Case No: C4/2009/0159, C4/2009/0157, C4/2008/2099

Neutral Citation Number: [2010] EWCA Civ 111

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH (ADMIN)
MR JUSTICE DAVIS
[2008] EWHC 3166 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2010

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE CARNWATH
and
LORD JUSTICE STANLEY BURNTON

- -

Between :

THE QUEEN ON THE APPLICATION OF WL (CONGO) 1 and 2
and
THE QUEEN ON THE APPLICATION OF KM (JAMAICA) — **Appellants**

- and -
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Respondent**

- -
- -

Raza Husain and **Alex Goodman** (instructed by **The Public Law Project**) for the **Appellant WL**
Raza Husain, Laura Dubinsky and **Andreas Pretzell** (instructed by **Lawrence Lupin)** for the **Appellant KM**

Robin Tam QC, Charles Bourne and **Jeremy Johnson** (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing dates : 30 November, 1 & 2 December 2009

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Judgment

Lord Justice Stanley Burnton:

Introduction

1. On 19 December 2008 Davis J gave judgment on claims for judicial review brought by five lead claimants who alleged that they had been unlawfully detained by the Home Secretary as a result of his application of an unpublished policy, introduced in April 2006, for the detention of convicted foreign nationals following the completion of their prison sentences with a view to or for the purposes of their being deported. The unpublished policy was inconsistent with the Secretary of State's published policy and was also alleged to be inconsistent with the statutory provision relied upon to justify the claimants' detention, namely paragraph 2 of Schedule 3 to the Immigration Act 1971. The claimants whose claims were before the judge sought, among other relief, damages, including exemplary damages, for their alleged false imprisonment.

2. Between April 2006 and 9 September 2008, the published policy of the Home Secretary provided that a foreign national prisoner (an "FNP") should continue to be detained following completion of his sentence of imprisonment only when his continued detention was justified. In other words, there was a presumption of release from detention. Before the judge it was admitted by the Home Secretary that the Home Office had indeed applied an unpublished and undisclosed policy instead of his published policy. There was an issue before the judge as to whether the policy in fact operated by the Home Office was a blanket detention policy, or whether it was a presumptive policy that allowed such prisoners to be released pending deportation (or a decision as to their deportation) if their release was justified. A new policy was published on 9 September 2008. The judge found that the policy in fact operated before that date was a presumptive rather than a blanket policy. He granted two declarations:

    (1) A declaration that paragraph 2 of Schedule 3 to the Immigration Act 1971 prohibits the Home Secretary from operating any policy in relation to the detention of FNPs pursuant to that provision pending their deportation which contains a presumption in favour of detention.

    (2) A declaration that it was unlawful for the Home Secretary to operate the policy introduced in April 2006 in relation to the detention of FNPs pending their deportation, in that it was not sufficiently published or accessible until its publication on 9 September 2008.

3. Apart from those declarations, the judge dismissed the claims for judicial review of four of the claimants; the claim of the fifth claimant was adjourned. The claims for damages for unlawful detention were also dismissed.

4. We have before us appeals against his order made in consequence of his judgment by two of the claimants whose claims he dismissed, namely WL (Congo) and KM (Jamaica), and a cross-appeal by the Home Secretary against the first of the declarations he made. In addition, WL appeals against the order of Collins J dated 17 July 2008 dismissing his claim for an order for a mandatory order directing his discharge from detention.

5. This is the judgment of the Court, to which each of its members has contributed, on those appeals and the cross-appeal.

6. At the beginning of his judgment Davis J said that the claims raised matters which were "in some respects unedifying and in other respects disquieting". We agree: indeed, we consider that the judge's words were if anything an understatement. The matters to which we refer reflect very badly on the Home Office in the period in question, during which there was at a high level a failure to have proper regard to, if not a disregard of, the legal obligations of the Department, and the failure does not appear to have been attributable merely to oversight.

7. Before us, argument was divided between submissions on issues that are generic to the appeals and submissions on issues relating to individual appellants. We shall divide our judgment similarly.

8. References below to the detention of FNPs are, unless otherwise indicated, to detention after completion of any sentence of imprisonment pending deportation or a decision as to their deportation, in other words to detention that is not authorised by any such sentence. References to detention pending deportation include detention pending a decision on the part of the Secretary of State whether to make a deportation order and also pending any appeal or application for judicial review seeking to avoid deportation.

A. GENERIC ISSUES

The legislative background

9. Sections 3(5) and 3(6) and section 5 of the Immigration Act 1971 (as amended) are as follows:

> 3.(5) A person who is not a British citizen is liable to deportation from the United Kingdom if –
>
> (a) the Secretary of State deems his deportation to be conducive to the public good; or
>
> (b) another person to whose family he belongs is or has been ordered to be deported.
>
> (6) Without prejudice to the operation of subsection (5) above, a person who is not a [British citizen] shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.
>
> …
>
> 5.(1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force.

10. Further extended powers of detention are conferred by subsequent legislation; they are not relevant for present purposes. Schedule 3 of the 1971 Act is of central importance to these appeals.

> 1. — (1) Where a deportation order is in force against any person, the Secretary of State may give directions for his removal to a country or territory specified in the directions being either—
>
> (a) a country of which he is a national or citizen; or
>
> (b) a country or territory to which there is reason to believe that he will be admitted.
>
> ….
>
> 2. (1) Where a recommendation for deportation made by a court is in force in respect of any person, and that person is not detained in pursuance of the sentence or order of any court, he shall, unless the court by which the recommendation is made otherwise directs, or a direction is given under sub-paragraph (1A) below, be detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary or State directs him to be released pending further consideration of his case or he is released on bail.
>
> (1A) Where –
>
> (a) a recommendation for deportation made by a court on conviction of a person is in force in respect of him; and
>
> (b) he appeals against his conviction or against that recommendation,
>
> the powers that the court determining the appeal may exercise include power to direct him to be released without setting aside the recommendation.
>
> (2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.
>
> (3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise).

11. The implied restrictions on the power to detain for the purposes of deportation were set out by Woolf J in *Hardial Singh* [1984] 1 WLR 704, 706:

> Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Second, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.
>
> In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time.

This has ever since been regarded as the authoritative statement of the implied limitations of the power to detain conferred by paragraph 2, and it was accepted as such before us.

12. Also relevant is Article 5 of the European Convention on Human Rights:.

> Article 5: *Right to Liberty and Security*
>
> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> …
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Power is conferred by the 1971 Act for the grant of bail. There is also, of course, the right to apply to the courts for habeas corpus or for judicial review by way of challenge to decisions continuing detention.

13. The Detention Centre Rules 2001 (S.I. 2001 No. 238) as amended were made under powers conferred by the Immigration and Asylum Act 1999. Rule 9 is as follows:

> 9. — (1) Every detained person will be provided, by the Secretary of State, with written reasons for his detention at the time of his initial detention, and thereafter monthly.
>
> (2) The Secretary of State shall, within a reasonable time following any request to do so by a detained person, provide that person with an update on the progress of any relevant matter relating to him.
>
> (3) For the purposes of paragraph (2) "relevant matter" means any of the following—
>
> (a) a claim for asylum;
>
> (b) an application for, or for the variation of, leave to enter or remain in the United Kingdom;
>
> (c) an application for British nationality;
>
> (d) a claim for a right of admission into the United Kingdom under a provision of Community law;
>
> (e) a claim for a right of residence in the United Kingdom under a provision of Community law;
>
> (f) the proposed removal or deportation of the detained person from the United Kingdom;
>
> (g) an application for bail under the Immigration Acts or under the Special Immigration Appeals Commission Act 1997;
>
> (h) an appeal against, or an application for judicial review in relation to, any decision taken in connection with a matter referred to in paragraphs (a) to (g).

The published policies of the Home Office

14. The relevant extracts are set out in Davis J's judgment, from which we take the following.

15. Over the years the Government issued relevant White Papers. In "Fairer, Faster, Firmer", issued in 1998, Chapter 12 deals with detention. In paragraph 12.3 of Chapter 12 it was noted that:-

> The Government has decided that, while there is a presumption in favour of temporary admission or release, detention is normally justified in the following circumstances: where there is a reasonable belief that the individual will fail to keep the terms of temporary admission or temporary release; initially to

> clarify a person's identity and the basis of their claims; or where removal is imminent …

In paragraph 12.10 it was stated:-

> In addition to any consideration of bail through the judicial process, the Immigration Service will continue its periodic administrative review of detention in each case. Individuals should only be detained where necessary.

Paragraph 12.11 stated:-

> Detention should always be for the shortest possible time, but the Government is satisfied that there should be no legal maximum period of detention …

In "Secure Borders Safe Haven" (2002) under the heading "Detention Criteria" this was said at paragraph 4.76:

> 4.76 Although the main focus of detention will be on removals there will continue to be a need to detain some people at other stages of the process. Our 1998 White Paper set out the criteria by which Immigration Act powers of detention were exercised and confirmed that the starting point in all cases was a presumption in favour of granting temporary admission or release. The criteria were modified in March 2000 to include detention at Oakington Reception Centre if it appeared that a claimant's asylum application could be decided quickly. The modified criteria and the general presumption remain in place …

16. This was in substance repeated in the Operations Enforcement Manual which, ostensibly at least, remained in effect for the periods relevant to these appeals until June 2008. The Operations Enforcement Manual was of general application with regard to immigration detention. It was a published document, available to the public on the Internet. In the introductory section to Chapter 38, which related to detention and temporary release, it was stated that the 1998 White Paper confirmed that "there was a presumption in favour of temporary admission or release and that, whenever possible we would use alternatives to detention". That was further confirmed by, for example, paragraph 38.3:

> 1. There is a presumption in favour of temporary admission or temporary release.
>
> 2. There must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.
>
> 3. All reasonable alternatives to detention must be considered before detention is authorised.
>
> 4. Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.
>
> 5. Each case must be considered on its individual merits.

In paragraph 38.3 various relevant factors, for and against detention, were set out. In paragraph 38.6.3 a detailed exposition of the applicable requirements for reasons for detention was given. These reasons included, amongst others, a risk of absconding; removal from the UK being "imminent"; and release not being considered "conducive to the public good".

17. Paragraph 38.5.2 of the Operations Enforcement Manual dealt expressly with FNPs:

> 38.5.2 *Authority to detain persons subject to deportation action*
>
> The decision as to whether a person subject to deportation action should be detained under Immigration Act powers is taken at senior caseworker level in CCD [the Criminal Casework Directorate]. Where an offender, who has been recommended for deportation by a Court or who has been sentenced to in excess of 12 months imprisonment, is serving a period of imprisonment which is due to be completed, the decision on whether he should be detained under Immigration Act powers (on completion of his custodial sentence) pending deportation must be made at senior caseworker level in CCD in advance of the case being transferred to CCD. It should be noted that there is no concept of dual detention in deportation cases (see 38.11.3).

This was supplemented by paragraph 38.11.3:

> *Immigration detention in deportation cases*
>
> Paragraph 2 (1) of Schedule 3 to the 1971 Act concerns the detention of a person who has been court recommended for deportation in the period following the end of his sentence pending the decision by the Secretary of State whether to make a deportation order. Paragraph 2 (2) of Schedule 3 defines the scope of the power to detain a person who has not been recommended for deportation by a court but who has been served with a notice of intention to deport (an appealable decision) in accordance with section 105 of the Nationality, Immigration and Asylum Act 2002, pending the making of a deportation order.
>
> …

18. On 19 June 2008 the Enforcement Instructions and Guidance 2008 came into effect, superseding the Operations Enforcement Manual. The Guidance is also publicly available on the Internet. Chapter 55 deals with Detention and Temporary Release (and so corresponds to Chapter 38 of the former Operations Enforcement Manual). Chapter 55 likewise starts with a reference to the 1998 White Paper and the presumption in favour of temporary admission or release and with a statement that, whenever possible, alternatives to detention would be used. That is reflected also in paragraph 55.3. Paragraph 55.11.3 gives general guidance in respect of immigration detention in deportation cases. Paragraph 55.20, which relates to temporary admission, release on restrictions and temporary release (bail) says this at the outset:-

> 55.20 *Temporary admission, release on restrictions and temporary release (bail)*

> Whilst a person who is served with a notice of illegal entry, notice of administrative removal, or is the subject of deportation action is liable to detention, such a person may, as an alternative to detention, be granted temporary admission or release on restrictions. The policy is that detention is used sparingly, and there is a presumption in favour of granting temporary admission or release on restrictions. Another alternative to detention is the granting of bail, which is covered separately in Chapter 57. The fundamental difference between temporary admission/release on restrictions and bail is that the former can be granted without the person concerned having to be detained, while the latter can only be granted once an individual has been detained and has applied for bail."

