Scottish Court of Session Decisions

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2014] CSIH 91
P139/13

Lady Dorrian

Lord Drummond Young

Lord Philip

OPINION OF THE COURT

delivered by LORD DRUMMOND YOUNG

in the petition of

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Petitioner and Respsondent;

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent and Reclaimer:

Respondent and Reclaimer: Lindsay, QC; Office of the Solicitor to the Advocate General
Petitioner and Respondent: Dewar, QC, Caskie; Drummond Miller LLP (for Bruce Short & Co, Solicitors, Dundee)

6 November 2014

[1] The petitioner was recommended for deportation from United Kingdom in 2005, and was detained by officials acting on behalf of the Home Secretary on 10 December 2006 and kept in detention until 27 August 2009. She now seeks damages for alleged wrongful detention. The proceedings originally took the form of an ordinary action, but following a procedure roll discussion in September 2012 it was determined that they should continue as a petition for judicial review. The petition came before the Lord Ordinary for a first hearing, and on 21 August 2013 the Lord Ordinary held that the petitioner had been unlawfully detained for a period of one year, between the end of August 2008 and 27 August 2009. The Lord Ordinary accordingly awarded for damages of £36,000, inclusive of interest to the date of decree. The Home Secretary has reclaimed against that decision.

The petitioner's circumstances

[2] The petitioner is an ethnic Palestinian, having been born, according to her birth certificate, on 25 November 1954 in the West Bank, which had been annexed by Jordan in 1950 and was in 1954 under Jordanian control. She married in 1978, and her marriage certificate records her nationality as Jordanian. Thereafter she moved to Saudi Arabia with her husband; they are now separated. She was granted visas to enter the United Kingdom as a visitor on three occasions in 2000, 2001 and 2002. In the Home Secretary's record of the issue of these visas it is stated that the petitioner's nationality was Jordanian, and a Jordanian passport number was included in each case. She was issued with these visas on the basis that she was a Jordanian citizen. She entered the United Kingdom on 27 August 2002.

[3] She subsequently became an overstayer. On 21 October 2005 she was arrested at Heathrow Airport, along with her son, on the ground that they were both attempting to use false French passports to travel from the United Kingdom to Canada. She was charged with and in due course convicted of two offences arising out of the attempted use of false passports, namely using a false instrument and attempting to obtain services by deception. On 25 November 2005 she was sentenced to 4 months' imprisonment on each charge, to run concurrently, with a recommendation by the sentencing judge that she should be deported on her release. She was released from prison on 20 December 2005, on completion of the custodial part of the sentence, but she was not detained or deported at that time. On 20 February 2006 the petitioner claimed asylum in the United Kingdom, but she failed to attend for an asylum screening interview and on 12 May 2006 an immigration official wrote to her to intimate that the Home Secretary had decided to deport her to Jordan. On 10 December 2006 she was detained at an address in London and served with notice of a deportation order. On 24 May 2007 her claim for asylum was refused.

[4] The petitioner then appealed to the Asylum and Immigration Tribunal, but the appeal was dismissed on 14 August 2007. She stated in the course of the appeal hearing that

her Jordanian travel document had been lost, but was in any event of no value as it was merely a travel document and not a passport. The Tribunal found that the petitioner's account of her history was not credible in a number of important respects. It further rejected a claim that the petitioner's return to Jordan would constitute a breach of her rights under articles 3 and 8 of the European Convention on Human Rights. It was specifically found that ethnic Palestinians would not encounter difficulties in Jordan of such a nature that they would prevent the appellant's deportation.

[5] On 19 January 2008 the Home Secretary removed the petitioner by air to Jordan. On arrival, she told Jordanian immigration officials that she was Palestinian, and as a result of that she was refused entry to Jordan. She avers that the Jordanian authorities also refused to allow her entry to transit to the West Bank as no arrangements had been made with the Israeli authorities who controlled that area. The petitioner was immediately brought back to the United Kingdom by immigration officials and returned to detention.

[6] Immigration officers remained convinced that the appellant was a Jordanian national, and they sought to confirm her identity and nationality with a view to having her removed successfully. Her continued detention was reviewed monthly by immigration officials, starting in January 2008. At the first review the authority for continued detention contain the following statement:

> "I agree that the continued detention of this subject is proportionate as the subject only claimed that she was not from Jordan upon arrival there, hence her return to the UK. We should do all we can to confirm her identity in order to effect removal".

