be faced with the choice of abandoning those rights or facing a longer detention than he would face if he had not been offered voluntary return."*

69. It is argued, on behalf of the Commissioner, that *Lumba* does not assist the Claimants because, it was common ground in that case that the claimants were detained. However, this submission appears to miss the point that the underlying principle in Lord Dyson's analysis was that a person should not have to choose between their freedom and being sent back to a place where they may face torture and persecution. The right to non-refoulement under the Refugee Convention equally applies under customary international law.

70. The Commissioner argues in his RADGD that the Claimants can leave Diego Garcia "*by boats independently arranged.*" This submission ignores the accepted fact that the boats, on which the Claimants arrived, are not seaworthy. The Claimants are penniless and vulnerable. They have no means to repair their boats, and no access to the provisions that would be required for a long onward journey to some other place. The Commissioner argues in his RADGD that the Claimants "*are being kept out*" of the military facility "*rather than kept in*" the Camp. The Claimants submit that this is a distinction without a difference. I agree. There can be no doubt that on any military base (let alone a joint UK/US military facility such as Diego Garcia with a high level of strategic importance) there will be sensitive areas, access to which must be restricted. This is nothing more than common sense. The Commissioner accepts that some parts of the island are more sensitive than others and the Claimants readily acknowledge that they should be prohibited from accessing important military sites. Therefore, the issue is whether the line the Commissioner has drawn constitutes detention; not whether the restriction on movement can be characterised as "*being kept out*" or "*kept in*."

71. The Commissioner also places significant reliance on the *obiter* comments of the Divisional Court (Whipple LJ and Chamberlain J) in *BAA v Commissioner of the BIOT* [2023] EWHC 767 (KB) which considered the issue of detention in the context of a claim for injunctive relief. An order was sought prohibiting the Commissioner from removing the claimants from Rwanda or for appropriate notice to be provided prior to removal. The Divisional Court had to consider whether the Commissioner owed the claimants a duty of care as a result of the relationship of detainer and detainee. The court, having considered the relevant test for interim relief ('*Is there a serious issue to be tried?'*), stated at §76:

> *"We have doubts about whether it can be said that the Commissioner, or the administration of BIOT, is detaining any of the migrants. They are free to leave Diego Garcia at any time, and many of their number have left, with assistance from the administration. Some have stayed behind because they do not want to, or cannot, return to their country of origin; while they are on Diego Garcia, they are reasonably (so it appears to us) subject to some restriction on their movement, for their own safety and to ensure security at the defence facility*."

72. The Divisional Court decision was made before the RMOs were enacted but I do not accept the Claimants' submission that once there was a legal basis, with purported criminal penalties for leaving the Camp, that puts beyond doubt the question of detention. There must be some restrictions on the Claimants' movements (which they accept) and a lawful RMO is an appropriate mechanism for achieving that aim; the key question is whether the restrictions that have been imposed amount to detention. That said, the Commissioner's reliance on *BAA* is misplaced. First, the tentative obiter remarks made by the Divisional

Court cannot be reconciled with the Supreme Court judgment in ***Lumba***. Being "*free to leave*" in the context of an unlawful detention claim must take into account whether that means going back to the country from which the detainee had cause to flee and give up a valid claim for international protection. Secondly, the Divisional Court was not referred to the decision in ***Lumba*** and it is not cited in the judgment. Thirdly, this Court has had the benefit of witness evidence and detailed legal argument on the question of detention.

73. Due to the passage of time, Ms Richards did not have a detailed recollection of the events that took place whilst she was Deputy or Acting Commissioner and I accept that, on many (if not all) occasions, incidents in the Camp would be reported to her after the event by the Camp Manager or Commander Malone. However, what came across very clearly from her oral evidence, was that she was anxious to avoid creating a detention facility and was even more anxious to ensure that the asylum seekers did not leave the Camp. Ms Richards informed the Court that the priority was to keep the asylum seekers safe and to ensure the security of the base was maintained. She defended that position very strongly but at times there was an uncomfortable tension between the ordinary natural meaning of the words used in the contemporaneous documents and the line that she was keen to maintain during her oral evidence. For example, during cross-examination, Ms Richards denied that the purpose of the RMO 2023 was to keep the asylum seekers in the Camp. When she was taken to her email, dated 4 July 2023, which states "*…order now in place to enable us to enforcedly keep people in TC* [Thunder Cove] *if need be*" she suggested that there was no contradiction. She insisted that the purpose of the RMO 2023 was to return people to the Camp and keep them safe. She appeared reluctant to accept that compulsion was a key feature. Another example relates to an email, dated 3 July 2023, from the Head of BIOT Migrants Policy & Operations which stated, "*we can't continue to detain without a lawful base*". Ms Richards suggested that the email had been drafted at speed causing an incorrect word to be used. She stated that the author of the email had made it very clear (presumably on previous occasions) that the Claimants were not being detained. The tension between the aim and the reality of the situation is reflected elsewhere in the documents. On the whole the asylum seekers have complied with the restrictions but, on occasions when an asylum seeker has left the Camp without permission, they are said to have "*absconded*." When Ms Richards' own use of "*absconding*" (in an email dated 4 July 2023) was put to her she stated that she had borrowed the word from her military colleagues and that it was a reference to "*turning up in dangerous places*".

74. Three things are particularly striking about Ms Richards' evidence; all three are interlinked. First, she appeared to have only a limited appreciation of the fundamental importance of liberty. It was clear from her evidence that her focus was on the status of Diego Garcia as a military base. She took the view that the Commissioner "*was very lucky*" to be able to use the base to accommodate the asylum seekers because there was no safe place on the island. This is, of course, consistent with the position the Commissioner has stressed throughout these proceedings namely, that the US Commanding Officer, has overall responsibility for the facility and neither the Commissioner, nor the UK government, can direct the Commanding Officer in respect of their security and protection responsibilities. Secondly, in addition to the non-exhaustive reasonable excuses included in RMO 2023 (i.e. attending medical appointments under escort, supervised access to the beach adjacent to the Camp and leaving the Territory by sea or air) she thought the asylum seekers could

leave the Camp if it were on fire. This indicates that, in her view, '*reasonable excuse*' is to be interpreted very narrowly. Thirdly, she was reluctant to concede that the asylum seekers could have greater liberty without compromising the security of the military base and stated that the Nature Trail presented a risk of injury. When pressed she emphasised that the US have the "*ultimate authority*."