19. However, on 9 September 2008 Chapter 55 of the Enforcement and Instructions Guidance was altered. It again recites the general policy presumption (that is, in favour of temporary admission or release). But specifically with regard to FNPs paragraph 55.1.2 is as follows:

> 55.1.2 *Criminal Casework Directorate Cases*
>
> Cases concerning foreign national prisoners – dealt with by the Criminal Casework Directorate (CCD) – are subject to a different policy than the general policy set out above in 55.1.1. Due to the clear imperative to protect the public from harm and the particular risk of absconding in these cases, the presumption in favour of temporary admission or temporary release does not apply where the deportation criteria are met. Instead the person will normally be detained, provided detention is, and continues to be, lawful. The deportation criteria are:-
>
> > For non-EEA cases – a sentence of at least 12 months as either a single sentence or an aggregate of 2 or 3 sentences over the past five years; or a custodial sentence of any length for a serious drugs offence (see list below);
> >
> > For EEA cases – a sentence of at least 24 months;
> >
> > A recommendation from the sentencing court …

This is expanded upon in the following pages. Thus it is said, for example, that:-

> Due to the clear imperative to protect the public from harm, the presumption of temporary admission or release does not apply in cases where the deportation criteria are met. In CCD cases concerning foreign national prisoners, because of the higher likelihood of risk of absconding and harm to the public on release, there is a presumption in favour of detention as long as there still is a realistic prospect of removal within a reasonable time scale …

Caseworkers are then instructed to have regard to specified matters which "might make further detention unlawful"; and it is then said that "substantial weight" should be given to the risk of further offending or harm to the public indicated by the subjects' criminality. Where the offence which triggered deportation is included on the list at paragraph 55.3.1 (essentially serious crimes, including violence, sexual offences and

drugs offences), it is said that the weight to be given to the risk of further offending or harm to the public is "particularly substantial". Paragraph 55.3 states:

> Public protection is a key consideration underpinning our detention policy. Where an ex-foreign national prisoner meets the criteria for consideration of deportation the presumption in favour of temporary admission or temporary release will not apply … the public protection imperative means that there is a presumption in favour of detention. However this presumption will be displaced where legally the person cannot or can no longer be detained because detention would exceed the period reasonably necessary for the purpose of removal. …

In the case of serious criminal offences it is indicated that "in practice" release is likely to be appropriate "only in exceptional cases"; a point then developed in paragraph 55.3 at considerable length. There is also a list of crimes "where release from immigration detention or at the end of custody would be unlikely": these are mainly serious offences.

20. Thus, at all events by September 2008, the published policy had changed. Until that date, it had been a policy under which there was a presumption in favour of release. After September 2008 in the cases relating to FNPs dealt with by the Criminal Casework Directorate there was an express presumption in favour of detention. Following Davis J's judgment, the policy was again changed so as to omit the presumption in favour of detention and to substitute a policy in favour of release from dentention.

An unpublished policy

21. The Appellants challenge the lawfulness of the new published policy. The issue as to its lawfulness is of a kind with which the courts are familiar. Whether the presumption in favour of detention of FNPs is lawful depends on the true construction and effect of the applicable legislation, including the Human Rights Act 1998 incorporating the European Convention on Human Rights. If the new policy is unlawful, that is the consequence of an unfortunate legal error which would not normally attract moral obloquy.

22. But, as the judge pointed out, that issue is not solely, or even principally, what these cases are about. The Appellants say that from April 2006 an unpublished policy was operated by officials on behalf of the Home Secretary; that this was done in a way which was never made public or announced in any accessible way, whether by a White Paper or a published revision of the Operations Enforcement Manual or formal statement to any Immigration Lawyers' Association or the like; and that this unpublished policy conflicted with the published policy. The Appellants contend that the unpublished policy so adopted was not simply a policy presumptive of detention; they say that it was a policy which positively required the detention of all FNPs pending their deportation or a decision not to deport (what in argument was called a "blanket" policy).

23. That there was an undisclosed policy is accepted by the Home Secretary. It will be remembered that Charles Clarke MP resigned as Home Secretary in May 2006 following the disclosure that over 1000 FNPs had been released from prison following the completion of their sentences without being considered for deportation or being deported. John Reid MP was appointed to replace him on 5 May 2006. Dr Reid remained as Home Secretary until he was himself replaced by Jacqui Smith MP on 28 June 2007. Upon his appointment he swiftly made it known that a different practice

must operate in relation to the detention and deportation of FNPs, but it seems that changes preceded his appointment. During April and early May 2006 "senior officials recall meetings with the Home Secretary in which he re-iterated his concern for public protection and the requirement to detain FNPs until deportation" (paragraph 21 of the internal review by David Wood, referred to below). There ensued a plethora of meetings and emails and doubtless conversations within the UK Borders Agency, and in particular the Criminal Casework Team (now referred to as the CCD), and the Home Office Legal Advisors Branch ("HOLAB"). However, no formal guidance was given to caseworkers until November 2007, when what were known as the Cullen criteria (known as "Cullen 1") were issued to caseworkers. These sought to identify those FNPs who posed lowest risks to the public and lowest risks of absconding, and who therefore might be released. The guidance was not published. Serious offences, such as sexual, violent and drugs cases which were identified in a list, were specifically excluded from consideration under such criteria. Paragraph 2.1 was headed " Cases which should not be considered for ending detention" (underlined in the original) and stated:

> Anyone convicted of a sentence which appears in the list attached should not be considered for management by maintaining rigorous contact, under these instructions.
>
> This list includes all violent offences, all sexual offences and all drug offences bar minor possession. ...

The attached list was headed, in bold capital letters:

> List of recorded crimes where release from immigration detention or at the end of custody will not be appropriate

24. Cullen 1 was modified in March 2008 (although some caseworkers were told of it earlier) with particular reference to less serious cases (again excluding serious offences) by an amended guidance (known as "Cullen 2"): the change being made, it was subsequently stated in a statement of Mr David Wood, Strategic Director of the Criminality and Detention Group of the UK Border Agency, of 26 June 2008, "in the light of our assessment of the types of cases in which the AIT was releasing ex-foreign national prisoners on bail and was intended to further ensure the legality of our decisions on detention and continued detention …". It was nonetheless stated that consideration of release of FNPs should stop (even if not convicted of serious criminal offences) if, amongst other things, removal was "imminent"; or, if removal was not imminent, if the subject was considered an above average risk of absconding. As before, the guidance excluded FNPs who had been convicted of violent offences, sexual offences or drug offences (bar minor possession) from consideration under the instructions contained in it. Once again, there was a list of recorded crimes "where release from immigration detention or at the end of custody will not be appropriate". Once again, the issue of the guidance was not made public.

25. We are concerned in these appeals with the effect of Cullen 1 and Cullen 2, and with the practice in fact followed by the Home Office in relation to the detention of FNPs between April 2006 and the publication of the current policy in September 2008 both before Cullen 1, and after Cullen 1 and Cullen 2, had been issued.

26. The discovery of the unpublished policy is described in paragraphs 21 to 26 of Davis J's judgment. The events which he relates cast no credit on many of those concerned in the Home Office. In legal proceedings by way of judicial review or applications for habeas corpus, witness statements were made indicating that the decision to detain the claimant had been made in accordance with the published policy under which the

presumption was for release. The existence and application of different criteria for detention were belatedly disclosed in *Ashori* [2008] EWHC 1460 (Admin) and *Lumba* [2008] EWHC 2090 (Admin), and it is right to give due credit to counsel and those instructing counsel in those cases who, as was their duty, took steps to ensure that the judges in those cases did not make orders in the mistaken belief that the claimants were detained as a result of the application of the published policy.

27. However, it was accepted by the Secretary of State before Davis J, and was accepted before us, that from April 2006 a policy different from that set out in the 1998 and 2002 White Papers and from that set out in Chapter 38 of the then Operations Enforcement Manual was intended to be operated on his behalf. Thus the only factual issue in relation to that policy is whether it mandated detention in all circumstances, or whether it was in effect the same policy as was later published, one that required detention pending deportation unless the facts justified release pending deportation. That is the only generic factual issue on these appeals.

28. We also mention that the judge expressly found that there was

> … no acceptable explanation for the failure to publish the new policy – whatever it was – until 9 September 2008, when the revised Enforcement and Instructions Guidance finally was published. Indeed the documents show a continuing unease over very many months in the interim on the part of a number of officials at the situation that was being allowed to subsist. Mr Wood in effect admits (in paragraphs 83 and 84 of this statement) that the eventual publication of the policy was in fact occasioned by the revealed "inaccurate" statements of Ms Honeyman in the Abdi and Lumba litigation.

We record that this finding was not challenged before us.

The generic issues in these appeals

29. At this point in our judgment it is convenient to set out the generic issues that were raised by the arguments before us:

(1) Was the unpublished policy a blanket policy requiring detention of FNPs pending deportation in all circumstances, as contended by the Appellants, or a policy imposing a presumption of detention, as contended by the Home Secretary and as held by the judge?

(2) Is it open to the Secretary of State to formulate and to apply a policy under which there is either a blanket policy requiring detention or a rebuttable presumption in favour of detention?

(3) Is the Secretary of State under a duty to publish his policy in relation to the detention of FNPs?

(4) Is the application of an unpublished policy adopted by the Secretary of State that is at variance with his published policy unlawful?

(5) If it was not open to the Home Secretary to apply the unpublished policy, does that mean that the detention of a FNP pursuant to that policy was unlawful in every case, or only in a case where the FNP would not have been detained under the published policy?

(6) If the Appellants were unlawfully detained, irrespective of whether they might have been lawfully detained on the application of the published policy, but the Secretary of State establishes to the requisite standard of proof that they would have been detained if the published policy had been applied, are they nonetheless entitled to substantial damages?

(7) If the Appellants are not entitled to substantial or general damages, may exemplary damages be nonetheless awarded?

Disclosure

30. At the beginning of the hearing of these appeals, the Court and indeed those representing the Appellants were faced with substantial additional disclosure of documents made by the Secretary of State. It is unnecessary for the purposes of these appeals to allocate blame for the lateness of this disclosure. It resulted in part from applications made by the Appellants for further disclosure of documents and cross-examination of the makers of witness statements filed on behalf of the Secretary of State, and the understandable desire of those representing him not to have the already limited time available for the hearing of the appeals taken up by the dispute as to that disclosure. We did not order cross examination (whether as to the contents of these documents, the reason for late disclosure, or the existence of yet further possibly relevant documents) or additional disclosure beyond that already made, for two reasons. First, we had the assurance of Mr Tam, on behalf of the Secretary of State, that proper disclosure of relevant documents had been made before Davis J and before us. The additional documents disclosed shortly before the hearing of the appeal, he stated, did not add materially so far as the issues to be resolved on these appeals are concerned, to the contents of the evidence filed on behalf of the Secretary of State (which is why they had not previously been disclosed) or had come into existence after he gave judgment. Good grounds were required for us to doubt this assurance. We considered there were none, in the light of what had been disclosed.

31. The second reason is the extent and the content of the disclosure made by the Secretary of State. The documents disclosed included sensitive, confidential documents, and the disclosure of a number of them is embarrassing, if not damaging, for their authors and the Secretary of State and his case. For present purposes, it is sufficient to refer to two documents. An email from the CCD dated 26 February 2007 stated:

> Previous advice has always been to detain in all circumstances even though this was against published detention policy.

Secondly, a draft policy submission of May 2007 referred to at paragraph 43.12 of Davis J's judgement included the following statements:

> Since the foreign national prisoner issue first broke in April 2006 we have been detaining <u>all</u> [underlined] criminal cases where it is decided to pursue deportation.
>
> …
>
> legal advice is that those statements [viz. made to the House of Commons] were insufficiently unambiguous to constitute such a change of policy and that we would therefore almost certainly lose any challenge if this were our defence.

The following comment was rightly described by the judge as "as cynical as it is unedifying":

> If we were to lose a test case, we could present any change in FNP detention practice as having been forced on us by the courts.

32. The judge said this of that comment:

> That may or may not be good politics: but it is deplorable practice, especially when it is seen that almost from day one the new unpublished policy was perceived in virtually all quarters within the department to be at least legally "vulnerable" and in some quarters positively to be untenable and legally invalid.

We entirely agree. However, the disclosure of such documents points to the Secretary of State's duty of candour having been fulfilled.

What was the unpublished policy?

33. We point out, first, that despite the attention this issue has received, it may be, on one view, of minor legal significance, at least in the instant cases. The principal vice of which the Appellants complain is that the Home Office operated a secret policy inconsistent with its published policy. They submit that it is and was unlawful to operate any secret policy, whatever its effect.

34. Secondly, the use of the word "policy" itself suggests a uniformity of understanding and application of the rules mandated by the policy that we simply do not find in the disclosed documents. To the contrary, as the judge pointed out, it is clear that, although many caseworkers did understand that all FNPs were to be detained pending deportation, save possibly in the most exceptional circumstances, there was no consistency. As we explain later, we think that to describe this as a "policy" may be to accord it a more formal status than is justified by the facts (see paragraph 55 below).