Immigration officials requested the Jordanian Embassy to provide evidence of the petitioner's nationality. The monthly reviews were optimistic that evidence that she was a Jordanian national would soon be received, which would enable a removal to proceed. Each month decisions were made to detain her on the ground that there was a risk that she would abscond if she were released.

[7] On 2 July 2008 the Jordanian Embassy advised that the petitioner was not a Jordanian national, but had only been issued with a temporary travel document by the Jordanian authorities. The petitioner was described as a "Palestinian National". Following this advice, on 4 July 2008 the responsible official in the Home Secretary's Criminal Casework Directorate ("CCD") assessed the prospect of removal to Palestine within a reasonable time as "highly unlikely", as such removal would require to be on a voluntary basis and the petitioner had refused to return. It was proposed that the petitioner should remain in detention but that she should be considered for release under rigorous contact management. The CCD Director agreed with this proposal.

[8] Nevertheless, the following detention review, in August 2008, made no reference to consideration for release. The official who reviewed her case stated that "we will be following up the option of documenting Ms S for removal to Palestine. This may take some time as she has previously been issued with a third country travel document (the Jordanian

passport)". The reviewing officer stated that there was a "clear and serious risk" that she would not comply in view of her "appalling immigration history". Authority was granted to continue her detention. The detention review in September 2008 noted that the petitioner had been suggested for release under rigorous contract management but that no decision had yet been made. In the review for October 2008 it was noted that further inquiries were being made to the Jordanian Embassy to determine whether Jordan would reconsider her case as her son had been returned on a Jordanian passport. The Director, CCD, indicated that she had concerns regarding delay and requested that she should be advised urgently as to when the proposal to release on contact management had been put to the relevant official. The available documentation does not disclose any reaction to this observation, and there is no reference in subsequent detention reviews to the possibility of release with contact management.

[9] Monthly reviews continued into 2009. Further attempts were made to persuade the Jordanian Embassy to accept that the petitioner had Jordanian nationality. Nevertheless no progress was made to remove the petitioner to Jordan or the West Bank. In each of the reviews a decision was made that the petitioner presented a high risk of absconding and that detention should continue. On 28 May 2009 the petitioner made an application for bail to the Asylum and Immigration Tribunal, but this was refused *in hoc statu* on 2 June 2009. On 16 June 2009 the petitioner's birth certificate was received by immigration officials. It had been sent to her at Dungavel immigration removal centre and was intercepted by officials there. The petitioner stated that she had only now found someone in the West Bank who would obtain a copy of her birth certificate. Nevertheless immigration officials regarded the appearance of the document at this time as sinister because the petitioner had previously stated that she did not know where her birth certificate was and could not obtain a copy in any way. The document was, however, accepted as genuine. The petitioner once again applied for bail, which was granted on 27 August 2009. Since then she has been at liberty and has remained in Scotland.

[10] On 2 October 2012 the Jordanian Ministry of Foreign Affairs advised that the petitioner was a Jordanian national holding a Jordanian national number, which was specified in the letter. Her father and sons were likewise all Jordanian nationals. In April 2013 directions were issued to remove the petitioner to Jordan. These were cancelled, however, as the petitioner claimed asylum on the ground that she had converted to Christianity. That claim was refused by the respondent on 18 March 2014. Appeal procedures have taken place since then, but it is not necessary for present purposes to consider these.

West Bank Palestinians

[11] The petitioner was born in the West Bank in 1954, and information about the nationality and residence status of Palestinians from the West Bank was available to the court and is recorded in the opinion of the Lord Ordinary. In 1954 the West Bank was part

of Jordan, having been annexed in 1950. The petitioner was therefore born as a Jordanian national. Israel occupied the West Bank in 1967, but Jordan continued to recognize West Bank residents as Jordanian citizens and to issue them with full passports valid for five years. This was the position when the petitioner married in 1978 and departed to Saudi Arabia in 1979 or 1980. In 1988 Jordan renounced its claim to the West Bank, and thereafter Palestinians who were resident in the West Bank received Jordanian passports valid for two years and only for travel. The petitioner was not resident in the West Bank at that time, and therefore would not qualify for such a passport. In 1995 King Hussein of Jordan announced that West Bank residents would once again be eligible to receive five-year passports but that these would be for travel only and did not confer citizenship. Citizenship could only be demonstrated by the presentation of a "national number" accorded at birth or upon naturalization to persons entitled to hold Jordanian citizenship.