75. The evidence of RG and AAB was compelling. They both gave honest and moving accounts of the conditions in the Camp and the impact on their well-being. Mr McKendrick KC acknowledged that AAB has certain vulnerabilities but suggested that parts of his oral evidence were inaccurate and tended towards exaggeration. This submission was made in reference to AAB's initial assertion that the US soldier comment was included in a Camp Notice. I do not accept Mr McKendrick's submission. AAB gave evidence through an interpreter. It is likely that either AAB or the interpreter (or both) were confused. Prompted by further questions from Mr McKendrick KC, AAB corrected the position. I am satisfied that by the conclusion of AAB's evidence he had made it clear that the US soldier comment had been made verbally in two meetings and was not included in a Camp Notice. AAB stated in his witness statement that this occurred during the initial period of his time in the Camp. AAB had arrived on the first boat on 3 October 2021. RG did not hear the US soldier comment because he arrived on the second boat which arrived 6 months later. Corroborative evidence of the US soldier comment is provided by other claimants, namely KP, AAC, AAD and AAG - all of whom arrived on the first boat with AAB. Their evidence was not challenged. In any event, I accept that the key issue is what the Claimants feared would happen if they left the Camp without permission. I accept that AAB's fear was genuine. I accept the evidence of RG and AAB.

76. A striking feature of this case is that the Commissioner prevented the Claimants from leaving the Camp even after they were granted bail by this Court on 23 April 2024. It is trite law that an order takes effect from the date it is made, unless otherwise specified, and must be obeyed, unless or until, it is discharged. I make no findings of fact as to *how* the Claimants were prevented from leaving the Camp. It is enough that Mr Dholakia conceded, during his oral evidence, that BIOTA did not give effect to the Bail Order. I accept the apology. Most importantly, for present purposes, is that failing to give effect to the Bail Order, is further evidence that the Claimants were being detained.

77. It may be very difficult to determine where the boundary lies between justified and unjustified restrictions. However, I accept the submission, made on behalf of the Claimants, that the lawfulness of past and present detention can be tested by asking whether the Commissioner is justified in preventing them from having greater access to the beach, the *barachois*, and DG1 etc given that access is currently only permitted because of an order of this Court. Ms Richards was unable to see anything other than risks associated with greater freedoms and her view appeared to be clouded by the expectations of the US authorities. The fact that the UK government and the Commissioner may have found it difficult to walk a delicate legal, political, or diplomatic line in managing their relationship with the US authorities does not affect the obligations and duties of this Court.

78. Mr Dholakia was candid, during his oral evidence, and made certain concessions (see paragraph 51). Mr McKendrick KC made three key points with regard to those

concessions. First, Mr Buttler KC's questions were focused on his clients. Secondly, Mr Dholakia was asked whether he was aware of any security or health and safety concerns arising from the exercise of bail, in particular the use of the beach and the Nature Trail. Mr Dholakia was not asked (and did not accept) that there was generally no evidence about these issues. Thirdly, Mr Dholakia did not resile from the position that there are concerns about the Claimants having substantially greater access to the base. Mr McKendrick KC submitted that even the Permanent Secretary of the UK Ministry of Defence is not privy to the US' assessment of its national security interests on Diego Garcia. Therefore, Mr Dholakia would not necessarily be aware of the details or reasons for the US' assessment of the security threat. Mr McKendrick KC reminded the Court that the US authorities stated in a diplomatic cable sent to the UK government, on 12 June 2024, that:

> *"The provision to such uncleared/unvetted individuals of expanded access to areas outside the U.S. Thunder Cove area presents an unacceptable and significant security risk to U.S. base operations and personnel would further compromise U.S. military readiness and operations already impacted by the migrant presence in the Thunder Cove area. Accordingly, consistent with the U.S. Commanding Officer's responsibility for ensuring the protection and security of the Facility under the 1976 Agreement, the migrants cannot be permitted greater access to the Facility."*

79. It is not for this Court to determine what is required to ensure military security on Diego Garcia. Nor is it for this Court to determine what future restrictions might be lawful. However, there is an evidential difficulty. The dire predictions which it was suggested would flow if the asylum seekers were granted access to DG1 and the beaches along the bail route have proved to be ill-founded. The actions of some of the Claimants have given rise to legitimate concerns. And, of course, the asylum seekers should not be permitted to roam freely without restrictions, but the Commissioner has not provided any evidence to satisfy me that greater freedoms would compromise the security of the military base. I have no doubt that increased access is a significant inconvenience, but no specific security concerns have been brought to my attention and it is not for me to speculate as to what those concerns may be. This case must be decided on the evidence. Seen through that lens I am not satisfied that any good reason has been provided for excluding the Claimants from the Nature Trail, the *barachois* or the beaches, subject to the same or similar safety briefings and appropriate training provided to contractors. The content of these briefings has not been disclosed, nor has the Commissioner explained why such briefings would not adequately mitigate the safety risks. In any event, the willingness of the Commissioner to agree to a final order "*providing for the relief for all those accommodated at Thunder Cove in the same terms as …the order of 31 July 2024*" undermines his assertion that the Claimants are not, and have never been, detained.

80. I accept the submission made by Ms Law that the situation of KP and VT is even more stark. Mr Dholakia, during his oral evidence, made it clear that on issues of law he would defer to those with legal expertise but accepted that KP and VT are factually detained in the STHF. Ms Richards made a similar concession in respect of KP. They are not permitted to leave the STHF (save in KP's case to access the bail route). As recently as 4 June 2024, the Head of British Indian Ocean Territory Policy referred to the STHF as a "*detention facility*". And in a review of the STHF from July 2024, the Border Force Senior Officer,

Home Office Gatwick Custody refers to the occupants as "DPs" (an acronym for 'detained persons'). The officer notes that, although the doors of the STHF are unlocked, this leads to a fenced off area so there is "*no risk of escape*."