35. Thirdly, the judge's finding as to the policy (or practice) applied after 2006 was a finding of fact, with which this Court would normally refuse to interfere unless it were shown that he had overlooked significant relevant evidence or his finding was one that could not be supported. It cannot be said that he overlooked any relevant evidence. His judgment contains a careful and comprehensive account of the evidence. His conclusions were in paragraphs 108 and 109:

> 108. …. But overall I do not think I would be justified in concluding that what was operated here was a blanket policy of detention, admitting of no exceptions and allowing for no individual consideration of individual cases. The Home Office's investigations are, even now, not complete. Further, some – though not many - of the disclosed contemporaneous e-mails would indicate that the policy was a presumptive policy, not a blanket policy. Moreover, as these five cases themselves show, individual consideration *was* being given to cases. Further again, Mr Wood's informal survey of caseworkers (as recorded in paragraph 70 of his witness statement of 31 October 2008) indicated that, of those responding, the "vast majority either correctly understood the policy that was intended to apply or were applying a policy that was more likely to result in release". I do not think I would be justified, in the absence of cross examination, in rejecting this.
>
> 109. My conclusion here is that the policy applied after April 2006, albeit inconsistently understood by caseworkers, was not

> designed to be a mandatory policy of detention of FNPs, permitting of no individual consideration of individual cases and of no exceptions to detention. It was a presumptive policy, admitting of exceptions whereby release from detention was capable of being authorised. Even so, the presumption – described by Mr Wood, with no element of overstatement, as a "strong" presumption – was intended to be very rigorously applied and flexibility, by reference to consideration of exceptional individual circumstances, clearly was to be limited, both by design and in practice. That is shown by the very few actual examples of release thus far identified by Mr Wood; by the contents of a significant number of the contemporaneous e-mails; and by Mr Wood's concession (in paragraph 11 of his witness statement of 31 October 2008) that the result of the change in the policy was that "the vast majority of FNPs who were to be deported were detained pending deportation". In other words, the proposition that such FNPs were never released pending removal shaded, in a Gilbert and Sullivan way, into the proposition that they were hardly ever released. Quite how that compares with the figures for detention of FNPs pending removal (whether or not after court recommendation) *prior* to April 2006 is not known: since no such figures were put before me.

36. Nor can it sensibly be suggested that his conclusion was not open to the judge. What might, however, justify its reconsideration is the completion of the Home Office investigation, to which the judge referred, and to which we now turn.

The Wood review

37. The principal evidence on this issue consists of two witness statements of David Wood, Strategic Director of the Criminality and Detention Group of the UK Border Agency, one of 26 June 2008 and the other of 31 October 2008. Mr Wood was not personally involved in the formulation or the application of the unpublished policy: he took up post as Strategic Director only on 5 May 2008. His evidence therefore was based on the documents he had collected and his interviews and discussions with civil servants. After Davis J had given judgment, Mr Wood prepared a further document entitled "An internal review of the failure to publish a revised FNP detention policy following the April 2006 crisis". The report assumes, as Davis J had held, that the policy was a presumptive policy. The object of the review was to establish:

> the lessons to be learned from the series of events that led to the judgement of the High Court in *Abdi and Others v Secretary of State for the Home Department* (SSHD), which (in brief) held that the failure to publish and make accessible the revised detention policy for Foreign National Prisoners (FNPs) following the FNP crisis in April 2006 was unlawful and that the presumptive detention policy applied was itself unlawful.

38. We find the following paragraphs of the executive summary to be significant:

> … the review identifies several factors contributing to the delay following the immediate period of fire fighting when the response was focused on putting the resources and systems in place to properly manage FNP referrals from prison and detaining those who had been released without consideration of

deportation ("the 1013"). The number of staff allocated to criminal case working grew quickly but large numbers of those staff were inexperienced in deportation work. Training could not keep pace with recruitment and significant time and focus was (sic) needed to improve this position. In hindsight there was need for better investment in high performing and experienced staff (particularly managers). Guidance and instructions were passed on by word of mouth and there was a lack of ability to send "global" e-mails. This contributed to the confusion. There should have been formal advice in a submission to Ministers, but this was not provided. Nor was the problem formally brought to the attention of the Chief Executive. Policy should have been clarified very early and guidance issued to staff in writing. Those interviewed also report confusion as to who was responsible for the policy development.

Thus, the report identifies issues of accountability and ownership for policy decisions; communication between policy, operational and legal officials; lack of escalation of issues between UKBA Board and Ministers; lack of consistency in the approach to operational cases; and management issues of resourcing; training; and managing.

39. The reference to lack of consistency is borne out by the contemporaneous documents. We have referred to it above. But much of the review indicates that what was being applied during the period in question was a blanket policy. The following passages are pertinent:

April – May 2006

20. Most people recall the period in April and early May 2006 as one characterised by unbelievable pressure, and long hours, to grip the FNP situation and manage the situation of the "1013" FNPs released without consideration. The new Home Secretary made his intentions very clear in the House that no more FNPs would be released before they had been considered for deportation. He set out eight priority areas for "management" action to achieve our long-term policy goals on foreign national prisoners which were aimed at ensuring that FNPs were referred to the IND and consistently considered for deportation against the correct criteria.

21. During this time, senior officials recall meetings with the Home Secretary in which he re-iterated his concern for public protection requirement to detain FNPs until deportation. The situation was very pressurised at the time, with intense media and Parliamentary scrutiny. The meetings were often called at short notice, sometimes at weekends, and were usually very limited in who could attend. No minutes, or notes of decisions made at these meetings now exist. It is recalled that the Home Secretary's office at the time did not send regular minutes or notes of meetings because of concerns about leaks to the press, of which there were several in this period.

...

25. The extent of the political imperative, the enormity of the task and the pressure managers (in particular) were under in IND following April 2006 cannot be underestimated. Civil Servants who had been in the Home Office for many years and worked through a number of crises recall this period as more challenging than any other period the department has faced. This was at least in part due to the nature of the issue: actually deporting FNPs is a very complex process with a number of challenging aspects and it took many months before the implications of the new focus on considering all FNPs for deportation and detaining them until deportation were fully understood and resourced. The specific policy implications of the different approach to detaining FNPs were not discussed at the IND Board, although there would have been various discussions regarding the re-detention of the 1013 and the transfer of resources.

26. At the very start of the crisis (25 April 2006), concerns were expressed by operational staff and managers to policy officials about the basis on which detention of FNPs was lawful in the context of the previous operational processes being stretched to accommodate Ministerial imperatives. Managers within CCD approached HOLAB who advised on the statutory basis for detention, the requirement to serve the correct papers prior to detention, restraints on the length of detention pending removal (the *Hardial Singh* Principles) and the need for individual consideration of cases prior to detention. In this context, HOLAB also advised that detention needed to be in accordance with the IND's stated policy in detention, as set out in the 1998 and 2002 White Papers. …

...

30. In the first weeks following the crisis, it is apparent that officials were seeking to grip the clear Ministerial imperatives and attempting to develop processes which would allow the public protection necessity to be met while meeting the requirements of the law. A large number of staff were moved to work on Criminal Casework and the units became seriously challenged by the number of referrals. Concerns were being expressed about the lack of policy support for the decisions. FNPs were released throughout the period (albeit in small numbers in the 18 months following the crisis). The focus was necessarily on ensuring that all FNPs were considered for deportation, and not released until this consideration had been completed. It was understood by senior management that the Home Secretary's intention was that, following a decision to deport, the obvious public protection imperative would necessitate continued detention until deportation in as many cases as possible and legal advice was sought, and given, around *Hardial Singh* considerations. Any other interpretation of the Home Secretary's statements would not have been logical. Nonetheless, legal advice continued to be clear that detention needed to be in line with public policy.

June -- September 2006

> 35. Throughout this period, operational managers and the Director of CCD were expressing a desire to work within legal frameworks and in line with published policy as well as working to avoid FNPs being released prior to consideration of deportation, as clearly set out by the Ministers' statements. In this period there were a number of meetings between operational and policy colleagues to discuss the requirements of a detention policy which reflected practice. It was hoped that a submission could be put to the Immigration Minister prior to his summer vacation.

40. In paragraph 39 of this report, Mr. Wood referred to an advice from counsel of 18 September 2006 which set out that:

> - In previous months, to maximise public protection, IND had been detaining all criminal cases where it had been decided to pursue deportation but that this position was not thought to be tenable and that IND was very vulnerable to legal challenge.
>
> - In order to reduce the legal and reputational risks, it was necessary to amend both the current practice and published policy.
>
> - If current practice was brought in line with published policy, it was likely that IND would need to release a large number of FNPs.
>
> - Instead, the policy should be amended for FNPs to say that "while we will generally seek alternatives to detention we will not if there is a risk to public protection if we do not detain".
>
> - OASyS (NOMS Risk Assessment on reoffending) thresholds for risk assessment could be used for ascertaining risk. It was argued, on the basis of the modelling undertaken, but this would not mean having to release a large number of FNPs that it was impossible to say what kinds of FNP would need to be released.

41. The next part of the report deals with the period from October 2006 to March 2007:

> 45. During this period, it is clear that the policy on the detention of FNPs was "inconsistently understood by caseworkers", since there was nothing clearly written down to instruct them what policy to apply. For example, a training manual in use in October 2006 sets out that there was not a presumption that FNPs completing their sentences should continue to be detained. Officials recall that there had not been time or resources to update the training manual but it is also likely that to update the manual would have been difficult given the lack of a written alternative policy.
>
> 46. There is evidence of continued concerns from operational staff about the basis on which FNPs were being detained post-sentence. It is clear from an e-mail chain in December 2006

that CCD staff in Liverpool were applying the published detention policy and releasing people on bail where there was no immediate prospect of them being removed. CCD Croydon managers visiting Liverpool made clear to caseworkers the approach which should be applied. However, these managers raised the issue of consistency of practice and the danger of unlawful detentions with the Director of CCD. In response to this, the Director of CCD said:

> "The Home Sec has been very clear in his statements that there will be a presumption of detention in all FNP cases until removal. We need to ensure that all staff are applying this."

47. A similar concern about the basis of detention for FNPs from countries to which it was difficult to remove to was raised by staff at Gatwick Removals Facilitation Unit in January 2007. The individual raising this concern (an Inspector) had previously attempted to raise the issue with both the Senior Director of Enforcement and the Director of CCD and was concerned by the lack of response he had received. In replying to this concern, a CCD manager wrote that he sympathised but stated that CCD "had been given a very clear steer instruction from Ministers that we are to detain all foreign national prisoners". He also assured the enforcement staff that the issues under consideration at a very senior level. The concern was then escalated by CCD to the IND Head of Policy, who stated that "the policy and practice on detention of FNPs is monitored by senior management in IND, and we are advised by LAB and by Counsel." The operational staff continued to press for an explanation and written evidence of the lawfulness of detaining those from nationalities which they were not able to remove. Following a subsequent meeting with an operational manager to discuss this issue, the IND Head of Policy mentioned the Home Secretary's statement:

> "that FNPs who meets the criteria for deportation should not be released from prison before consideration of deportation is complete. This is a matter of public policy and public protection."

The Detention Services Policy lead had also pointed out the relevant statutory provisions for detention pending removal and had highlighted that as a point of policy, no nationalities were considered irremovable.

48. It seems, therefore, that the Home Secretary's statements to Parliament were now being relied upon as the basis for a new presumptive detention policy. In early 2007, the newly formed Operational Policy and Process Unit (OPPU) started to draft the first CCD Process Communication (PC) on detention, to make clear the grounds on which FNPs were detained and the process of carrying out detention reviews. Early drafts of this communication included the following statement:

> "The Home Secretary has made clear that foreign national prisoners who meet the criteria for deportation, should be

> detained until they are deported or until a decision has been made not to deport them."
>
> 49. This precipitated a discussion between operational managers, a policy official in the DDG's office, HOLAB and the Detention Services policy lead, about the extent of support for a presumptive detention policy which could be inferred from the Home Secretary's statements. CCD operational managers raised the point that none of the Home Secretary's statements clearly stated that FNPs would be detained until deportation. They highlighted that there could be a significant period of time following the decision to deport until deportation had actually taken place. The Rt. Hon. John Reid's statement before the Home Affairs Committee on 12 December 2006 was circulated, in which he set out the challenges faced in completing the consideration process, including Judicial Reviews and the judicial process. In this context, he had said:
>
> > "In the meantime, I am faced with the question, would the public expect me to release onto the streets prisoners of foreign nationality who have committed serious offences? My judgement is, no, the public would not and, therefore, I made the decision, as I said to this Committee, that, with all of the constraints in prison places, all of the shortages we face and all of the difficulties involved in that decision, that these people ought to be kept in detention until we have fully considered their deportation."
>
> …
>
> 51. … the final version (of the Process Communication) stated that:
>
> > "The Home Secretary has made clear that foreign national prisoners, who meet the criteria for deportation, should be detained until their deportation has been considered."
>
> 52. This PC was issued to CCD staff in late February 2007. As a result, a senior caseworker in Liverpool raised a question about whether temporary admission could now be authorised following consideration of deportation if the individual was difficult to remove. In other words, the question was whether the PC authorised a more lenient approach to detention than had recently been undertaken within CCD. The answer from OPPU was that this was not the intention but that the PC was intended to put into writing an approach which was already being followed. The reason for including the Ministerial statement was that this was the basis on which FNPs were being detained since "it has been confirmed that ministers want detention to continue until deportation".