[12] The UK Border Agency issued a Country Policy Bulletin in 2010 dealing with the position of West Bank Palestinians, which disclosed the following. In June 1967 the government of Israel carried out a census of residents in the West Bank and Gaza Strip. Only those who were present at that time were registered in the Palestinian population registry, and only those were recognized as legal residents and provided with identification cards. From 1967 until 1994 the Israeli authorities issued identity cards conferring on the holder the right to reside in the Occupied Palestinian Territories. In 1994 the Palestinian authorities took over responsibility for issuing identity cards and travel documents. Persons not listed in the registry who wish to join their families and reside permanently in the West Bank can only do so with the approval of the Israeli government. In 2000 the Israeli government stopped processing requests for family unification or issuing visitor permits to non-resident family members. Since then requests have only been granted in exceptional cases, and obtaining a substantive response can take several years. Palestinians with permanent West Bank residency status are liable to lose it if they stay abroad for more than six consecutive years, or for more than three years without extending their exit permit.

[13] The petitioner considers herself to be a stateless Palestinian. This is not accepted by the Home Secretary, who considers the petitioner to be a Jordanian national.

Applicable law: the *Hardial Singh* principles

[14] The Home Secretary has power under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 to detain any person against whom a deportation order is in force pending that person's removal or departure from the United Kingdom. On its face this power is unqualified, but it is accepted by the Home Secretary that it is subject to significant legal limitations. Perhaps the most important of these are what have come to be known as the *Hardial Singh* principles, which are derived from the case of *R* v *Governor of Durham Prison, ex parte Hardial Singh*, [1984] 1 WLR 704. The generally accepted formulation of these principles is that of Dyson LJ in *R (I)* v *Home Secretary*, [2003] INLR 196, at paragraph 46:

> "(i) The Secretary of State must intend to deport the person and can only use the

power to detain for that purpose;
(ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
(iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
(iv) The Secretary of State should act with reasonable diligence and expedition to effect removal".

The foregoing principles have been adopted and applied in subsequent cases, including *R (Lumba)* v *Home Secretary*, [2011] 2 WLR 671, at paragraph 22, and in the Inner House *RN* v *Home Secretary*, [2013] CSIH 11. Thus the lawfulness of detention under the Immigration Acts remains governed by the *Hardial Singh* principles.

[15] The first of those principles depends on the intention of the officials acting on behalf of the Home Secretary. The second and fourth, by contrast, are objective in nature. The third principle follows from the second, and governs cases where it is apparent that the second principle will not be met. Whether it applies depends on emerging facts, as they are known to officials acting for the Home Secretary. Thus the first and third of the principles contain important subjective elements. In the present case it is not in dispute that the first principle is satisfied. The dispute relates to the application of the second and third principles, when it became apparent during 2008, following the petitioner's return from Jordan in January of that year, that the Jordanian authorities asserted that the petitioner was not a Jordanian national but had only been issued by the Jordanian authorities with temporary travel documents.

[16] When the lawfulness of detention by the Home Secretary is challenged under the *Hardial Singh* principles, the proceedings take the form of a petition for judicial review. It is important, however, to note that that is only a matter of form; the substance of the proceedings is not judicial review but a claim for damages on the ground of wrongful imprisonment. Consequently the court is not reviewing the basis on which the decision of the Home Secretary was made on *Wednesbury* grounds; it is making a decision in its own right as to whether wrongful imprisonment has occurred and, if so, the damages that should be awarded by way of compensation. In this connection we agree with the view expressed by Judge Gordon Reid QC in *KM* v *Home Secretary*, [2010] CSOH 8, at paragraph [52], following *R (Nasseri)* v *Home Secretary*, [2010] 1 AC 1, at paragraphs 12-14, and *R (AM)* v *Home Secretary*, [2012] EWCA Civ 521, at paragraphs 24-26.

[17] In determining whether the *Hardial Singh* principles have been satisfied by the immigration authorities, a number of factors have been held to be relevant. First, the conduct of the person who has been detained is relevant to the extent that it displays a lack of co-operation or a risk of either absconding or reoffending in cases where a criminal offence has been committed: *RN* v *Home Secretary*, *supra*, at paragraphs [8]-[9]; *R (Amougou-Mbarga)* v *Home Secretary*, [2012] EWHC 1081 (Admin), at paragraphs 43-45. Thus in a case

where the person detained has been convicted of a significant criminal offence, especially if it involves deception, a longer period of detention may well be justified. Secondly, it is also relevant to take account of the need to obtain the necessary documentation and evidence to deal with the case, and to make arrangements for effective removal: *Amougou-Mbarga*, at paragraph 44. Nevertheless, in a case where the third of the *Hardial Singh* principles applies because deportation within a reasonable time no longer seems possible, the need to obtain documentation becomes of less significance. Thirdly, while there must be a sufficient prospect that the person detained can be removed from the United Kingdom, there is no requirement that a finite time for removal should be identified: *R (MH)* v *Home Secretary*, [2010] EWCA Civ 1112, at paragraphs 64-65. What is relevant to the second and third of the *Hardial Singh* principles is a reasonable time, and that is a flexible concept, dependent upon the particular circumstances.