81. Given the circumstances, described above, it is unsurprising that the Claimants feel as if they are in a prison; that is exactly what it is, in all but name. On 11 April 2024, the Head of the BIOT Migrants Team stated in an email that erecting more fencing would "*make the camp feel more like a prison*". It was already a prison. It had been a prison from the outset. I accept the submission made by the Claimants that the Commissioner has utilised all the methods identified by Lady Hale in *Jalloh* as indicia of detention: the wire fencing provides a physical barrier; G4S officers guard the Camp 24/7 and stand ready to forcibly return any absconders; the RMOs ensure that the Claimants are aware that non-compliance will have legal consequences; and punishments are imposed for leaving the Camp without permission. The indicia of detention that applies to the Camp equally applies to the STHF save that instead of a wire fence KP and VT are confined to a pod with four walls.

82. For these reasons, I have concluded that the contention that the Claimants are not being detained does not bear scrutiny. As a matter of objective fact and in law the Claimants are being detained and have been detained since their arrival on Diego Garcia.

Is the detention lawful (or has it been)?

83. There are few rights more important than the right not to be falsely imprisoned. Lord Brown in *Lumba* endorsed Lord Bingham's extrajudicial statement that the "*Freedom from executive detention is arguably the most fundamental right of all*." In *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74 at 111, Lord Scarman stated that "*The writ of habeas corpus issues as of right*". As it is not a discretionary remedy if detention cannot be legally justified, release from detention cannot be denied on the basis of policy considerations, no matter how important they may appear to be.

84. The Commissioner invites the Court to answer the lawfulness question in the affirmative on the grounds that it is necessary to detain the asylum seekers and the RMOs are lawful. I address each of these issues below.

Necessity

85. Mr McKendrick KC submitted that section 3 of the Courts Ordinance 1983 requires English law to be adapted given the special nature of Diego Garcia. The local circumstances include the geography, the presence of a highly sensitive military installation and the absence of sophisticated institutional arrangements such as a developed mental health system. Mr McKendrick KC emphasised the importance of the 1976 Exchange of Notes to the reality of the situation. He submitted that detention is justified primarily in the interests of the safety of the asylum seekers but also for the maintenance of the safety and security of the island as a whole. Mr McKendrick KC relied on *R v Bournewood Community and Mental Health NHS Trust ex parte L* [1999] 1 AC 458 at 486. The claimant in *Bournewood* required medical treatment but lacked the capacity to consent. It was held that the restrictive action

taken in his best interests was justified on the basis of necessity. Lord Goff in the leading judgment of the House of Lords stated:

> *"The concept of necessity has its role to play in all branches of our law of obligations - in contract (see the cases on agency of necessity), in tort (see In re F. (Mental Patient: Sterilisation) [1990] 2 A.C. 1), and in restitution (see the sections on necessity in the standard books on the subject) and in our criminal law. It is therefore a concept of great importance. It is perhaps surprising, however, that the significant role it has to play in the law of torts has come to be recognised at so late a stage in the development of our law."*

Mr McKendrick KC acknowledged that the facts in *Bournewood* are very different to this case. However, he submitted that the underlying principle is the same and Lord Goff did not confine the defence of necessity to situations where a person lacks capacity. Mr Kendrick also referred the Court to the observations made by Lord Goff in *re F* [1990] 2 AC 1 (another case concerning an incapacitated adult) in which he stated:

> *"That there exists in the common law a principle of necessity which may justify action which would otherwise be unlawful is not in doubt."*

86. Mr McKendrick KC was silent (in his closing submissions) with regard to the Claimants' argument that all land in the BIOT is Crown Land, under section 2 of the Acquisition of Land for Public Purposes Ordinance 1983. It was the Claimants' contention that, as an unincorporated treaty, the 1976 Exchange of Notes has no effect on domestic law and referred the Court to *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223, §77-78, per Lord Reed. However, I am not required to determine whether the US authorities are mistaken in believing they have the right to insist on particular restrictions. It is sufficient, for present purposes, to note that the unique circumstances on Diego Garcia are highly relevant, but regardless of the significance of the US Commander's security role, it does not extend to insisting on restrictions that amount to the detention of the Claimants. As the Court of Appeal held in *R (VT and Ors) v Commissioner* [2024] BIOT CA (Civ) 3, §37, the objections of the US authorities do not "*amount to a 'trump card', still less a 'veto'"*. Furthermore, *Bournewood* is plainly not authority for the proposition that the executive can detain individuals if it is deemed to be in their best interests. No authority has been provided to support the contention that detention can be justified on the grounds of necessity where the detainees have mental capacity and object to being detained.

87. Even on the assumption that the defence of necessity is available to the Commissioner, detention is not necessary based on the circumstances of this case. The reasons for reaching this conclusion are as follows. First, it is clearly not in the Claimants own interests to be detained. The UNHCR report refers to high levels of emotional distress and poor mental health among the asylum seekers which is corroborated by social workers and health professionals. Furthermore, the Commissioner has accepted that confinement to the Camp is detrimental to the health and well-being of the children. Secondly, no significant security concerns have been raised since the bailed Claimants have had access to the bail route and there has been no application to vary or revoke those conditions. Mr Dholakia accepted that the Claimants could be afforded greater freedoms which would not pose a risk to the

operation of the facility and it was not submitted by Mr McKendrick KC that it is necessary to prevent the Claimants from accessing the beach adjacent to the Camp, the *barachois*, or the Nature Trail. Thirdly, the Commissioner has not provided an individual justification for detention against any of the Claimants. Most of the Claimants rely on indirect, familial, or perceived associations with the Liberation Tigers of Tamil Eelam ('LTTE'), but the Commissioner is no longer suggesting (as he did at the first bail hearing) that these links pose a security risk. Even if specific individual security risks were identified it does not automatically follow that detention would be necessity.