42. Paragraphs 56 to 59 of the report deal with a period between April and December 2007 and the drafting and issuing of the Cullen policy:

> 58. … A submission was sent in the Chief Executive's name to the Immigration Minister on 7 June 2007 setting out a basis whereby low risk FNPs could be released with Contact Management and Electronic Monitoring arrangements. A series

> of meetings took place with Ministers and the Home Secretary agreed a strategy which she conveyed to the Prime Minister on 19 September 2007. This provided a framework for the consideration of release of low risk FNPs and was called "Operation Cullen". This provided a list of offences which would be excluded from consideration for the release of FNPs under the policy. This instruction was conveyed to caseworkers (on) 8 November 2007. Operation Cullen was not published, and the published detention policy was not changed. Operation Cullen could not have been published without the policy being changed as it would not have made sense (a *policy* stating there was a presumption of release and then *Cullen* saying we should release some low risk FNPs). Cullen was thus, in essence, guidance for caseworkers.
>
> 59. The Cullen processes did not result in many releases as, apart from the offence based limitations, FNPs had to have a sponsor willing to support them and confirm that in writing. The first Cullen policy resulted in three FNPs being released from detention. No further work continued at this time in developing a detention policy for publication; all energy having been transferred into securing a policy for release which was achieved.

43. During this period, on 13 July 2007, a submission was sent by Lin Homer, the Chief Executive of the Border and Immigration Agency, to the Home Secretary which included the following summary:

> In May 2006, the former Home Secretary promised that no FNP would be released from detention without being considered for deportation. This promise has been maintained. In addition we have interpreted this as meaning that where deportation is being pursued FNPs should normally be detained until they have been deported. Until recently, we were confident that this was a sustainable position.

44. The section of the report dealing with the period between January and September 2008 includes the following:

> 68. The documents served in the proceedings demonstrated that we had received legal advice on several occasions from 2006 to 2008 indicating the need to publish a detention policy reflecting our practice, that caseworkers and managers were agitating and concerned about this, that caseworkers were giving individual consideration to cases, but there was not a clear and shared understanding of the policy which had led to different approaches.

45. The conclusion we draw from this report and the contemporaneous documents is, as we have already indicated, that there was no consistency of approach by caseworkers, at least until the issue of the Cullen criteria. Those criteria excluded from consideration for release from detention all FNPs who had been convicted of the specified serious crimes, as is confirmed in paragraphs 58 and 59 of Mr Wood's report. The list of those crimes was extensive, and we think in practice virtually all FNPs who had been sentenced to imprisonment would have committed one or more of them. The result was that there was an unpublished blanket policy covering those

prisoners, even if for others it was only presumptive, from November 2007 until September 2008. This conclusion is consistent with a submission made by the Home Secretary to the Prime Minister on which the Appellants placed great emphasis:

> Since April 2006 the BIA has been applying a near blanket ban on release regardless of whether removal can be achieved and the level of risk to the public linked to the nature of the FNP's original offence.

The law

Overview

46. The claim is for declarations as to the illegality of the detention, and for damages (including exemplary damages) for false imprisonment.

47. The judge's conclusions in summary were:

    (1) The unpublished, or secret, policy was not a "blanket" policy;

    (2) The secret policy was unlawful, because, although not a "blanket" policy in the sense that it excluded any individual consideration (paragraph 108), -

        a) it was in "presumptive" form, which was not permitted by the statute; and

        b) it was "not sufficiently published or accessible, in the public law sense" (paragraph 110).

    (3) Under the heading "causation" (paragraphs 129ff), the Defendant was entitled as a matter of principle to show that the unlawful decision had not "caused" the detention, the burden of proof being on the Defendant (paragraph 151); in the cases in which he was required to examine the facts the Secretary of State had satisfied that burden;

    (4) Accordingly, the issue of damages did not arise;

    (5) He would not in any event have granted exemplary damages.

48. Before discussing the issues in more detail, it may be helpful to indicate our conclusions in advance, to highlight the points of difference from the judge. Our conclusions in brief will be that:

    (1) It is now clear that the policy as applied at least from the time of Cullen 1 effectively operated on a blanket basis, for reasons that have already been given. The Wood review has led us to differ from the judge's finding that the unpublished policy was one of presumption.

    (2) Although a policy involving a presumption of detention is not in itself necessarily unlawful, a policy which effectively operates on a blanket basis is unlawful.

    (3) In any event, from April 2006 until September 2008, there was in operation a secret policy or practice, which was unlawful because it conflicted with, and was less favourable to the Appellants than, the published policy.

(4) This did not make the detention unlawful unless the unlawful practice or policy was a material cause of the detention. It is necessary, therefore, in every case in which it is relevant to do so, to ascertain whether detention was authorised by reference to the blanket practice or policy or by consideration of a presumption or, indeed, without reference to any administrative practice or presumption.

(5) In the two cases before us on the facts, the materiality was not established.

(6) Accordingly, we agree with the judge that the issue of damages does not arise.

(7) We also agree that, in all the circumstances, an award of exemplary damages would not in any event have been appropriate.

49. It will be seen from this summary that, although we arrive at the same result, we are unable fully to support the judge's approach to the legal significance of the facts that the policy was unpublished and in presumptive form, and we also have reservations about some of his reasoning in respect of the issue of causation. We acknowledge that in both respects he was guided to some extent by judgments of this court. For that reason it will be necessary to discuss those issues in some detail. We will start with some comments on the issue of illegality in the context of false imprisonment, and finish with the issues relating to damages.

Illegality

50. It was not in dispute before the judge that if the detention was shown to be unlawful, then in principle the ingredients of the tort of false imprisonment were made out and, at least, nominal damages would be payable. The judge considered that the issue was principally one of causation (para 131, quoted at para 80 below). Nor, as we understand it, was any distinction made between common law damages and "compensation" for wrongful detention under Article 5.5 of the Convention.

51. We must also accept that, for the purposes of the common law tort of false imprisonment, the decision to detain may be rendered invalid not only by a lack of specific statutory authority for the detention, but also by breach of *Wednesbury* principles. That was clearly stated by Lord Diplock in *Holgate-Mohammed v Duke* [1984] AC 437, 443, and the same approach has been followed in a number of decisions of this court, most recently in *D v Home Office* [2006] 1 WLR 1003; [2005] EWCA Civ 38, paragraph 61.

52. In that case Brooke LJ affirmed the principle, and gave an illustration related to issues of policy:

> If a court judges that in making his decision to detain, an immigration officer failed to take into account matters of material significance (viz. he has overlooked relevant features of internal policy or paid no regard to the fact that the prospective detainee is a child protected by Article 37(b) of the UN Convention on the Rights of the Child), then he will have strayed outside his wide ranging powers. As a result he will have had "no power" to authorise the detention in question. This is what the doctrine of *ultra vires* is all about …. (paragraph 111)

Law, Policy and Presumptions

53. In modern government, Ministerial policy statements are a familiar means of guiding, and explaining, the exercise of government powers and discretions (see e.g. the discussion in *Halsbury's Laws* Vol 8(2) *Constitutional Law and Human Rights* paragraph 7). We would make a number of comments relevant to the discussion of such statements in the present case.

Policy and Practice

54. First, for the purposes of legal analysis, it is desirable to distinguish between different categories of policy or practice. In the context of the present case we would distinguish (a) formal published policies, (b) formal *internal* policies, and (c) informal internal "practices". The most obvious example of (a) is a White Paper, which can be regarded as Government policy in the fullest sense, representing as it does a public statement of the settled view of government (normally following full consultation) on a particular subject. Examples in the present case are the 1998 and 2002 White Papers referred to above. Other less formal published statements include the many circulars or guidance notes issued by Departments on a wide variety of topics, ranging from high level policy to practical guidance. An example in this case is the published Operations Enforcement Manual, which offers a more detailed statement of how the relevant policies are operated in practice.

55. Under (b) we would include internal statements of policy or practice, which have been subject to some form of process leading to what may be regarded as formal Departmental approval, but are not intended for general publication. In the present case, the documents known as Cullen 1 and Cullen 2 seem to fall into this category. We suggest that the term "policy" would normally be reserved for such formalised statements, as distinct from category (c), that is, matters of internal practice, which, however prevalent, have never been subject to any formal process, internal or external. In this case, although Davis J records Mr Tam's concession that from April 2006 there was a new and secret "policy" in operation (paragraph 20), the evidence does not suggest to us that until Cullen 1 in November 2007 there was anything more than an informal practice guided by what was "understood by senior management (to be) the Home Secretary's intention…" (Wood April 2009 report paragraph 30). To avoid further confusion we shall henceforth refer to it as "the secret practice".

56. It is also important, when considering the effect of departure from policy to distinguish between illegality and administrative muddle. As Carnwath LJ said in a recent case:

> … The court's proper sphere is illegality, not maladministration. If the earlier decisions were unlawful, it matters little whether that was the result of bad faith, bad luck, or sheer muddle. It is the unlawfulness, not the cause of it, which justifies the court's intervention, and provides the basis for the remedy. Conversely, if the 2004 decisions were otherwise unimpeachable in law, I find it hard to see why even "flagrant" incompetence at an earlier stage should provide grounds for the court's (as opposed to the ombudsman's) intervention. (*R (S) v SSHD* [2007] EWCA Civ 546 paragraph 41)

Policy and law

57. Secondly, to state the obvious, policy is not the same as law. The Home Secretary is not a legislator, except to the extent (not relevant here) that he has been given specific powers to make delegated legislation. This is as true under the Convention as it is in domestic law. Indeed, it is clear that, where the Convention requires something to be done in a manner "prescribed by law", that means what it says; mere administrative policies are not good enough: see *R (Gillian) v Commissioner of Police of Metropolis* [2006] UKHL 12; [2006] 2 AC 307 at paragraphs 31 to 34 per Lord Bingham.

58. However, although policy is not to be equated with law, it may give rise to obligations or restrictions in public law. Depending on the context, that may be explained in different ways. For example, a failure by the Secretary of State to apply his own published policy without good reason may be reviewable as a breach of legitimate expectation (see e.g. *R (Abbasi) v Foreign Secretary* [2003] UKHRR 76; [2002] EWCA Civ 1598, paragraph 82). A different analysis is needed where the decision is by a different body. Thus, a failure by a local planning authority to have regard to planning policy guidance issued by the Secretary of State is not a breach of any expectation created by the authority, but may be categorised as a failure "to have regard to material considerations", under familiar *Wednesbury* principles. More broadly, such cases may sometimes be analysed as examples of inconsistency or unfairness amounting to abuse of power. Indeed, we may have arrived at the point where it is possible to extract from the cases a substantive legal rule that a public body must adhere to its published policy unless there is some good reason not to do so. The treatment of such concepts may vary in the cases and textbooks, but the differences are usually immaterial. The principles are well summarised in the discussion in *Wade & Forsyth Administrative Law* 10th Ed p 315: "Inconsistency and unfairness, legitimate expectation"; see also *De Smith's Judicial Review* 6th Ed p 618 "To whom directed - personal or general?")

Presumptions and R (Sedrati) v Home Secretary

59. Thirdly, coming more directly to the judge's reasoning, there is no rule of law that a policy cannot lawfully be stated in "presumptive" form, even if it relates to detention. The judge seems to have recognised that his conclusion might come down to a matter of wording; and that a policy presumption in favour of detention might legitimately be restated as an exception to a presumption the other way (paragraph 109). However, he felt constrained by what he understood to be the consequences of a declaration made (by consent) by Moses J in *R (Sedrati) v Home Secretary* [2001] EWHC Admin 410. That stated that "the terms of paragraph 2 of Schedule 3 ... do not create a presumption in favour of detention upon completion of the sentence". Starting from that premise, he asked rhetorically:

> "Given then, on the authority of *Sedrati*, that as a matter of law paragraph 2 of Schedule 3 does not create a presumption in favour of detention, the obvious question that follows is: how can such a presumption be created as a matter of executive decision?" (paragraph 114)

60. *Sedrati* was directly concerned with paragraph 2(1) of Schedule 3. It is not binding on us. We express some surprise that the Home Secretary should have consented to a declaration in that form. We understand that the purpose was to negate the suggestion that he might seek to argue that the wording of paragraph (1) implied a presumption in favour of detention. However, we doubt whether a formal declaration was necessary or appropriate to achieve that objective. The present case demonstrates the potential risks of that course.

61. We start from the position that detention with a view to deportation may be lawful under Article 5 even though there is no risk of absconding or re-offending. In *Chahal* (1996) 23 EHRR 413, the European Court of Human Rights said:

> 112. …. Article 5 para. 1 (f) (art. 5-1-f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5 para. 1 (f) (art. 5-1-f) provides a different level of protection from Article 5 para. 1 (c) (art. 5-1-c). Indeed, all that is required under this provision (art. 5-1-f) is that "action is being taken with a view to deportation". It is therefore immaterial, for the purposes of Article 5 para. 1 (f) (art. 5-1-f), whether the underlying decision to expel can be justified under national or Convention law.

See too *Saadi* [2002] UKHL 41, and subsequently (2008) 47 EHRR 17:

> 72. Similarly, where a person has been detained under Article 5 § 1(f), the Grand Chamber, interpreting the second limb of this sub-paragraph, held that, as long as a person was being detained “with a view to deportation”, that is, as long as “action [was] being taken with a view to deportation”, there was no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing (*Chahal*, cited above, § 112). The Grand Chamber further held in *Chahal* that the principle of proportionality applied to detention under Article 5 § 1(f) only to the extent that the detention should not continue for an unreasonable length of time; thus, it held (§ 113) that “any deprivation of liberty under Article 5 § 1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible ...” (and see also *Gebremedhin [Gaberamadine] v. France*, no. 25389/05, § 74, ECHR 2007-...).