[18] As we have noted, if the *Hardial Singh* principles are not satisfied, the person detained has a delictual claim for wrongful imprisonment. The nature of such a claim was considered in *Lumba*, *supra*. Lord Dyson, who delivered the leading opinion, stated the following (at paragraphs 62 and 64):

> "The introduction of a causation test in the tort of false imprisonment is contrary to principle both as a matter of the law of trespass to the person and as a matter of administrative law. Neither body of law recognizes any defence of causation so as to render lawful what is in fact an unlawful authority to detain, by reference to how the executive could and *would have* acted if it had acted lawfully, as opposed to how it *did in fact* act. The causation test entails the surprising proposition that the detention of a person pursuant to a decision which is vitiated by a public law error is nevertheless to be regarded as having been lawfully authorized because a decision to detain could have been made which was not so vitiated.…
> Trespassory torts (such as false imprisonment) are actionable per se regardless of whether the victim suffers any harm".

Those statements represent the view of the majority of judges who took part in that decision (Lord Hope at paragraph 176, Lady Hale at paragraphs 209-212, Lord Collins at paragraph 219, and Lord Kerr at paragraphs 238 et seq. In our opinion, although they are framed by reference to the English tort of false imprisonment, they are also applicable to the Scottish delict of wrongful imprisonment. Those two civil wrongs are in essence the same thing: the detention of a person without legal justification. Similar considerations of public policy apply to both wrongs; in particular both are concerned with the maintenance of individual liberty and freedom from wrongful detention. That is fundamental to any system of government based on the rule of law. The critical point, which in our opinion is of importance in the present case, is that executive acts which result in detention must be judged as they are made, according to the knowledge available at that time. Thus the fact that a justification for detention existed but was not known about by the decision-maker is irrelevant; it is the particular decision to detain that must be justified, and if it cannot be justified according to what was known to the decision-maker the delict of wrongful

imprisonment has been committed.

[19] The principal argument presented on behalf of the Home Secretary was that, in view of the fact that the court acted as decision maker rather than merely reviewing the decision to detain on *Wednesbury* grounds, it was permissible to have regard to evidence that post-dated the petitioner's liberation from detention. On that basis, it was said, the letter of 2 October 2012 from the Jordanian Ministry of Foreign Affairs should have been taken into consideration in assessing the lawfulness of the decision to detain. That letter indicated that the petitioner was a Jordanian national and could accordingly have been deported to Jordan at any time. Counsel for the Home Secretary further submitted that it was also possible to take account of the fact that the petitioner had not challenged the removal directions made in April 2013 on the ground that she had no right to reside in Jordan, and had made no reference to any inability to reside in Jordan in her latest claim for asylum.

[20] In our opinion two problems arise in relation to this argument. First, as already indicated, the first and third of the *Hardial Singh* principles clearly relate to the state of mind of the officials who make the decision to detain. The first of the principles requires that those officials must intend to deport the person who is to be detained, and the third depends on the factual situation known to those officials. No doubt that situation must be assessed on objective grounds to determine whether there is a prospect of removal within a reasonable period, but that assessment is dependent on the facts known at the time. Secondly, the foregoing statements taken from the opinion of Lord Dyson in *Lumba* indicate that executive acts that result in a claim for wrongful imprisonment must be judged in the manner in which they are made and according to what was then understood by the decision-maker. Thus, while it is quite correct that it is the court that determines whether detention was wrongful, and in this respect the court does not merely review the decision made by the executive, the assessment of wrongfulness must be judged according to the knowledge available to the executive at the relevant time, both according to the *Hardial Singh* principles and on the principles that apply to the delict of wrongful imprisonment.