88. The Commissioner has not come close to establishing that it is necessary for the Claimants to be detained. There is no evidence that greater access to the parts of the island (that are not militarily sensitive) will cause immediate and/or significant risk of harm and there are reasonable alternative ways of securing the safety and security of the facility. Such risks that exist can be mitigated via a lawful RMO.

Lawfulness of the Restriction of Movement Orders

RMO 2023

89. The preamble to the RMO 2023 stated as follows:

> *"I, Colvin Osborn, Commissioner's Representative and Principal Immigration Officer make this Restriction of Movement Order (the "Order"), which has been* ***authorised*** *by the (Acting) Commissioner for the British Indian Ocean Territory ("the BIOT"),* ***in accordance with section 113 of the Penal Code 1981***. [emphasis added]

90. Section 113 of the Penal Code provides:

> *"Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or person acting in any public capacity and duly authorised in that behalf is guilty of an offence, and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience, to imprisonment for two years."*

91. Section 2 of the RMO 2023 provided that the Rules applied to all persons who have arrived in the Territory without permission ('Relevant Persons'). Section 4 provided that a person who disobeyed the Rules would be liable to prosecution under section 113 of the Penal Code 1981. Rule 2 prohibited Relevant Persons from leaving the Camp or Secondary Accommodation "*without reasonable excuse*". Rule 3 stated that for the purposes of Rule 2, reasonable excuses for leaving the Camp included (but were not limited to): (i) attending medical appointments under escort; (ii) supervised access to the beach adjacent to the Camp; and (iii) departing the Territory, by air or sea, under escort.

92. Although the RMO 2023 refers to section 113 of the Penal Code 1981 as its enabling power that section does not grant any authority to make an order; it merely states that, where an

order has been made, disobeying that order constitutes an imprisonable offence. Therefore, I accept the submission made by the Claimants that Section 113 did not authorise Commander Osborn to make the RMO 2023. Mr McKendrick KC did not concede this point, but it was not challenged. Mr McKendrick KC submitted that the RMO 2023 provided a lawful basis for the restriction of the Claimants' movements and was enacted pursuant to Section 10 of the BIOT (Constitution) Order 2004 (the 'Constitution Order'). Section 10 provides as follows:

> *"Subject to the provisions of this Order,* ***the Commissioner*** *may make laws for the peace, order and good government of the Territory* [emphasis added]."

93. The Claimants relied on the UK Supreme Court case of *R v Adams* [2020] UKSC 19; [2020] 1 WLR 2077, in support of their submission that the Section 10 power to make laws can only be exercised by the Commissioner personally and cannot be delegated. At stake in *Adams* was the validity of an interim custody order ('ICO') which was potentially a precursor to internment (detention without trial in Northern Ireland). Although an ICO could be signed by a Secretary of State, a Minister of State or an Under-Secretary of State, the relevant legislation provided that the statutory power to make the ICO arose "*where it appears to the Secretary of State*" that a person was suspected of being involved in terrorism. On the assumption that the Secretary of State had not personally considered whether the appellant was involved in terrorism the UK Supreme Court considered whether the ICO was valid. Lord Kerr construed the Secretary of State's power to issue an ICO as non-delegable, not least because "*the power to detain without trial and potentially for a limitless period*" was such a "*crucial decision"* that it was not apt to be delegated under the *Carltona* principle (i.e. the acts of government departmental officials are synonymous with the actions of the minister in charge of that department - see *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560).

94. The Commissioner asserts in his RADGD that Ms Richards, the then the Acting Commissioner, "*authorised* ***and directed*** [emphasis added]" Commander Osborn to make the RMO in an email dated 4 July 2023. The email to Commander Osborn states:

> "*Please find attached a* ***draft*** *Restriction of Movement Order which I* ***authorise*** *you to sign and bring into force* [emphasis added]."

95. Ms Richards stated in her witness statement that it was her implicit intention to direct Commander Osborn to issue the RMO 2023 in the terms set out in the draft. During her oral evidence she stated that '*authorise*' means "*direct or require*." Strictly speaking, although in some contexts there may be an overlap, to authorise someone means to give them permission or official approval to do something and implies that the person has the right or power to act in a particular way, but it is not the same as being instructed or ordered to do something. Based on the ordinary natural meaning of Ms Richards email she authorised Commander Osborn to make the RMO 2023 but did not direct or require him to do so. However, I accept that it was Ms Richards intention to issue a direction and that appears to be how Commander Osborn understood it. However, in my view, it does not matter whether Ms Richards directed or authorised Commander Osborne because I am satisfied that the proper interpretation of Section 10 is that the power to make laws is to be exercised by the Commissioner personally and cannot be delegated. Section 10 did not give

Commander Osborn the power to make law, and there is no other law authorising him to make the RMO. This is particularly important in the context of an order which was to have the effect of restricting liberty.

96. For the above reasons, the RMO 2023 was a nullity. However, even if it was not a nullity, Section 10(4) of the Constitution Order makes it clear that laws in the BIOT do not come into force until the date on which they are Gazetted, unless the law provides otherwise. Furthermore, Section 6(5) of the Interpretation and General Provisions Ordinance 1993, provides:

> *"[N]o person shall be guilty of an offence or be liable to any penalty thereunder by reason of anything done or omitted before the publication of the Ordinance or the subsidiary legislation in the Gazette."*

Promulgation ensures that laws are effective, just, and enforceable. It is consistent with the fundamental principle that "*elementary justice ... demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible*": (see *Fothergill v Monarch Airlines Ltd* [1980] UKHL 6; [1981] AC 251, per Lord Diplock, §279). The RMO 2023 was not published in the Gazette until February 2024. Therefore, prior to that date, it did not prevent the Claimants from leaving the Camp. As a result, the Commissioner's actions in confining the Claimants to the Camp under the assumed enforcement of the RMO 2023 had no legal or binding force.