62. It follows that a national law that authorises detention with a view to deportation may be compatible with Article 5 even if it imposes a presumption of detention pending deportation. In this respect, sub-paragraph (f) of Article 5.1 differs from sub-paragraph (e), considered in *H v Mental Health Review Tribunal, North & East London Region* [2001] EWCA Civ 415; [2002] QB 1.

63. There is similarly no rule of our domestic law that precludes the application of a presumption in favour of detention pending deportation, subject, of course, to the limitations in *Hardial Singh*, none of which involves consideration of risk of reoffending or absconding. Such risks are relevant to the reasonableness of the period during which it is lawful to detain a FNP, i.e., to the continuation of detention: *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 at paragraphs 54 and 55. However, the absence of risk does not of itself render detention unlawful.

64. Moreover, even if we assume that a policy that all FNPs should be detained unless they can prove that they are not a risk of absconding or reoffending may infringe Article 5 (because, for example, it would catch those who had been imprisoned for 7 days for being drunk and disorderly on a single occasion), a presumption, the application of which depends on individual facts that sensibly viewed do give rise to

the presumption should not be unlawful. Thus, where a court has both imposed a sentence of imprisonment and recommended deportation, it may be assumed (or presumed) that the crime was sufficiently serious to justify detention pending deportation.

65. For these reasons, there is no reason in principle why paragraph 2.1 of schedule 3 to the 1971 Act, which clearly does require continued detention unless the Secretary of State otherwise orders (i.e. a presumption of detention), should not be construed as a presumption of detention pending deportation. Equally, the Secretary of State may lawfully adopt a policy for the purposes of paragraph 2(2) or (3) that involves a presumption. A presumption that those who have committed serious crimes (e.g., most of those listed in Cullen 1 and 2) should be detained is unobjectionable.

66. For these reasons we would hold that the declaration made in *Sedrati* was wrong in law. Strictly, it was binding only between the parties to that litigation, but it would be wrong to allow other cases to be decided on the mistaken view of the law that the declaration represents. We also have concerns that the declaration may amount to an effective amendment of primary legislation. We shall allow the Secretary of State's cross appeal.

67. It is nonetheless clear law that, if the presumption operates as a "blanket" policy, which precludes consideration of individual cases, it is an unlawful fetter on the exercise of discretion (Wade p 296). Even where serious crime has been committed, a policy must allow for the individual exception. A mercy killing may be murder, but may not justify an extended period of detention pending deportation if there is no risk of absconding or reoffending.

68. We note Mr Husain's powerful appeal to constitutional principles of liberty. However, such broad considerations, important as they are, have little bearing on a case where Parliament has specifically authorised detention for a particular purpose, itself identified as permissible by the Convention, and where the courts have (in *Hardial Singh* and later cases) clearly laid down the principles under which that power is to be exercised. Provided the policy is consistent with that purpose and those principles, it matters not in our view whether it is stated in positive or negative form.

69. Even if the declaration granted in *Sedrati* was correct, it did not support the inference implied by the judge's rhetorical question. Whether or not a statutory power is stated in "presumptive" terms, that question has no necessary bearing on the permissible scope of a policy designed to implement the statutory power. The only question is whether the policy, presumptive or not, is consistent with the statutory authority.

Unpublished policies

70. Fourthly, and again with reference to the judge's reasoning, there is no general rule of law that policy must be published, or, if it is not, that it can be categorised as unlawful for that reason alone. It is not unlawful (whether or not it is good modern practice) for a Department to have an unpublished, internal policy to guide officials as to the exercise of a Ministerial discretion, even one relating to as sensitive a subject as detention. It is noteworthy that in *Halsbury's Laws* publication of policy is referred to as a matter of discretion and convenience, and no more:

> A minister is entitled to adopt from time to time general policies according to which he proposes to exercise his discretion, and there is nothing to preclude him from announcing such policies; it may indeed be of great

> convenience to the public that he should do so. (*op cit* paragraph 7 note 14).

71. The judge held:

> … where detention is involved both publication of the applicable policy and a degree of precision in stating that policy are necessary: the more so where there is a departure from a previously published policy.

As we have made clear already, it is the latter point – the departure from published policy - which is crucial in our view. We respectfully disagree with the first part of that statement. The judge found authority for the wider proposition, in the judgment of the ECHR in *The Sunday Times v UK* [1979] EHRR 245. He also referred to a statement of Sedley LJ as to the "cogent objections" to the operation of undisclosed policies affecting individual entitlements (*R (Begbie) v Secretary of State for Education and Employment* [2000] 1 WLR 1115 at p.1132); and to one of Stanley Burnton J, to the effect that consistency with "the constitutional imperative" that statute law be made known required that "the government should not withhold information about its policy relating to the exercise of a power conferred by Statute" (*R (Salih) v Secretary of State of the Home Department* [2003] EWHC 2273 Admin, paragraph 52).

72. We have no difficulty in accepting Sedley LJ's statement as one of good administrative practice, as we understand it to have been. Stanley Burnton J's statement was made in the quite different context of the Secretary of State's decision to withhold from the individuals concerned an internal policy relating to a statutory scheme designed for their benefit: see paragraph 44.

73. As to the passage in the *Sunday Times* case, that is not, as we read it, about *policy* as such, but is rather directed to the need for accessibility and precision, as requirements of *law* in the strict sense. Thus, it was introduced as an enumeration of "the requirements which flow from the expression 'prescribed by *law*'", and the language is entirely consistent with that introduction:

> 49. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct...

74. In the present context, the requirement for an accessible and precise statement of the relevant law is satisfied by paragraph 2 of the Schedule, taken with the *Hardial Singh* guidelines. This was confirmed by this court in *R (SK) v Secretary of State for the Home Department* [2008] EWCA Civ.1204. The Home Secretary had failed to ensure the carrying out of regular reviews following detention, as required by the Detention Centre Rules. It was held that such a failure did not render the detention itself unlawful. Commenting on the requirement of Article 5(1) that detention must be "in accordance with the law", Laws LJ said

> … The words "in accordance with the law" appear, of course, in Article 8(2). Plainly the language of Article 5(1) – "in accordance with a procedure prescribed by law" – is not the same, but the two provisions impose, I think, kindred requirements: "to ensure that any interference is not random

> and arbitrary but governed by clear pre-existing rules". Here the "rules" are the *Hardial Singh* principles. Their fulfilment in any given case saves a detention from the vice of arbitrariness. A system of regular monitoring is, no doubt, a highly desirable means of seeing that the principles are indeed fulfilled. But it is not itself one of those principles.... (paragraph 33)

75. We note that the decision is subject to appeal, but for the time-being it is binding authority at this level.

76. In fairness to the judge, we acknowledge that his reliance on the *Sunday Times* case gained apparent support from the judgment of this court in *R (Nadarajah) v Home Secretary* [2003] EWCA Civ.1768, paras 64-67 to which he also referred. Although we respectfully agree with the actual decision, and indeed most of the reasoning, of the court in that case, we have some difficulty, with respect, in understanding one aspect of the reasoning. The two cases there under consideration concerned the Home Secretary's policy, as understood from published documents, not to treat removal of an unsuccessful asylum-seeker as "imminent" (thus justifying detention), where proceedings to challenge removal had been initiated. Unpublished policy guidance indicated that in deciding whether removal was imminent, no regard would be paid to statements, even by legal advisers, that proceedings were about to be initiated. The unpublished guidance was at odds with the published policy. As a result, solicitors acting for the asylum-seekers were unaware that a formal letter indicating that proceedings were about to begin would not prevent their client's detention: the solicitors believed, on the basis of the published policy, that their letter before claim would suffice to avoid his detention.

77. The court held that a decision to detain, made in reliance on the unpublished guidance, was unlawful. In a passage headed "Is the policy accessible?" Lord Phillips MR (in a judgment with which his colleagues agreed) quoted the same passage from the *Sunday Times* case, as indicating that "the law" must be "accessible" (para 64-5). He then moved, without further discussion of the principle, but after considering the evidence, to the conclusion that the Secretary of State's "policy" was not accessible (paragraph 67). The explanation for this apparent *non-sequitur* may possibly be found in an earlier passage, in which he stated, after reference to the rule against arbitrary detention in Article 5 of the Convention, and by way of introduction to the four questions said to be raised by the case:

> "Our domestic law comprehends both the provisions of Sch 2 to the Immigration Act 1971 and the Secretary of State's published policy, which *under principles of public law, he is obliged to follow*." (para 54, emphasis added)

The court (quite possibly reflecting the argument as it had been developed before it), thus appears to have accepted as a starting-point, without further analysis, that at least in the context of Article 5 published policy was equivalent to law, and that unpublished policy, at least so far as inconsistent with published policy, was unlawful.

78. Given the lack of discussion of this point, we do not with respect regard ourselves as bound by this judgment to accept that, whether for the purposes of the *Sunday Times* principles or otherwise, policy is to be equated with law. We have no difficulty in accepting the decision so far as it depended on the inconsistency of the published and unpublished policies. In that respect it is readily explicable under principles of legitimate expectation, as already discussed. Thus in *N*'s case (the other case was said to be "even stronger": paragraph 70), the Master of the Rolls accepted that the claimant had arguable claims for judicial review, that there was no reason to doubt the

genuineness of his solicitor's intentions, and that had she been aware of the unpublished policy she would have instituted proceedings before the detention (paras 68-9). He observed:

> Those acting for N could reasonably expect, having regard to those aspects of the Secretary of State's policy that had been made public, that N would not be detained on the ground that his removal was imminent. The only basis upon which the Immigration Service could treat his removal as imminent was by applying that aspect of the Secretary of State's policy which had not been made public, namely that no regard would be paid to an intimation that judicial review proceedings would be instituted. The Secretary of State cannot rely upon this aspect of his policy as rendering lawful that which was, on the face of it, at odds with his policy, as made public. (paragraph 68)

79. That, to our mind, is the language of legitimate expectation, rather than of a specific legal requirement. Thus, as in the present case, the vice was not the lack of publication, but the operation of the unpublished policy in a manner inconsistent with the published policy.

Causation

80. The next question is whether the fact that the decision to detain was made against the background of an unlawful policy was in itself sufficient to provide the foundation for the cause of action for false imprisonment, and an award of at least nominal damages. The judge held that it was not. He summarised the respective arguments:

> 130. The essential submission on the part of the claimants was simple. Each of these claimants was, they say, detained (or as the case may be kept in detention) under an unlawful policy. Therefore they were unlawfully detained. Unlawful detention is to be equated with false imprisonment: and accordingly, and without more, they are entitled to damages for the period of their unlawful detention...
>
> 131. Mr Tam did not seek to advance before me an argument that there may be some categories of unlawful detention case, properly so styled, which do not sound in damages. Rather his submission was that *where the unlawful policy was of no causative effect (because detention would still have been lawfully directed irrespective of the new policy) then the detention is not to be styled as unlawful detention at all.*
>
> 132. So there are two stages to the argument. The first is whether, as a matter of principle, it is open to the defendant to rely on an argument based on causation. The second is (if it is so open to the defendant) whether on the individual facts of each of these five cases the claimant concerned would in any event have been lawfully detained quite apart from the new policy. (paras 130-2, emphasis added)

81. The judge accepted Mr Tam's submission (as emphasised in this passage), and that it was accordingly necessary for him to inquire, by reference to the individual facts –

> … whether the introduction of the unlawful and unpublished policy in fact caused each claimant unjustifiably and unlawfully to be detained. (paragraph 147)

82. As we understand it, he regarded the legal issue as concluded in favour of the Secretary of State by binding authority, in particular the decision of this court in *D v Home Office*, to which reference has already been made. That claim also was for damages for false imprisonment, arising out of detention pending deportation. The judge relied on a passage in the judgment of Brooke LJ:

> 110. (Counsel for the Home Secretary) also submitted that we should bear in mind the consideration that, when the Administrative Court quashes a decision of an immigration officer on the grounds of public law error, there will be nothing to stop him making the same decision, this time by a lawful route. It appears to me that the answer to this objection *lies in the field of causation*....”

83. To illustrate this point Brooke LJ contrasted –

(1) *Nadarajah* (above), where it was held that, if the officers' decisions had not been tainted by failure to disclose the relevant policy, the applicants would have started the legal proceedings which under the secret policy were needed to prevent their detention; and

(2) *Saadi* [2002] 1 WLR 3131, where it was held by the House of Lords that failure to give the right reason for the detention, although procedurally inept, did not affect the legality of the detention.

84. With respect to Brooke LJ, we do not find this part of the judgment easy to follow. It does not appear to sit easily with the following paragraph (quoted at para 52 above), in which Brooke LJ emphasised that, under modern public law principles, once it is found that the immigration officer failed to take into account a matter of material significance, he will have had “no power” to authorise the detention in question. Nor do we think that the two judgments cited by Brooke LJ provide sufficient support or illustration for the point. They appear to say nothing of the causal relationship between the invalidity and the detention. Nor was either concerned directly with the constituents of a cause of action for false imprisonment.