Lord Ordinary's decision

[21] At the outset of the operative part of the Lord Ordinary's decision he stated his task as being "to decide whether the petitioner's detention was lawful at the outset and, if so, whether her detention continued to be lawful, taking into account all relevant circumstances". He then rejected an argument for the Home Secretary that in carrying out that task he should apply the benefit of hindsight. He considered it implicit in the *Hardial Singh* principles that the lawfulness of the petitioner's detention must be assessed against the background at the time, including in particular the factual information that was then available to the Home Secretary. On that basis the Lord Ordinary held that he should not attach any weight to the 2012 letter from the Jordanian Embassy. Furthermore, if it had been known in 2008 that the petitioner would require to be detained for a further four or five years before removal could be effected, it could not be argued that her continued detention

was reasonable in all the circumstances.

[22] Based on the foregoing approach, the Lord Ordinary concluded that the detention of the petitioner after the removal attempt in January 2008 did not amount to a breach of the *Hardial Singh* principles. To some extent the decision to detain her was based upon the incorrect factual assertion that her claim to be a West Bank Palestinian was made only on arrival in Jordan for the purpose of frustrating removal from the United Kingdom. Nevertheless, there was uncertainty regarding her status as a Jordanian national at that time. Furthermore, certain aspects of the petitioner's immigration history cast doubt on her credibility: she had attempted to use a false passport to travel to Canada, she had been unable to produce the Jordanian documentation on the basis of which her visa for the United Kingdom had been issued, and her asylum claim had been rejected as not credible. There was accordingly a material risk that she would abscond. Furthermore, at that time it could still be possible to effect removal within a reasonable period.

[23] The Lord Ordinary held that lawfulness of the petitioner's detention did not change during the first half of 2008. Attempts were being made to obtain information from the Jordanian Embassy, but progress was slow. The position changed, however, on 2 July 2008 when the Jordanian Embassy advised that the petitioner was not a Jordanian national, that she had only been issued with a temporary travel document, and that she was a "Palestinian national". The immediate reaction of the Home Secretary's officials was to accept that information and consider possible deportation to Palestine. Nevertheless, it had been acknowledged in the review that took place in July 2008 that deportation to Palestine was highly unlikely as removals were currently on a voluntary basis only and the petitioner had refused to return. The Israeli authorities had adopted a generally hostile position to persons who attempted to return to the West Bank after many years' absence (see paragraph [12] above), and thus even voluntary return to Palestine within a reasonable time could not reasonably have been regarded as realistic. So far as Jordan was concerned, the door appeared to be closed. The detention reviews referred to the possibility of releasing the petitioner subject to rigorous contact management, but this was not taken further.

[24] In these circumstances the Lord Ordinary considered that a fresh assessment of the lawfulness of the petitioner's continued detention was required after 2 July 2008. By that stage he considered that there was no likelihood of her being removed "shortly". The risk that the petitioner would abscond was, he thought, overstated in the monthly detention reviews, especially in view of the fact that following her release from prison she had remained at the same address until detained a year later. Furthermore, the Lord Ordinary did not accept that it had been demonstrated by the Home Secretary that the petitioner was guilty in 2008 of any attempted deception or of any conduct calculated to frustrate removal; she had given the Jordanian authorities an accurate statement of her status. In all the circumstances, a fair-minded assessment, balancing the prospect of successful removal against the risk of absconding, would have led to the conclusion that the Home Secretary would not be able to effect deportation within a reasonable period. On that basis he concluded that the petitioner's detention ceased to be lawful by the end of August 2008. She was released on bail on 27 August 2009, and accordingly she was unlawfully detained for a

period of one year.

Analysis of the facts: application of the *Hardial Singh* principles

[25] The Lord Ordinary found that, after the attempt to remove the petitioner to Jordan in January 2008, continued detention did not constitute a breach of the *Hardial Singh* principles, as uncertainty remained as to whether she might still be accepted as a Jordanian national. Furthermore, aspects of the petitioner's immigration history cast doubt on her credibility. We agree with this assessment; we consider that after the failed removal attempt the Home Secretary was justified in making further inquiries with the Jordanian authorities to clarify the petitioner's nationality. The Lord Ordinary held that that situation continued through the monthly detention reviews during the first half of 2008, while inquiries were pursued with the Jordanian Embassy. Once again, we agree entirely with this assessment.