97. On the assumption that I am wrong and the RMO 2023 was properly enacted under section 10 of the Constitution Order, I shall consider the argument that it was *ultra vires* not least because the same argument applies with regard to the lawfulness of RMO 2024.

The Ultra Vires argument

98. It is not in dispute that the Commissioner's legislative competence is limited by the Constitution Order and is amenable to judicial review on conventional public law grounds including legality, rationality, and procedural propriety. Furthermore, when a measure affects fundamental rights, the courts will employ an "*anxious degree of scrutiny*" (see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61; [2009] 1 AC 453).

99. The case of *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 concerned the power to detain pending deportation under paragraph 2(2) of Schedule 3 to the Immigration Act 1971 and on its face the power to detain appeared to be open-ended. However, the English Courts have determined that the power to detain is subject to implied limits that reflect common law requirements of reasonableness save for an important modification that the Court makes its own judgment when applying the *Hardial Singh* principles and is not limited to a reviewing jurisdiction. In *Lumba*, the Supreme Court approved and summarised the *Hardial Singh* principles as follows: (i) *Hardial Singh* 1 (HS1) - the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) *Hardial Singh* 2 (HS2) - the deportee may only be detained

for a period that is reasonable in all the circumstances; (iii) *Hardial Singh* 3 (HS3) - if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect removal within a reasonable period, he should not seek to exercise the power of detention; (iv) *Hardial Singh* 4 (HS4) - the Secretary of State should act with reasonable diligence and expedition to effect removal. The *Hardial Singh* principles reflect the basic public law duties to act consistently with the statutory purpose (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1030 B—D) and to do so reasonably in the Wednesbury sense. In *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888; [2003] INLR 196, at §48, Dyson LJ set out a non-exhaustive list of factors relevant to the reasonableness of a period of detention for the purposes of HS2 (which looks back) and HS3 (which looks forward):

> *"[T]he length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences."*

100. In accordance with sections 12(1) and 12(3) of the Immigration Order 2004, the Commissioner has the power to direct that any person who is present in BIOT unlawfully shall be removed and be subject to detention pending removal. The Commissioner accepts that that power cannot be exercised whilst such a person has a pending claim for international protection. The Claimants submitted that RMO 2023 was *ultra vires* because it was an unreasonable exercise of the Commissioner's legislative power. The asylum seekers were detained under the RMO 2023, subject to a reasonable excuse to leave the Camp, while their claims for international protection were being processed. If their claims for international protection were rejected, they would then be subject to detention under Section 12(3) of the Immigration Order 2004. The Claimants further submitted that the Secretary of State's powers of detention are subject to a reasonableness requirement and so is the Commissioner's power to direct the detention of the Claimants through the RMO 2023.

101. Mr McKendrick KC submitted that the Claimant's reliance on *Hardial Singh* is misplaced. The *Hardial Singh* principles are not free-standing principles that can be separated from their statutory context. However, he accepted that a modified version of the principles applies where a person is detained with a view to examining their claim and did not dispute that analogous principles might apply to the exercise of the power to detain pending removal pursuant to the Immigration Order 2004; but no such power is currently being exercised. The restrictions placed on the Claimants are designed to enable them to reside safely on a strategically important military facility pending determination of their non-refoulement claims pursuant to an agreed Statement on Process. The *Hardial Singh* principles are not pertinent to detention by reference to an order restricting movement in order to secure personal safety.

102. In *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* 1997 AC 97 the Privy Council considered an appeal against a decision of the Court of Appeal of Hong Kong (HK). The HK Court of Appeal held that the *Hardial Singh* principles "*had no application in*

determining the legality of the detentions of Vietnamese boat people." The Privy Council disagreed. It held "*that in conferring … a power to interfere with individual liberty, the legislature intended that such power could only be exercised reasonably and that accordingly it was implicitly so limited*." The relevant legislation contained two separate powers of detention: (i) for the period during which the Vietnamese migrant is being screened to determine whether they would be given refugee status in Hong Kong; and (ii) for the period between the refusal of refugee status and repatriation to Vietnam. Each of the applicants in *Tan Te Tam* had been detained during both periods, but the appeal turned on the legality of their continued detention only during the second period, i.e. pending removal from Hong Kong. This enabled Mr McKendrick KC to argue that *Tan Te Lam* is no more than an application of the *Hardial Singh* principles in the context of detention pending removal.

103. As stated above, the Commissioner's argument that the asylum seekers are being confined to the Camp for their own safety has been rejected. The only other basis for detention is for the purpose of examining the asylum seekers international protection claims. Although the Commissioner does not accept that the asylum seekers were being detained pursuant to the Immigration Order, the RMO 2023 formed a critical component of the process for their potential removal from the BIOT. That is the reality of the situation. It cannot be the case that the asylum seekers can be detained indefinitely based on a generalised safety and security risk. To conclude otherwise, would, in effect, amount to an unconditional warrant to detain. In light of the above, there are two problems with the argument advanced by Mr McKendrick KC. First, the process for considering an international protection claim in accordance with the Immigration Order 2004 is in practical terms identical to the process of detention and removal in the UK under the Immigration Act 1971. Secondly, it is well established that the *Hardial Singh* principles apply to the *duty* to detain pending the making of a deportation order under paragraph 2(1) of Schedule 3 of the Immigration Act 1971 (see *R (Francis) v Secretary of State for the Home Department* [2015] 1 WLR 567) and the exercise of the *power* to detain pending removal under paragraph 16 of Schedule 2 to the Immigration Act 1971.