85. Mr Husain submits further that Brooke LJ’s approach to causation is inconsistent with the House of Lords judgment in *Christie v Leachinsky* [1947] AC 573, not apparently cited to him. That well-known case related to an action for false imprisonment, following arrest by an officer. The arrest was stated to be on grounds of “unlawful possession” under a local Act, although the Act gave them no power to arrest without warrant. It was no defence that another statutory power existed which might lawfully have been invoked to justify the arrest. The reason why the other power of arrest could not be relied on was that it was a condition of its lawful exercise that the person arrested was informed of the reason for his arrest: see the speech of Viscount Simon at 587 to 9. In our judgment, the *ratio* of the decision is correctly set out in the headnote:

> It is a condition of lawful arrest that the party arrested should know on what charge or on suspicion of what crime he is arrested: and, therefore, just as a private person arresting on suspicion must acquaint the party with the cause of his arrest, so must a policeman arresting without warrant on suspicion

> state at the time (unless the party is already acquainted with it), on what charge the arrest is being made or at least inform him of the facts which are said to constitute a crime on his part. …

86. *Roberts v Cheshire Chief Constable* [1999] 1 WLR 662 may also appear inconsistent with Brooke LJ's approach, but that needs to seen in the light of its consideration by this Court in *SK*. In *Roberts* the claimant had been arrested on suspicion of conspiracy to burgle, and taken to a police station for questioning, and his detention was duly authorised at 11.25pm. Under the relevant statute, his detention should have been reviewed at 5.25am, but it did not take place until 7.45am, when his continuing detention was confirmed. (He was eventually released at 6.55pm that evening.) Although it was clear that, if the review had been conducted at the correct time he would still have been detained, he had a good claim for unlawful false imprisonment during the intervening 2 hours 20 minutes. This was because the requirement of periodic review was a pre-condition of the continuation of his lawful detention: if there was no review, the authority for his detention expired. Clarke LJ said, at 665:

> In these circumstances the judge held that the respondent was being unlawfully detained as from 5.25am. I agree. Section 34(1) of the Act is mandatory. As already stated, it provides that a person shall not be kept in police detention except in accordance with the relevant provisions of the Act. The respondent was detained at 11.25pm on the 30th July, so that by section 40(1)(b) a review of his detention should have taken place before 5.25am on the 31st July. No such review took place. It follows, as I see it, that from that time the respondent was not being detained in accordance with the relevant provisions of the Act. It further follows from section 34(1) that his detention was thereafter unlawful until some event occurred to make it lawful.

Clarke LJ approved the statement in a supplement to *Clerk & Lindsell on Torts*:

> "In relation to detention under the Act of 1984, the situation is quite different. On the expiry of the prescribed period of detention, any authority to continue the detention of the arrested person ceases to exist and continued detention is unlawful."

We therefore respectfully agree with Laws LJ's explanation of *Roberts* in *SK*:

> 25. Thus in *Roberts* the requirement of periodic review, on the proper construction of the statute, had to be satisfied as a condition precedent to the legality of the suspect's detention. It was made so by the express terms of s.34(1) [of the Police and Criminal Evidence Act 1984]. …

87. Thus, in both *Christie* and *Roberts* there was no lawful authority (in *Roberts*, after the expiration of the prescribed period) for the detention of the detained person. In the present case there is no doubt that the statutory powers relied on by the Secretary of State were apt for the purpose, and the case is not based on the breach of any specific regulation on which the legality of detention was dependent. Rather it is about the manner in which the power was exercised.

88. We consider, first, that it is necessary to distinguish between the detention of FNPs under sub-paragraph (1) of paragraph 2 of Schedule 3 to the 1971 Act and detention

under sub-paragraphs (2) or (3). Sub-paragraph (1) is itself legislative authority for the detention of a FNP who has been sentenced to imprisonment and who has been the subject of a recommendation for deportation. If an unlawful decision is made by the Secretary of State not to direct his release, the Court may quash the decision and require it to be retaken, but the legislative authority for his detention is unaffected. It follows that the FNP will have no claim for damages for false imprisonment in such circumstances. Furthermore, *SK* is authority, binding on us, that a failure in breach of procedural rules to review his detention does not necessarily render the detention unlawful.

89. The position is different when the decision to detain is made under sub-paragraph (2) or (3). In these cases, there is no lawful authority to detain unless a lawful decision is made by the Secretary of State. The mere existence of an internal, unpublished policy or practice at variance with, and more disadvantageous to the FNP than, the published policy will not render a decision to detain unlawful. It must be shown that the unpublished policy was applied to him. Even then, it must be shown that the application of the policy was material to the decision. If the decision to detain him was inevitable, the application of the policy is immaterial, and the decision is not liable to be set aside as unlawful. Once again, however, once a decision to detain has lawfully been made, a review of detention that is unlawful on *Wednesbury* principles will not necessarily lead to his continued detention being unlawful.

90. For completeness, we would add that the test of materiality may not be precisely the same as in the context of an application for a quashing order in judicial review. In that context, a court, faced with a judicial review claim made promptly following the original decision, would be likely to quash a decision, and require it to be retaken, even if the evidence showed only a risk that it might have been affected by the illegality. However, in the context of a common law claim in tort, which is concerned not with prospective risk, but actual consequences, we think it would be entitled, if necessary, to look at the question of causation more broadly, and ask whether the illegality was the effective cause of the detention (see e.g. *Galoo Ltd v Bright Grahame Murray* [1994] 1WLR1360, 1374; and the the discussion of "Causation in Law" in *Clerk & Lindsell Torts* 19th Ed, paras 2-69-71).

Damages

Compensatory or nominal damages?

91. As will be seen from our review of the facts, the issue of damages does not arise in the cases before us. However, we make some comments in the light of the full argument we have heard. There appears to be little authority on the proper approach to the assessment of damages in a case where the actual detention was unlawful, but where a lawful decision might have produced the same result. It is clear that proof of damage is not an essential ingredient of the cause of action for false imprisonment; it is a "tort actionable *per se*". In such cases:

> "… the proper approach is to regard an *injuria* or wrong as entitling the claimant to a judgment for damages in his favour even without loss or damage, but where there is no loss or damage such judgment will be for nominal damages only" (*McGregor on Damages* p.359).

92. This issue was considered in *Roberts* (above) the essential facts of which have already been noted in connection with the issue of causation. The judge had awarded £500 for false imprisonment. An alternative argument for the Defendant was that the claimant was entitled to nominal damages only, as he had suffered no loss, it being established

that he would have been detained in any event. Clarke LJ saw the force of the submission but rejected it:

> "... the reason why the continued detention was unlawful was that no review was carried out. The wrong was not, however, the failure to carry out the review but the continued detention. If the wrong had not been committed the plaintiff would not have been detained between 5.25am and 7.45am. It follows that, as a matter of principle, he is entitled to compensation for having been detained for those 2 hours and 20 minutes." (p 668H)

93. He noted that there was no challenge to the amount of the award, assuming that the case for nominal damages only was rejected. However he added that £500 was "substantially more" than he himself would have awarded to compensate the claimant for false imprisonment –

> ... for a period of 2 hours and 20 minutes during which he was asleep, especially in circumstances in which if a review had been carried out, his detention would have been lawful. (p 669H)

This appears to be authority that the mere fact that a lawful decision would have led to the same consequence is not necessarily a reason for limiting the award to nominal damages. On the other hand, the court accepted this as a material factor in assessing the amount of the award.

94. We admit to some difficulty, with respect, in understanding this reasoning. Either what would have happened if there had been a review was relevant to the assessment of damages or it was not. If it was relevant, then as a matter of logic damages should have been nominal, since for practical purposes the absence of a review made absolutely no difference to the claimant's detention. On the other hand, if this consideration was not a material factor in deciding whether damages should be nominal, then it would seem to follow that it should have been ignored altogether in assessing the quantum of damages.

95. It is also helpful, in our view, given the requirements of the Human Rights Act, to have in mind the relevant law under the Convention. Article 5.5 of the Convention requires that the victim of detention in contravention of that Article must have an enforceable right to compensation. However, Article 5.5 does not require compensation in the absence of damage. In *Wassink v The Netherlands* (application 12535/86), the Court said:

> 38. In the Court's view, paragraph 5 of Article 5 (art. 5-5) is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (art. 5-1, art. 5-2, art. 5-3, art. 5-4). It does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. In the context of Article 5 § 5 (art. 5-5), as for that of Article 25 (art. 25) (see, inter alia, the Huvig judgment of 24 April 1990, Series A no. 176-B, pp. 56-57, § 35), the status of "victim" may exist even where there is no damage, but there can be no question of "compensation" where there is no pecuniary or non-pecuniary damage to compensate. …

96. If we had to decide the matter, we would not necessarily regard ourselves as precluded by *Roberts* from considering, for the purposes of assessing damages, whether an unlawful detention had in practice caused any real loss. If, on the evidence, it was clear that, even assuming a lawful consideration, there was no realistic possibility of a different decision having been reached, and no realistic possibility of earlier release, then we do not see why that should not be reflected in an award of nominal damages only. However, on the view we have taken of the issue of causation, such a set of facts in the present context would mean that there was no liability at all, so that the issue of damages would not arise. It follows that the determination of the appeals depends on the facts of the individual cases. Since consideration of the Appellants' claims for exemplary damages depends on their establishing liability in principle, we shall return to that issue later in this judgment.

ISSUES SPECIFIC TO THE APPELLANTS

97. Because of the lack of consistency and clarity in the practice of the Home Office in relation to FNPs during the period in question in these appeals, it is necessary to consider, in respect of each Appellant, whether his continued detention was determined pursuant to the unpublished policy or not. Secondly, the question arises whether relief should be granted on the basis of any change of circumstances since Davis J's judgment.

WL

98. WL has been detained under paragraph 2(2) and (3) of Schedule 3 since June 2006, a very long time. It is contended on his behalf that, quite apart from the issues as to the Home Secretary's unpublished practice, that was already unjustifiably long when his case was considered by Collins J in his judgment given on 4 July 2008, i.e. it could not be justified by reference to *Hardial Singh* principles; it was far too long when his claim for judicial review came before Davis J; and he has now been detained for the purposes of deportation for an unprecedented and unlawful period.

99. Davis J summarised the facts and his findings in paragraphs 82 to 88 and paragraphs 198 to 204 of his judgment:

> 82. Mr Lumba, a citizen of the Democratic Republic of Congo, entered the United Kingdom unlawfully on 10 April 1994. He claimed asylum. This was eventually refused, but he was given leave to remain until 13 April 2004.
>
> 83. On 26 February 1998 he was convicted of a count of assault occasioning actual bodily harm and received a custodial sentence. He was convicted subsequently, on separate occasions, of counts of disorderly behaviour and threatening behaviour. Then on 24 April 2001 he was convicted of a count of assault occasioning actual bodily harm and was sentenced to 6 months imprisonment. On 29 August 200l (in the interim having been convicted for minor offences of theft) he was sentenced to 4 months imprisonment for assaulting a police officer. On 24 October 2003 he was convicted of a count of inflicting grievous bodily harm with intent, which involved striking a man on the head with a brick. A probation report noted no sign of regret or remorse and "an alarming pattern of reoffending in relation to violent offending". He was sentenced on 12 January 2004 to 4 years imprisonment. He received

several adjudications for bad behaviour while in prison (including for fighting).

84. On 20 January 2004 Mr Lumba lodged an application for indefinite leave to remain. However, by letter dated 3 April 2006 the Secretary of State informed Mr Lumba of the intention to deport him, and formal notice was thereafter given to him and, in due course, his wife. He was due to be released from prison on 23 June 2006 but by letter dated 22 June 2006 he was notified that he was to be detained under immigration powers.

85. He pursued an appeal against deportation. The appeal was dismissed on 15 December 2006, the Immigration Judge noting the "appalling criminal record" and being unpersuaded as to the assertions of illness. In the meantime, it does not appear that regular, or any, detention reviews were introduced before February 2007.

86. Lack of co-operation on the part of Mr Lumba in helping obtain travel documentation was noted. On 14 March 2007 a deportation order was signed. The Democratic Republic of Congo Embassy was pressed by the Home Office for progress. Eventually, directions for removal were set for 20 August 2007. Five days before that, fresh representations were made by Mr Lumba that he would be at risk if returned. Those were rejected. He commenced judicial review proceedings, which were then ordered by consent to be stayed pending the decision in the pending BK case (relating to removal of failed asylum seekers to the Democratic Republic of Congo). In the meantime, detention reviews maintained a decision to detain on the principal ground of very high risk of absconding and also risk of reoffending.

87. The present proceedings were commenced on 18 October 2007. Thereafter various bail applications were refused by Immigration Judges: one, not unreasonably, noting that Mr Lumba had shown a "blatant disregard" for some aspects of English law. In the meantime, the renewal application for permission to apply for judicial review was adjourned, pending the final outcome of the BK case. On 14 May 2008, Collins J refused to grant bail.

88. On 24 June 2008, his application came before Collins J .... In a fully reasoned judgment Collins J reviewed relevant authorities such as *Hardial Singh* and *I* and *A* Collins J expressed himself as "entirely satisfied in the circumstance of this case that there is a real risk of absconding". Collins J concluded that continued detention then remained lawful (the decision of the Court of Appeal in the *BK* case by then being awaited). Collins J then went on to note the "disturbing development" raised during the hearing before him, concerning the changed approach to the detention of FNPs; considered that aspect; but indicated that he remained satisfied that it was proper to maintain detention. But he ruled that the issue of the lawfulness of the past detentions of Mr Lumba would have to

be considered at a further hearing (which, as I have already indicated, is how the matter came before me).