[26] The Lord Ordinary held that the position changed following the receipt of the letter of 2 July 2008, when the Jordanian Embassy advised that the petitioner was not a Jordanian national and was instead a Palestinian national. At that point, he thought, the prospect of return to Jordan has ceased to be realistic, and return to Palestine was for practical purposes impossible. Furthermore, he drew attention to the suggestion made in the detention review dated 10 July 2008 that advice should be prepared to recommend release on rigorous reporting restrictions. He considered that that was the correct way to proceed. Removal to either Jordan or Palestine had been ruled out in the foreseeable future, and in those circumstances he considered that the third of the *Hardial Singh* principles was not satisfied; deportation within a reasonable period was no longer possible, and consequently detention could no longer be maintained. The obvious interest of the United Kingdom immigration authorities in keeping a check on the petitioner would be met by rigorous reporting restrictions. In this connection, the Lord Ordinary drew attention to the fact that, during the year following her release from prison, she had remained at liberty at the same address, which suggested that she would observe any restrictions.

[27] We agree with the foregoing approach. Removal to Palestine does not appear at any time to have been a realistic possibility, on account of the petitioner's refusal to opt for voluntary removal and the attitude of the Israeli authorities, which was generally hostile to taking West Bank Palestinians. Removal to Jordan had been considered at some length, but following the receipt of the letter from the Jordanian Embassy Jordanian nationality seemed to be excluded. It is true that in their letter of 2 October 2012 the Jordanian Foreign Ministry indicated that the petitioner was a Jordanian national and held a Jordanian national number. It followed from that that the petitioner could be deported to Jordan. Nevertheless, this was contrary to the information obtained from the Jordanian embassy in July 2008. When decisions to detain were made in August 2008 and during the following year, for the reasons that we have already explained (at paragraphs [18]-[20] above), we are of opinion that it was the current state of information that was relevant. On the basis of what was known then, it was in our opinion clear that the third of the *Hardial Singh*

principles could not be satisfied.

[28] Furthermore, as the Lord Ordinary points out, if it had been known in August 2008 that the Jordanian authorities would not acknowledge that the petitioner was a national until October 2012, it would have been obvious that the petitioner could not be deported within a reasonable time, and on that basis continued detention could not be justified. In other words, even if hindsight is used, it operates in two directions: to indicate that the petitioner was a Jordanian national, but also to demonstrate that the Jordanian authorities did not acknowledge that until 2012. For these reasons we consider that the decision of the Lord Ordinary on the application of the third of the *Hardial Singh* principles was correct.

[29] It was submitted on behalf of the Home Secretary that the period of detention was reasonable if regard were had to all relevant circumstances, including the petitioner's refusal to co-operate with voluntary return, her past conduct, the risk that she would abscond and the risk of re-offending. These are all relevant factors: see paragraph [17] above. It is true that the petitioner had committed a crime of dishonesty, in using a false passport in an attempt to go to Canada, and she had certainly shown evasion of the immigration authorities and the system of immigration control. Nevertheless, it is clear that by August 2008 responsible officials had suggested that the petitioner might be released from detention on rigorous reporting conditions. Furthermore, as the Lord Ordinary indicated in his opinion, during the year following her release from prison she had continued to live at the same address. Factors such as past dishonest conduct and lack of co-operation certainly justify a longer period of detention, but even in such a case, unless the conduct is extreme, there comes a time when deportation appears impossible and, in accordance with the third of the *Hardial Singh* principles, the detention must come to an end. In the same way, while time must be allowed to obtain the necessary documentation for deportation, once deportation appears not to be achievable within a reasonable time the period of detention must come to an end.

[30] Counsel for the Home Secretary further placed reliance on the fact that immigration judges had refused bail applications, including an application that was heard on 2 June 2009. On that argument, the Lord Ordinary accepted that in appropriate cases the decision of an independent tribunal during the period of detention will carry considerable weight. In the petitioner's case, however, the refusal of bail was expressly stated to be a decision *in hoc statu* pending receipt of certain documents, and her subsequent application for bail was successful. On this matter we are unable to fault the reasoning of the Lord Ordinary.

[31] It was submitted on behalf of the Home Secretary that there was no indication that deportation of the petitioner within a reasonable period of time would be impossible. In relation to the period down to August 2008, we agree entirely with this argument. After that, however, two obvious hurdles lay in the way of deportation: first, the Jordanian Embassy had intimated in early July that the appellant was not a Jordanian national, and secondly, deportation to the West Bank was for practical purposes impossible, partly because of the petitioner's lack of co-operation and partly because of the general attitude of the Israeli authorities.