104. The *Hardial Singh* principles require modification, but the point made by the Claimants, is that detention under the Immigration Act 1971 is *analogous* to the situation of the asylum seekers. The Claimants' submission is that a legislator is to be taken to have intended that a power of administrative detention cannot exceed an objectively reasonable period and that HS2 is an example of the application of that principle. I accept that submission. The asylum seekers are in a unique situation. Diego Garcia is in one of remotest parts of the world, the Camp is not a suitable location (save for a brief period), and the current arrangements do not meet international standards. The presence of the asylum seekers on the island has caused tensions between the UK and US authorities as the priority to remove the asylum seekers as soon as possible has conflicted with the primary objectives of protecting the UK's sovereignty and preventing a migration route to the UK via the Indian Ocean. In that context the Commissioner has been placed in a difficult situation. I agree with the observations made by the UNHCR team that:

> *"The arrangements for receiving and hosting asylum-seekers and refugees who were disembarked on Diego Garcia were developed in a very complex legal and operational environment, complicated by the presence of a US military facility. Temporary*

arrangements established for what was effectively an emergency response have however become untenable in a protracted situation and, despite considerable efforts to provide a safe and dignified living environment, there are significant shortcomings in current conditions that are adversely affecting the physical and mental well-being of those remaining in the camp."

However, there must be limits on the Commissioner's executive power to detain. The reasonableness requirement holds the executive accountable for its actions. It forces authorities to justify their decisions to detain individuals, ensuring that detention is not conducted in a manner that is secretive, arbitrary, or unfair. And as stated by the Privy Council in *Tan Te Lam*:

"…Although these restrictions are to be implied where a statute confers simply a power to detain 'pending removal' without more, it is plainly possible for the legislature by express provision in the statute to exclude such implied restrictions. Subject to any constitutional challenge (which does not arise in this case) the legislature can vary or possibly exclude the Hardial Singh principles. But the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances."

105. For the reasons outlined above, even if the RMO 2023 was lawfully made and contained an unqualified requirement for all "Relevant Persons" to remain within the boundaries of the Camp, it would still be subject to a reasonableness requirement, unless the implied restrictions were expressly ousted. There is no such ouster. I am satisfied that over and above the non-exhaustive list of reasonable excuses (Rule 3) a reasonableness requirement is to be read into the RMO 2023 given the high value that must be placed on personal liberty. The asylum seekers cannot be detained for longer than is reasonable in all the circumstances.

106. In the circumstances of this case how long is a reasonable period? The factors identified by Lord Dyson in *(I) v SSHD* (supra) provides a helpful structure in determining the answer to this question.

107. The Commissioner bears the legal and evidential burden of explaining any delays in processing the Claimant's international protection claims and progressing their removal. The Claimants have been detained for an extraordinarily long time and it is unclear what (if any) significant headway has been made in progressing the Claimants' international protection claims. By the time of the hearing, they had all been detained for 35 months, save for RG, who had been detained for 29 months. Only two international protection claims have been determined and there is no indication as to when decisions will be made in respect of the others. If the outstanding claims are successful, there is likely to be a significant delay before a decision is made about the next steps given that RG received his positive non-refoulement decision on 30 March 2023 and to date is still awaiting the outcome of the Commissioner's efforts to transfer him to a safe country. Although the Commissioner recommended that the Claimants be granted leave to enter the UK, at the time of the hearing, the situation remained uncertain. The Statement of Process, setting out the process under which the international protection claims would be processed, was not

promulgated by the Commissioner until July 2022; 9 months after the Claimants first arrived on Diego Garcia. The Commissioner conceded in September 2023 that the Statement of Process was unlawful and promulgated a new Statement of Process in October 2023. The Commissioner refused to grant the Claimants legal aid for their international protection claims until the Chief Justice determined in May 2023 that that decision was unlawful (see *VT* (supra)). In February 2024, the Commissioner accepted that the Claimants required in-person assessment by medical experts but to date these have not been facilitated thereby hindering progression of the claims. A Ministerial Statement, dated 1 July 2024, indicates that the impediment to progression is a concern expressed by the Home Office that allowing medical experts to visit in person could set a precedent for the wider UK-Rwanda Migration and Economic Development Partnership.

108. The asylum seekers are monitored constantly and G4S officers patrol the Camp and surrounding areas at regular intervals 24/7. The UNHCR team reported that due to the hot weather conditions and limited communal space the asylum seekers spend much of the day in their tents. For the single men in particular the tents provide limited privacy and personal space. Many have placed crates and cardboard on top of the folding army beds due to back pain. Until July 2023, children shared tents with single men. The Claimants complain about the presence of rats. Some have been bitten by rats, including RG who stated that the presence of vermin made it difficult to sleep. The holes created by the rats have been difficult to repair and water leaks into the tents when it rains. Mr Candler stated in his third witness statement, dated 22 July 2024, that those in charge of the Camp have been trying to control the number of rats but "*this has proven very difficult*" as it is a problem across the whole island. RG stated in his witness statement that the tents periodically flood when it rains heavily and "*water seeps into the floor sheet and cardboard has to be used to ensure we can walk in the tent*." Many of the asylum seekers are fishermen, carpenters, labourers, and tailors but they are unable to make use of these skills to catch fish, cook, or make things. In his fourth witness statement, dated 11 April 2024, Mr Dholakia refers to the boat repair project. From May 2023 to late 2023 some asylum seekers were permitted to work on repairing a boat. There was a hunger strike taking place at the time and one of the intentions behind the project was to help some of the asylum seekers to focus on a positive and optimistic task. However, apart from the boat project there have been no activities to give the asylum seekers mental and physical stimulation and a sense of control over their own lives.

109. UNHCR stated that the long-term uncertainty about the future, and the conditions of detention are contributing to elevated levels of distress, suicidal thoughts, and behaviour and a "*rising hopelessness*." For example, ME (the wife of SE) swallowed a razor blade and a coin, and required medical attention. KP has self-harmed and attempted to take his own life several times. VT has also self-harmed. The children are exposed to the trauma, angst, and mental health difficulties of the adults in the Camp.

110. The Claimants are of good character (save for KP and VT). None of the Claimants have absconded or attempted to abscond whilst subject to bail and no reliance is being placed on the risk of criminality. In reality there is only a negligible risk of the Claimants absconding. Given the nature and size of the island the Commissioner will be able to locate them and remove them from the island in the event that their claims for international protection are rejected.