…

198. Mr Lumba was held in immigration detention on 23 June 2006 and has been in detention up to the time of the hearing before me – a period of nearly 2½ years. His appeal rights were exhausted on 27 December 2006. The background of his (very serious) criminality while in the United Kingdom appears from what I have summarised earlier in this judgment.

199. There can be no doubt that Mr Lumba would, if released, pose a serious risk of (serious) reoffending, to the potential serious harm of members of the public, and would pose a high risk of absconding.

200. I think I can take his case quite shortly, notwithstanding the elaborate arguments advanced on his behalf. I can do so primarily because of the judgment of Collins J in this case given on 4 July 2008. Collins J necessarily considered the matter by reference to the old policy, which indeed (together with the Cullen criteria) was the one in effect identified in the initial evidence of the Secretary of State put before him. Collins J applied the principles of *Hardial Singh* and I and A. Collins J noted the various failed bail applications on the part of Mr Lumba, including a previous bail application refused by Collins J himself. He noted that there was pending for consideration by the Court of Appeal the case of returns to the Democratic Republic of Congo in the BK case. Collins J found that the continued detention in the case of Mr Lumba nevertheless as at that time was lawful, concluding that there was a real risk of absconding.

201. In the course of his judgment Collins J, said that the dangers to the public of release and the risk of absconding are always highly relevant considerations. He said this at paragraph 64:

> "64. I have already indicated that I am entirely satisfied in the circumstances of this case that there is a real risk of absconding. That means that to release would be likely to undermine the whole purpose of deportation, which is clearly in the public interest and for the public good, as the Secretary of State has decided; and that decision has been upheld on appeal."

He also said this at paragraph 78:-

> "In all cases it is surely necessary to consider whether the individual is sufficiently high risk, notwithstanding the circumstances which led to his imprisonment."

He went on to say this at paragraph 86 and 87:-

> "86. It seems to me that I have to consider for myself whether detention, applying the correct principles, based on

> *Hardial Singh*, is lawful. Mr Goodman submits that it is not for the court to remedy any defects in the process or any unlawfulness perpetrated by the Secretary of State. That is not what the court is doing. The court has to take account not only of the presumption in favour of liberty but also has to take into account the circumstances, the danger to the public if the man is released, the risk of absconding so that deportation is frustrated and the reasonableness, on the relevant principles, of continuing detention. That does not depend upon any matters raised by, or possible mistakes made by, the Secretary of State.
>
> 87. In *SK* Munby J suggested that it was not appropriate for the court to rely on matters not raised by the individual officer in objecting to bail. In that case the matter that was not relied on was the risk of absconding. I am bound to say that I do not agree with that. It seems to me that the court is not only entitled to, but is bound to take into account all relevant material in deciding for itself whether detention is or is not lawful, both that which is favourable to and that which is unfavourable to a particular individual."

As will be gathered, I agree with that approach of Collins J: which also seems to me to be entirely consistent not only with *A* but also with the subsequent approach of the Court of Appeal in *SK*.

> 202. In my view, if continued detention after July 2008 can be justified applying (among other things) *Hardial Singh* principles, as Collins J has decided, then it seems to me virtually to follow that continued detention before that date is likewise justified by reference to those principles. In any event, having reviewed the evidence for myself, I conclude that it was and that such detention was reasonable and lawful.
>
> 203. I further conclude that there is nothing in the evidence to show that Mr Lumba was initially, or thereafter, detained by application of the new policy. It is clear that his case was regularly reviewed after February 2007, with individuated consideration being given to release: these reviews are fully documented in witness statements of Ms Honeyman made in the proceedings. A high risk of absconding and a high risk of reoffending was, entirely justifiably, assessed. I also consider, in line with the reasons of Collins J, that there was at all stages indeed a prospect of removal within a reasonable period. There was no lack of due expedition. I have no hesitation in concluding that not only could the defendant properly and lawfully detain Mr Lumba, but the defendant properly and lawfully did do.

100. We have seen nothing in the evidence to justify interfering with Davis J's finding in paragraph 203 of his judgment. It is entirely borne out by the contemporaneous documents relating to WL's detention. Moreover, he has made applications to the AIT for bail that have been refused by Immigration Judges unaware of the unpublished practice. It is relevant to cite the reasons given by Immigration Judge Goldfarb when refusing bail on 4 February 2008:

> I am satisfied that the appellant has shown a blatant disregard for the laws of this country, both immigration and general law, with respect to his criminal activities. I do not consider he would abide by any conditions of bail nor do I consider that his nephew with whom he has only an intermittent contact would ... be able to exert any influence over him to ensure he would respond to conditions of bail. I notice the two judicial reviews and the first hearing in April. I take into account that removal is not imminent but consider on balance that as he has shown violence in his past criminal activities he should continue to be detained. I consider there is the possibility of his committing further offences.

101. It follows that the fact that there was an unpublished practice with regard to the detention of FNPs is irrelevant to his claim. Thus the real attack on his behalf is against the judgment of Collins J, who, as has been seen, decided that there was a real risk of absconding. In view of WL's criminal record of violence, the risk of further offending and or serious harm to the public if he were released was obvious. In deciding that despite the duration of his detention he could continue to be detained under the 1971 Act, Collins J took into account both the fact that WL could have returned to the Congo voluntarily, but refused to do so, and that his deportation had been delayed by his several unsuccessful applications for asylum or leave to remain and appeals against their refusal. It is submitted on behalf of WL that the judge erred in doing so.

102. In our judgment, the fact that a FNP is refusing to return voluntarily, or is refusing to cooperate in his return (for example, by refusing to apply for an emergency travel document, as initially did WL) is relevant to the assessment of the legality of his continued detention: see *R (A) v Secretary of State for the Home Department* cited below. So is the fact that the period of his detention has been increased, and his deportation postponed, by his pursuit of appeals and judicial review proceedings seeking to challenge his deportation order or his application for asylum or leave to remain, particularly if his applications and appeals are obviously unmeritorious. In our judgment, as a matter of principle, a FNP cannot complain of the prolongation of his detention if it is caused by his own conduct.

103. This approach is consistent with the judgment of the Divisional Court in *R (Q) v Secretary of State for the Home Department* [2006] EWHC 2690 (Admin). The Court, in deciding whether detention was compatible with the *Hardial Singh* principles, disregarded the delay which took place as a result of the Respondent pursuing a statutory appeal. Auld LJ said:

> 20. In the Court's view, despite the unfortunate legal history of this case since January 2003, the appropriate period for considering the delay for the purpose of these applications is from Q's withdrawal in March 2006 of his appeal against deportation, a period of six or seven months. Until then the Secretary could not know whether or when he would have power to deport him and, with it, a corresponding obligation to engage with the Algerian authorities as to the details they required in his case as to his identity and family connections etc …

104. In *R (I) v Secretary of State for the Home Office* [2002] EWCA Civ 888 Simon Brown LJ said:

> 35. What *Chahal* (1996) 23 EHRR 413 illustrates is that a detained asylum seeker cannot invoke the delay necessarily occasioned by his own asylum claim (and any subsequent appeal(s)) to contend that his removal is clearly "not going to be possible within a reasonable time", so that he must be released. That, however, is by no means to say that where, as here, a detainee, whom for reasons quite other than his asylum claim the Secretary of State is unable to remove, chooses during his detention to claim asylum, that claim, whilst unresolved, precludes his asserting that limitation 2 of the *Hardial Singh* principles is not satisfied. …

Dyson LJ agreed:

> As regards the relevance of the appellant's asylum claim and appeal, I agree that for the reasons given by Simon Brown LJ, this is not material to the reasonableness of the length of detention.

105. In *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 detention of 4 years was lawful because it had been occasioned by the detainee's refusal to accept voluntary repatriation. Toulson LJ said:

> 54. I accept the submission on behalf of the Home Secretary that where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, and likely often to be decisive factors, in determining the reasonableness of a person's detention, provided that deportation is the genuine purpose of the detention. The risk of absconding is important because it threatens to defeat the purpose for which the deportation order was made. The refusal of voluntary repatriation is important not only as evidence of the risk of absconding, but also because there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss of liberty involved in the individual's continued detention is a product of his own making.

Longmore LJ agreed with the judgment of Toulson LJ. Keene LJ broadly agreed, but added comments of his own.

106. It follows that we see no material error in Collins J's approach or in his conclusion.

107. WL also seeks to rely on the judgment of the ECJ in *Saïd Shamilovich Kadzoev v. Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti* Case C-357/09, a case on Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98). The Directive was not relied upon in the grounds of appeal. In any event, however, the United Kingdom has opted out of the Directive. We accept the submission of the Secretary of State that in these circumstances WL cannot rely on the Directive.

108. WL asks us to consider the period that has elapsed since Davis J's judgment and subsequent evidence, including a psychiatric report, and to determine the legality of his current detention. We consider that the Court of Appeal should be very circumspect about taking such a course, especially on the facts of this case. There are current proceedings before the AIT, which ordered reconsideration of its decision refusing to revoke the deportation order. The Court of Appeal should not embark on a first instance decision on matters, such as whether the deportation order should be revoked on account of WL's mental condition, that Parliament has entrusted to a specialist tribunal. Whatever the precise extent of the jurisdiction of the Court of Appeal to rule on the continuing legality of detention at the appeal stage, we do not propose to do so in the present case, first because we have concluded that we ought to dismiss the appeals against the orders of Collins and Davis JJ in relation to WL's individual claims, secondly because of the pending proceedings before the Tribunal. It would be inappropriate for this Court to consider as a first instance decision whether the mental condition of WL renders his continued detention unlawful. Apart from that, having reviewed the history of WL's detention and the reasons given for continuing it, and for the refusals of bail, and his several hitherto unmeritorious appeals and applications, we are satisfied that his detention for the purposes of his deportation continues to be lawful.

KM

109. KM too was detained under paragraph 2(2) and (3) of Schedule 3. Davis J summarised the facts of his case as follows:

> 77. Mr Mighty was born in Jamaica on 18 November 1980. He arrived in the United Kingdom on 4 December 1992, initially being given 6 months leave to enter as a visitor. Various applications thereafter for leave to remain failed; however on 10 February 2003 he was granted indefinite leave to remain as part of the seven year overstayer concession. A subsequent application for naturalisation was refused in 2005.
>
> 78. He has been convicted of 14 offences on 11 occasions. In particular, on 23 May 2003 he was convicted on counts of robbery and possession of a Class A drug with intent to supply and was sentenced to 3½ years imprisonment on 27 June 2003. On release on licence, he committed a driving offence and was recalled to prison. He had received a further custodial sentence for this on 30 May 2005. He was released on 31 March 2006.
>
> 79. On 9 May 2006 he was notified of a decision by the Secretary of State to deport him. On 19 May 2006 he was detained. An appeal against the decision was unsuccessful and all appeal rights were exhausted by 20 November 2006. An application for bail had been refused on 27 September 2006.
>
> 80. A further application for bail was unsuccessful. On 2 November 2006 he attempted with others to escape from detention (apparently while in a prison van). In respect of this he was subsequently convicted of counts of attempting to escape and assault occasioning actual bodily harm on 6 August 2007 and sentenced to 6 months imprisonment.
>
> 81. A deportation order was signed on 15 December 2006. An application for a travel document was submitted to the

> Jamaican High Commission and there was an interview on 27 November 2007. He remained in detention, with regular reviews: the decisions to continue detention included, as reasons, risk of absconding and risk of reoffending, against an assessment that his removal to Jamaica was imminent. An application for bail was refused on 19 February 2008. He commenced the present proceedings on 29 May 2008. He was finally released on bail by an Immigration Judge on 28 July 2008.