[32] Finally, counsel for the Home Secretary submitted that the petitioner's detention was self-induced and self-perpetuating. She had obstructed the removal process by failing to provide details of her true identity and by making use of several different aliases. She had obstructed the removal process in December 2006 by failing to sign an application for an emergency travel document, and on 18 January 2008, when removed to Jordan, she claimed on arrival that she was a Palestinian national. Those actions are described as a deliberate attempt to frustrate her removal. It is quite correct that there had been a marked lack of co-operation on the part of the petitioner. That would undoubtedly justify continued detention for a period, but it is difficult to understand how it could justify detention for a period of years, when the petitioner did not pose any threat to the British public through serious criminal behaviour and had not taken steps to evade the immigration authorities by moving her address. In relation to events when she was deported to Jordan, it is now a matter of agreement that the petitioner was born on the West Bank, and thus could properly claim to be Palestinian, in at least an ethnic sense. The Lord Ordinary finds (at paragraph [5] of his opinion) that on arrival in Jordan the petitioner told Jordanian immigration officials "that she was Palestinian", and that as a consequence of this she was refused entry to Jordan. He does not find that she claimed to be a Palestinian national. While there is a degree of ambiguity in this part of the history, we are unable to hold that she acted dishonestly when deported to Jordan.

[33] In the foregoing circumstances, we are of opinion that the Lord Ordinary was fully justified in concluding that from August 2008 onwards the immigration authorities were in breach of the *Hardial Singh* principles. The petitioner's detention for the following year accordingly amounted to the delict of wrongful imprisonment, for which she is entitled to payment of damages. We now turn to the quantification of those damages.

Damages

[34] The Lord Ordinary began consideration of damages by noting that a finding that a person has been unlawfully detained does not result automatically in an award of compensatory damages; in *Lumba*, *supra*, the UK Supreme Court had held that the claimants were only entitled to nominal damages for false imprisonment, since if the power to detain had been lawfully exercised it was inevitable that they would have been lawfully detained and they therefore suffered no loss. This is in fact not a comprehensive description of what happened in *Lumba*, and we return to what was decided in that somewhat confusing case at paragraph [35] below. The Lord Ordinary records that in the present case the Home Secretary had admitted that the petitioner's detention from 10 December 2006 to 9 September 2008 was unlawful because it was an application of the unpublished policy relating to the detention of foreign national offenders that had been held unlawful in *Lumba*. Nominal damages of £2 had been accepted in settlement of that part of the claim against the Home Secretary.

[35] In relation to the period from August 2008 to August 2009, the Lord Ordinary held that the only basis that had been put forward for detention was that advanced in the answers to the petition; it was not suggested that any other lawful basis for detention existed. Because that period of detention had been held to be in breach of the *Hardial Singh* principles, the petitioner was entitled to compensatory damages. The Lord Ordinary then considered quantification, and concluded that an award of £36,000, inclusive of interest to the date of decree, would afford appropriate compensation.

[36] In *Lumba*, majority of the court adopted two separate approaches to compensation. First, those who had been detained pursuant to the policy that was held illegal in that case were only entitled to nominal damages. On this matter, Lord Dyson, expressing the views of the majority, stated (at paragraph 95):

> "The question here is simply whether, on the hypothesis under consideration, the victims of the false imprisonment have suffered any loss which should be compensated by more than nominal damages. Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused. If the power to detain had been exercised by the application of lawful policies, and on the assumption that the *Hardial Singh* principles had been properly applied [an issue discussed subsequently], it is inevitable that the appellants would have been detained. In short, they suffered no loss or damage as a result of the unlawful exercise of the power to detain. They should receive no more than nominal damages".

That was a case where the Home Secretary had power to detain the persons concerned, but the exercise of that power by her officials was vitiated owing to the existence and application of an unpublished policy which was unlawful as it allowed no exceptions. Had it not been for the policy, the power could have been used lawfully. In all but one of the cases there was no breach of the *Hardial Singh* principles, and it is significant that in the paragraph that we have quoted from Lord Dyson's opinion it is assumed that those principles have been properly applied.

[37] In one case, however, that of the first claimant (Lumba himself), the question had been raised as to whether there had been a breach of the *Hardial Singh* principles. The first claimant had been detained for a period in excess of 54 months while he was pursuing a series of appeals, with the result that he could not be deported during that period, and it was claimed that this amounted to a breach of the *Hardial Singh* principles. In this case the majority of the UK Supreme Court decided that they should not themselves decide the *Hardial Singh* claim, and that instead it was appropriate to remit the case to the High Court to decide whether on the facts the first claimant's detention amounted to a breach of the *Hardial Singh* principles and, if so, what the amount of damages should be: see Lord Dyson at paragraphs 147-148, concurred in at paragraphs 170, 195, 218, 338 and 362.