111. Having considered the factors referred to above I have no hesitation in concluding that by the time the RMO 2023 was promulgated in July 2023, any lawful authority to detain had long expired.

RMO 2024

112. The Commissioner does not accept that the RMO 2023 was legally flawed and a nullity. However, on 14 May 2024, it was revoked and the RMO 2024 was promulgated. The RMO 2024 was promulgated by the Commissioner personally, in accordance with his powers in Section 10 of the Constitution Order 2004 and appeared in the Gazette on 15 May 2024.

113. The provisions in the RMO 2024 are similar to those in the RMO 2023 but not the same. The original Rule 3 of the RMO 2024 stated that, for the purposes of Rule 2, reasonable excuses for leaving the Camp included (but were not limited to): (i) attending medical appointments under escort; (ii) supervised access to the beach adjacent to the Camp; (iii) accessing a designated route outside the Camp within the terms of an Order of the BIOT Supreme Court; (iv) being remanded in custody by a BIOT Court; and (v) departing the Territory, by air or sea, under escort. The RMO 2024 was amended on 11 June 2024. The amended Order repealed and replaced the Rules. The new Rules include, at Rule 3, a provision for the Camp Manager to direct that Relevant Persons be accommodated within Secondary Accommodation, to ensure (a) the security of the Facility, (b) the safety of other Relevant Persons, or (c) the maintenance of order within the Camp.

114. The RMO 2024 provides that the Rules apply to all those in BIOT without permission. Therefore, it applies to all the Claimants, save for RG and KP. Although RG and KP arrived in BIOT without permission, they have received positive non-refoulment decisions and have a right to remain unless and until arrangements are made for their transfer to a safe country.

115. For the same reasons, as stated above, in relation to the RMO 2023, the RMO 2024 is *ultra vires* because it is an unreasonable and unlawful exercise of the Commissioner's legislative power under Section 10 of the Constitution Order, in all the circumstances.

The Detention of KP and VT

116. The STHF is designated as Secondary Accommodation in accordance with Rule 1 of the RMO 2024. As stated above, KP and VT were confined to the Laundry Room and a tent outside the Camp respectively and both are now confined to the STHF. VT was taken to the STHF before he was granted criminal bail in the criminal proceedings. When bail was granted in those proceedings the STHF was no more than a residence condition. Mr McKendrick KC submitted that accommodating KP and VT in the STHF does not constitute detention as the RMOs are lawful. I have already rejected the lawfulness of the RMOs in relation to detention in the Camp. This reasoning also applies to the detention of KP and VT in the STHF. However, it is appropriate that I address the specific points that have been raised with regard to the additional restrictions placed on their liberty.

117. Mr McKendrick KC submitted that there is an additional need to restrict the movements of KP and VT as they pose a risk to themselves and others. He referred the Court to KP's alleged offending behaviour which includes allegations of arson (which occurred in the presence of families and children) physical threats (directed towards Camp residents and medical staff) and sexual assault. Mr McKendrick KC submitted that KP's detention under immigration powers between 14-16 July 2023 was lawful as a detaining authority is entitled to a reasonable grace period to ensure a safe release from immigration detention (see - *AC (Algeria) v SSHD* [2020] EWCA Civ 36). KP was moved from immigration detention within two days of the decision to defer his removal. Mr McKendrick KC acknowledged that VT's bail conditions do not give the Commissioner power to detain. However, he submitted that they constitute a further and separate basis for his accommodation at the STHF after 14 June 2024. Mr McKendrick KC submitted that there is no alternative place on Diego Garcia where KP or VT can be accommodated. He further submitted that they have never been in solitary confinement.

118. Ms Law submitted that none of the Commissioner's arguments in support of the detention of KP and VT in the STHF are sustainable. I agree.

119. KP and VT are confined in the STHF for the reasons I have already stated. Until recently, there were periods when their detention was also solitary. Solitary confinement is commonly understood as the practice of isolating an individual from other detainees, with little to no meaningful human interaction, for 22 hours or more each day. There are references in the contemporaneous documents to the isolating effect of detention in the STHF. By way of example, in an email dated 9 June 2024, Commander Malone, observed that moving KP and VT to the STHF (and a number of proposed alternatives) "*will result in isolation […] and having less freedom that [sic] they would ordinarily enjoy at the camp*". Regular contact with two G4S staff throughout the day and regular contact with clinical staff is clearly not "*meaningful human contact*" in any true sense. It also contradicts the definition in the 'Independent Care (Education) and Treatment Reviews Oversight Panel's solitary confinement code of practice framework' (published on 8 November 2023 by the UK Department of Health and Social Care) which states that:

> "*Contact that involves being face to face with a loved one, friend or significant other who provides empathic, warm and nurturing interpersonal communication and who helps you to feel safe. It includes having a community presence and relationships, recognising that some people will not have relationships with family or lack close friends.* ***Meaningful human contact does not include being with staff in institutions or talking to people through medical necessity*** [emphasis added]."

120. KP and VT were held in solitary confinement for an indefinite period. The UNHCR monitoring team stated in their report that in order to meet international standards, decisions to detain asylum seekers or to extend detention, must be in accordance with national laws and must prescribe minimum procedural safeguards. These safeguards include regular periodic reviews of the necessity for continued detention before a judicial or other independent authority. There is no such formal review mechanism in place. The documents Mr McKendrick KC referred to in his closing submissions relate to the period immediately prior to KP and VT being placed in the STHF in June 2024. Furthermore, Mr Dholakia stated during his oral evidence, that there was no review process because the risk of harm

"*will not change*" so long as there are children present in the Camp. The RMO 2024 (the only legal basis for the detention of KP and VT) could not authorise indefinite preventive detention.