110. The judge considered his claim that he had been unlawfully detained in paragraphs 189 to 197:

> 189. Mr Mighty's detention under paragraph 2 of Schedule 3 commenced on 19 May 2006. His appeal rights were exhausted on 20 November 2006. He was released on bail on 28 July 2008: a period of over 2 years and 2 months' from initial detention. Thereafter, I add, it seems that he has now been charged with an offence of possession of a class A drug with intent to supply, committed after his release, and is awaiting potential committal for trial.
>
> 190. The essence of his claim, he having commenced proceedings on 29 May 2008, was that his detention was for a longer than reasonable period; that there had been no prospect of deporting him within a reasonable period of time; that he was unlikely to abscond if released; and generally, on *Hardial Singh* principles, that he should have been released. The amended grounds also of course attack the new policy.
>
> 191. That Mr Mighty could properly have been detained and was properly detained in the first instance, if applying the old policy, seems to me to be plain. He had a very bad record of serious criminality, with a very high risk of reoffending, and there was a high risk of absconding (illustrated further by his attempt to escape while in detention). It is to be noted that bail was refused on these grounds by Immigration Judges on numerous occasions which supports what in my view is also plain, namely that such risks continued.
>
> 192. The question remains as to whether he was detained for a longer than reasonable period or (a linked issue) whether there had been no prospect of deporting him within a reasonable period of time. Mr Macdonald suggested that he should have been released after one year's detention.
>
> 193. The evidence in this case was relatively limited. But it is sufficient to show that Mr Mighty's case was reviewed on an individuated basis. It also shows that contact was maintained by the defendant with the Jamaican authorities with a view to securing removal. Ultimately, after an application on 18 September 2007, an interview was arranged with the Jamaican Embassy on 27 November 2007 to secure the necessary travel documentation. A monthly progress report of the CCD of 18 January 2008 indicated that Mr Mighty would be kept in detention because of a risk of absconding, because "it will

> enable us to affect your removal from the United Kingdom" and because "your release is not considered conducive to the public good". This position was thereafter maintained until eventually he was released on bail on 28 July 2008.
>
> 194. There is no very detailed evidence to show that Mr Mighty, his appeal rights having been exhausted, failed to cooperate. However, by a letter from the defendant dated 12 May 2008, it was recorded that in March and July 2007 Mr Mighty failed to comply with requests for information which might lead to the issue of a travel document and he only completed the necessary forms on 21 August 2007. It is also the case, as I see it, that, inevitably, he would have been remanded or detained, in the aftermath of the attempt to escape and assault occasioning actual bodily harm, in respect of which he was convicted on 6 August 2007 and sentenced to 6 months' imprisonment. Indeed the defendant's letter of 12 May 2008 makes that practical point. I would, all the same, have appreciated rather more evidence than was put before me to show the defendant's attempts to gain the necessary travel documents before the autumn of 2007 and thereafter. It may also be noted that throughout Mr Mighty had been pursuing an application to the European Court of Human Rights. Indeed that was relied on by his solicitors as showing no reasonable prospect of removal within a reasonable period; which, on *Hardial Singh* principles, does not follow.
>
> 195. In my view, on the evidence, the Secretary of State was justified in detaining, and in continuing the detention of Mr Mighty until he was released on 28 July 2008. Given the high risk of (serious) reoffending, the high risk of absconding, set also in the context of the escape incident for which he was convicted on 6 August 2007 and sentenced to 6 months' imprisonment, and the initial lack of cooperation I think the period of detention was reasonable and justified on *Hardial Singh* principles.
>
> 196. There is also nothing in the papers before me to indicate that the overall decision to detain, and keep in detention, was influenced, or "infected" as Mr Macdonald put it, by the new policy: on the contrary, the papers indicate that, generally speaking, the approach applied to Mr Mighty was in fact conducted by an assessment consistent with the old policy. Accordingly, I am satisfied that Mr Mighty would have been and was kept in detention irrespective of the new policy, and that such detention was lawful and justifiable.
>
> 197. I conclude that his claim for damages for unlawful detention fails.

111. The crucial issue, for present purposes, is whether the additional documents disclosed by the Secretary of State show that Davis J's conclusion, in paragraph 196, that the decision to detain, and to continue to detain, KM was not made by the application of the new policy.

112. The documentary evidence begins with an undated letter from the probation officer supervising KM following his release from prison on 31 March 2006. The letter refers to his detention for deportation on 19 May 2006, and therefore may be assumed to have been written shortly afterwards. It gives a positive account of his period in the community. However, on 27 September 2006 he was refused bail by the AIT on the grounds that his record was such that he could not be relied upon to abide by any conditions of bail, and he could not be relied upon not to re-offend.

113. As mentioned above, on 2 November 2006 KM attempted with others to escape from detention. Between 2 November 2006 and 6 August 2007, when his sentence of 6 months imprisonment was imposed following his late pleas of guilty, he was remanded in custody in connection with his trial and not under the Immigration Acts: see the sentencing remarks of HH Judge Pearl at page 5B. A monthly progress report of 24 September 2007 indicates that he was detained because there was reason to believe that he would fail to comply with any conditions attached to his release, to enable his removal from the United Kingdom and because his release was not considered conducive to the public good. It referred to his attempt to escape from custody. There were further progress reports in October and November 2007. The latter proposed that he should remain in detention because a deportation order had been signed against him; the issue of a travel document was imminent and would enable him to be removed; he was being held at HMP Wandsworth as result of his conviction for attempting to escape from custody; and he was being uncooperative with the emergency travel document process. None of those progress reports refers to any policy or practice of the Home Office. However the next detention review, dated 5 December 2007, refers to his detention having been considered "according to the current criteria". KM relies on this and similar references in subsequent reviews as indicating that the unpublished practice had been applied in his case. We note that the progress report provided to KM on the same date does not refer to any criteria. The review of January 2008 is in the same terms as that of December 2007.

114. On 19 February 2008, KM was refused bail by an Immigration Judge. The judge's reasons included the following:

> The Applicant presents as a 27-year old citizen of Jamaica who arrived in the UK in December 1992 as a lawful visitor and has a history of serious criminal offending, unreliability, and non-cooperation, in that:
>
> - he has convictions on 11 occasions for 14 offences and these include a conviction on 23rd of May 2003 at Kingston Crown Court for Robbery and Possession with Intent to Supply for which he received a custodial sentence of 3 ½ years.
>
> - He was most recently convicted on 6 August 2007 of ABH and also [significantly going to the issue of suitability for bail] of Attempting to Escape from Lawful Custody, for which he was sentenced to 6 months' imprisonment;
>
> - during his time in administrative detention he has exhibited disruptive and un-co-operative conduct by being part of a hunger strike, barricading himself in a room and destroying property.

115. A review of 6 March 2008 concluded that detention should be continued. It was anticipated that a travel document for KM would be issued imminently. The reasons given for maintaining detention were evidence of previous absconding and the fact that he had no further right of appeal and his removal to Jamaica was pending. The review concluded:

> This case has been considered under the current criteria, however, [KM] should not be released as his removal is considered to be imminent and his conviction for attempting to escape lawful custody demonstrates non-compliance.

A senior executive officer commented as follows:

> Whilst I agree with the reasoning behind maintaining detention, in that [KM] presents a serious risk of absconding, we need to be clear about the imminence of his removal. It is not imminent, as such, although I have considered that we have applied for and are awaiting an ETD -- we are progressing the case to removal, and there are no other barriers. Taking progress into account and also the very serious nature of his offences I consider that removal will be achievable within a reasonable period and that detention is proportionate to the risk that he may abscond.

The Assistant Director of the CCD gave authority to maintain detention adding the following comment:

> There is a real prospect of obtaining an ETD within a reasonable timescale and the subject is unlikely to comply with reporting restrictions at this late stage in the deportation process.

116. A case worker's review at the end of April 2008 proposed that detention be maintained for the following reasons:

> [KM] should not be released as his removal is considered to be imminent and his conviction for attempting to escape lawful custody demonstrates non-compliance.
>
> This is confirmed by an Immigration Judge at his bail hearing which was refused on 16/11/2007, who quotes "I am not satisfied that the applicant would comply with any conditions of bail. He has a significant criminal history and has behaved violently in the past has made an attempt to escape from custody previously. The only bar to removal is the ETD and I accept that the delay in obtaining that is solely due to the applicant's disruptive behaviour".
>
> Based on the above it is recommended that he be further held in IS detention which will assist in his removal when his ETD is approved
>
> This case has been assessed for its suitability for release under current policy.

The SEO commented:

> It is clear from the history above but this man presents a significant risk of absconding. We are now well advanced with obtaining an ETD and taking particular account of the serious conviction I consider that, on all the known facts that detention is proportionate to the risk of absconding and that removal within a reasonable period remains in prospect.
>
> Please do not rely mainly on quotes from adjudicator/IJ rulings in future reviews. Their findings are of course important (and likely to be persuasive) but we must ensure that we have considered the facts ourselves on behalf of the S of S when considering whether detention under the Immigration Act is the right decision in terms of the law and application of policy.

117. Subsequent reviews do not refer to policy. By way of example, the comment made when authorities maintained detention on 4 July 2008 was as follows:

> I agree that detention remains appropriate for the reasons given above. I note particularly that [KM] is a serious and persistent offender who presents a risk of re-offending and of harm to the public. He has previously escaped from lawful custody. I am satisfied that there is a serious risk he would fail to comply with terms of his release as his history suggests someone who has little regard for the law and would not wish to keep in touch with the authorities. His case has also reached the point where he knows that we have a realistic prospect of removal and he is unlikely to comply with immigration control. Whilst we do not have a document yet, good supporting evidence has been produced in a high-level intervention are [sic] being made with the Jamaican authorities.

118. Having reviewed the late disclosure, we conclude that the unpublished practice of the Home Office made no difference to the decision to detain him. Although current criteria are referred to in some detention reviews, they are not in most of the reviews. We do not consider that the documents disclosed by the Secretary of State lead to the conclusion that the reviews deliberately concealed the application of the unpublished practice. Perhaps more importantly, the reasons given for his detention are cogent in the extreme. Given the number and seriousness of his offences, he would inevitably have been detained on the application of the published policy. That is all the more obviously the case after he had attempted to escape from custody. The decisions on his bail applications, to which we have referred, add support for this conclusion.

119. It follows that even assuming the unpublished practice of the Home Office was applied to him, that made no difference to his detention. His claim that he was unlawfully detained therefore fails.

Exemplary damages

120. For the above reasons we agree with the judge's conclusion that, in the two cases before us, claims for damages fail, and accordingly the question of exemplary damages does not arise. However, it may be helpful for us to make some brief comments. The principles governing the award of exemplary damages in respect of unlawful imprisonment were authoritatively reviewed by this court in *Thompson v Metropolitan Police Commissioner* [1998] QB 498. Having explained the directions which should be given to a jury in relation to compensatory or aggravated damages, the court indicated that such damages might be appropriate exceptionally -

> … where there has been conduct, including oppressive or arbitrary behaviour, by police officers which deserves the exceptional remedy of exemplary damages.

The court set out certain points to be explained to the jury, including the following:

> (c) that an award of exemplary damages is in effect a windfall for the plaintiff and, where damages will be payable out of police funds, the sum awarded may not be available to be expended by the police in a way which would benefit the public….

121. In the present case the judge indicated that he would not have regarded such an award as appropriate:

> 205. I add, briefly, that, even if I had concluded there was unlawful detention in any of these cases justifying an award of damages, I would not in any event have awarded exemplary damages on the footing of unconstitutional, oppressive or arbitrary conduct, in so far as sought. While the Home Office has, to put it mildly, not covered itself in glory in this whole matter of the new policy, I think the failings were in essence one of failing, promptly and directly, to confront and address a perceived legal difficulty: whether through concerns at being bearers of unwelcome news to the Ministers or through an instinct for ducking an apparently intractable problem or through institutional inertia or some other reason, I cannot really say. I am not prepared, however, to conclude on the material before me that there was a conscious decision within the Home Office to operate tacitly an unpublished policy, known to be highly suspect, in the hope it would not be uncovered or, if it was uncovered, against a plan, if the courts intervened, to present that reversal as being due solely to the courts or the Human Rights Act. In my view what happened here, in any of these five cases, cannot fairly, I think, be described as sufficiently outrageous to justify an award of exemplary damages. In any event, I emphasise that individual consideration was given to the cases of each of the claimants.

122. We give weight to that assessment by the judge at the end of his very careful and comprehensive judgment. It also accords with our own view, even taking account of the additional material which has been disclosed. We consider that there was a failure, which to put it very mildly indeed, was very regrettable, on the part of the Department to face up to the basic problem that the published policy had not caught up with the much more restrictive approach implicit in Ministerial statements on the subject. However, we find it difficult to describe such conduct as "unconstitutional, oppressive or arbitrary", in circumstances where the Home Secretary had an undoubted power to detain for the purposes in question, and it has been held that on the facts of the case he could lawfully have exercised that power with the same effect; at any rate, if it can be so described, these circumstances mean that the conduct is at the less serious end of unconstitutional, oppressive or arbitrary. We also bear in mind also that the claimants had the right to apply for bail to an independent tribunal, at which it was possible for the continuing reasonableness of their detention to be challenged. An award of exemplary damages would be an unwarranted windfall for them, and it would have little punitive effect since it will not be borne by those most directly responsible.

Rather it would be a drain on public resources which in itself is unlikely to add significantly to the remedial effect of a declaration of unlawfulness.

123. Moreover, it is difficult to see on what basis exemplary damages could be assessed in lead cases such as these. The conduct of the Home Secretary complained of in the present case was common to a large number of detainees who have brought proceedings against him. The selection of lead claimants such as WL and KM does not depend on the merits of their individual cases, which have not been assessed other than for the purposes of the grant of permission to apply for judicial review or permission to appeal. Other claimants may have equally or even more meritorious claims to damages, and if appropriate exemplary damages, than the present claimants. There would be no principled basis, therefore, to restrict an award of exemplary damages to the present lead claimants. If an award of exemplary damages is made to the present lead claimants, a similar award would have to be made in every case. Exemplary damages are assessed by reference to the conduct of the tortfeasor. The court would, we think, have to assess an appropriate sum as exemplary damages and divide it between all successful claimants. But we do not know how many successful claimants there will ultimately be. These considerations demonstrate that exemplary damages, in a case such as the present, may be ill suited to be a remedy in judicial review proceedings, and would be in the present cases.

Conclusion

124. For the reasons set out above:

(1) The Secretary of State's cross appeal will be allowed, and the first declaration (see para 2 above) will accordingly be set aside.

(2) The Appellants' appeals will be dismissed.