[38] It thus appears to have been accepted that in any case where there has been a breach of the *Hardial Singh* principles compensatory rather than nominal damages should normally

be awarded. The reasoning behind this would appear to be as follows. Wrongful imprisonment, or in England and Wales false imprisonment, is a delict of strict liability, actionable in consequence of the very fact of imprisonment or detention, and without any requirement to show specific loss beyond the fact of imprisonment or detention. That is hardly surprising; in the constitutional law of the United Kingdom protection against the arbitrary or unjust use of imprisonment by the executive has always been regarded as a fundamental aspect of civil liberty, and it is implicit in this that the mere fact of imprisonment amounts to a loss. This consideration, that wrongful imprisonment is based on strict liability, also explains why contributory negligence is not available as a defence. If a breach of the *Hardial Singh* principles is established, the resulting detention is *ex hypethesi* unlawful and that detention itself amounts to a loss, for which compensatory damages must be awarded. That applies in the present case, and we are accordingly of opinion that the Lord Ordinary was correct to award compensatory damages.

[39] For the Home Secretary, it was submitted that the Lord Ordinary's quantification of damages at £36,000 was excessive. In essence, the petitioner had chosen detention in the United Kingdom over freedom in Jordan, and therefore she was entitled to no more than a nominal award of damages. The evidence that was said to support this conclusion was that in April 2013 removal directions had been issued against the petitioner, and her response demonstrated that she now accepted that she could be returned to Jordan but for her alleged conversion to Christianity. It was not suggested that her nationality had changed since January 2008, when she frustrated her removal to Jordan by claiming to be Palestinian. For broadly the same reasons as those submitted in relation to the substance of the petitioner's claim (see paragraph [19] above), it was said that the evidence that had come to light since August 2008 was relevant, and indicated that the appellant could and should have been returned at that time.

[40] The answer to this argument is in our opinion that the petitioner's detention during the year from August 2008 to August 2009 amounted to wrongful imprisonment, and the very fact of wrongful imprisonment amounts inevitably to a loss, in the manner discussed in paragraph [38] above. Consequently, except perhaps in highly exceptional cases, compensatory damages will normally be payable. In this case, moreover, during the year from August 2008 to August 2009 the information that was available from the Jordanian authorities was that the petitioner was not a Jordanian national; that appeared from the letter of 2 July 2008, and was consistent with the refusal of entry in January 2008 when the petitioner stated that she was Palestinian. In these circumstances it is difficult to understand how the assertion by the petitioner that she was a Jordanian national would have helped; her case had been considered by the Jordanian authorities and rejected. For these reasons we must reject the argument that the petitioner chose detention in the United Kingdom in preference to freedom in Jordan.

[41] There remains the Lord Ordinary's quantification of damages. In some cases the initial shock of detention or imprisonment is regarded as a factor that should be compensated in the award of damages, but as the Lord Ordinary indicates that was not so in the present case, as the unlawful period of detention followed a period which was accepted

as being lawful. The Lord Ordinary made an award of £36,000 inclusive of interest to the date of decree, which was 21 August 2013; the interest element would thus have been approximately 20% of the capital sum, or £6,000. That amounts to a daily rate of approximately £82. In *R (NAB)* v *Home Secretary*, [2011] EWHC 1191 (Admin), a case where it was noted that the claimant had chosen detention in the United Kingdom over freedom in Iran, Irwin J awarded damages at a rate of £75 per day. The Lord Ordinary expressed the view that that case provided useful guidance, but he was not persuaded that the petitioner could be said to have chosen detention in the United Kingdom over freedom elsewhere. That would obviously justify a somewhat higher daily rate.

[42] Although it is not stated in the Lord Ordinary's opinion, it seems to us that the very fact of detention for any significant period must itself call for an award of damages, a matter that is conceptually distinct from the increase in damages to cover initial shock. Wrongful detention, regardless of its length (beyond a minimal period), requires to be recognized by an award of compensation. This would mean that the daily rate for a short period of detention should work out somewhat higher than that for a longer period, because the fact of detention exists in both cases. On this basis, we consider that the Lord Ordinary's award of approximately £82 per day is comparable to the award of £75 per day in *NAB*. We cannot in all the circumstances conclude that the Lord Ordinary was in error in the amount that he awarded.

Conclusion

[43] For the foregoing reasons we will refuse the reclaiming motion.