121. KP was removed from the Laundry Room and detained in the STHF from 12-14 July 2023. This period of detention was explicitly based on the negative decision regarding KP's claim for international protection. Once detention is unlawful any further detention can only be lawful for a reasonable period to put in place appropriate conditions for release. In *AC (Algeria)* (supra) Irwin LJ stated at §39:

> *"The duration of…a period of grace must be judged on the facts of the case. The relevant facts include the history, as well as the risks to the public. I fully accept that the risk to the public is a highly important factor, but it cannot justify indefinite further immigration detention. No risk can justify preventive detention: that is clearly outwith the statutory power of the Secretary of State* [emphasis added]."

It was two days before KP was returned to the Camp. Although there will be many circumstances where two days is a reasonable "*grace period*" no supporting evidence has been provided setting out the practical steps that were taken to facilitate a return to the Camp. In the absence of any evidence justifying KP's continued detention in the STHF I am not satisfied that two days was a reasonable period of grace. In any event, the Commissioner has conceded that the negative non-refoulement determination was unlawful. In the UK Supreme Court case of *R (DN (Rwanda)) v Secretary of State for the Home Department* [2020] UKSC 7; [2020] AC 698 at §25 Lord Kerr stated:

> "*The giving of notice of the decision to make a deportation order, the making of the deportation order, and the detention on foot of it are essential steps in the same transaction. The detention depends for its legality on the lawfulness of the deportation itself. Absent a lawful basis for the making of a deportation order, it is not possible to breathe legal life into the decision to detain*."

On the facts of this case the error in the decision-making process had a direct impact on the decision to detain KP in the STHF. Because the error was fundamental to that decision this period of detention was unlawful.

122. The presence of KP and VT in the Camp has to be balanced against the needs of others. Mr Dholakia stated, during his oral evidence, that reconfiguration of the Camp would not be a sufficient mitigation. He also stated that there was a limit to what could be achieved because the US authorities did not want a permanent structure in place as they may need to use the Camp area at short notice. I acknowledge the difficulty. However, I do not accept as submitted by Mr McKendrick, that there are only two locations in which the migrants can be located. There are clearly other options. One option was the redevelopment of the Moody Brook site which would have taken months to complete. Mr Candler stated in his witness statement, dated 22 July 2024, that this option was rejected on grounds of costs.

123. On 28 June 2023 (a week before KP's detention in the STHF), Commander Osborn advised the FCDO that:

"[The STHF] … has been declared unsafe and unfit for purpose (ligature points, air conditioning, alarm system, non-functioning CCTV) and we use it with mitigation at BIOTA risk by ensuring that two guards are physically present inside 24/7. I would not recommend its use for somebody with the declared intent to harm themselves."

I accept that the conditions in which KP was detained contributed to a deterioration in his mental health. He has suffered several fits and has deliberately self-harmed multiple times, which required urgent medical attention. He was temporarily medically evacuated to Bahrain on 24 August 2024, for urgent treatment to remove a twisted metal wire he had ingested in an attempt to self-harm. Prior to his arrest on 21 March 2024, VT was in poor mental health. I accept that his ongoing indefinite confinement, and the lengthy periods in isolation have caused him considerable distress.

124. The conditions of detention as described above are not reasonable.

Update

125. In written submissions, dated 5 December 2024, the Claimants provided the Court with an update with regard to recent factual developments and the consequential implications for bail and the relief sought.

Factual Developments

126. On 16 October 2024, KP was convicted of assault occasioning actual bodily harm, having pleaded guilty at the earliest opportunity. On 17 October 2024, the sentence imposed was an immediate 24-week term of imprisonment. The offence occurred in the course of a suicide attempt. KP spent the first two weeks of his sentence in solitary confinement in the police cell, which has no window. He was then transferred back to the STHF, which the Commissioner has now designated as a prison, where he remains.

127. On 1 November 2024, VT was convicted of one count of assault by penetration and three counts of sexual activity with a child, resulting in an immediate three-year sentence of imprisonment handed down on the same date. He is currently serving that sentence in the STHF.

128. On 2 December 2024, all of the people held in the Camp on Diego Garcia were flown to the UK, where they have been granted permission to enter and leave to remain outside the Immigration Rules for six months. The following day, all of the people sent to Rwanda for medical treatment were flown to the UK. Consequently, all of the Claimants save for KP and VT are now in the UK. There is one family from the Camp on Diego Garcia who are now in Bahrain. They are not Claimants in these claims. This family was evacuated to Bahrain for urgent medical treatment because the youngest child (who has just turned five) is gravely ill. It is expected that this family will travel to the UK as soon as they are able to do so.

Bail

129. The Revised Bail Order of 31 July 2024, which imposes positive obligations on the Commissioner to facilitate the Claimants' access to bail, can now be set aside. The Claimants' application to vary bail, filed on 1 November 2024, is now academic and is withdrawn.

Relief Sought

130. As a result of these factual developments, the writ of habeas corpus is not currently sought by any of the Claimants.

131. The Claimants seek a declaration as to when their unlawful detention began and when it came to an end, with any assessment of damages to follow.

Conclusion

132. For the reasons stated above I make the following declarations.

i VT was unlawfully detained from his arrival on Diego Garcia on 3 October 2021 until 21 March 2024 when he was detained in criminal custody. He was further unlawfully detained after he was released from criminal custody on 31 May 2024 until he was sentenced to immediate custody on 1 November 2024.

ii KP was unlawfully detained from his arrival on Diego Garcia on 3 October 2021 until he was sentenced to immediate custody on 16 October 2024.

iii RG was unlawfully detained from his arrival to Diego Garcia on 10 April 2022 until he left for the United Kingdom on 2 December 2024.

iv AAA and ZZZ were unlawfully detained from their arrival to Diego Garcia on 3 October 2021 until they were medically evacuated to Rwanda on 9 June 2024.

v All of the other Claimants were unlawfully detained from their arrival to Diego Garcia on 3 October 2021 until they left for the United Kingdom on 2 December 2024.

133. I am grateful to counsel and their supporting legal teams for the expert assistance and the clarity of their submissions both in writing and at the hearing. The parties are invited to draw up an order which reflects the updated position, and the conclusions set out in this judgment. The parties should endeavour to agree the terms of any consequential matters including costs.