Neutral Citation Number: [2015] EWHC 1748 (Admin)

Case No: CO/9171/2013

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

Cardiff Civil Justice Centre
2 Park Street,
Cardiff

Date: 26/06/2015

Before :

HIS HONOUR JUDGE BIDDER QC

- -

Between :

PAOLO ANTONIO	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Alex Goodman (instructed by **Duncan Lewis, Solicitors**) for the **Claimant**
Susan Chan (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 26th and 27th May 2015

- -

JUDGMENT

His Honour Judge Bidder QC :

1. On the 28th and 29th October 2014 I heard the Claimant's application for judicial review. On 21st November 2014 I handed down my judgment in which I found that the Claimant's detention from 18th October 2010 to 13th November 2013 was unlawful and that he was falsely imprisoned and imprisoned in breach of article 5 of the ECHR during that period. The parties could not agree on an order following that judgment and there had to be a further short hearing before me on the 12th January 2015 (at the Cardiff Crown Court) in which I made a detailed order giving declaratory relief and quashing the Deportation Order dated the 8th July 2013.

2. The parties had been unable to agree damages and, therefore, in my order of the 12th January 2015, I ordered that a hearing take place to determine what damages and/or compensation should be awarded to the Claimant and also ordered that the Defendant should file and serve no later than 4pm on Monday 9th February written submissions on the questions:

   i) Why, if at all, no more than nominal damages/compensation should be awarded at common law and pursuant to article 5;

   ii) Why, if at all, "reduced" damages/compensation should be awarded at common law and pursuant to article 5 and the quantum of such damages;

   iii) Assuming neither nominal nor reduced damages are awarded, the quantum of "full" damages for the false imprisonment/compensation for breach of article 5.

3. I propose, at the outset of my judgment, to deal with a preliminary issue of whether I should take account of oral argument by the Defendant upon the issue of whether I should order reduced compensation for the fourth period of unlawful imprisonment found by me in my judgment on liability, before dealing with the substantive points between the parties.

4. Although it did not reach me until the very day of the hearing (not the fault of the Defendant), the Defendant filed and served a document headed "Points of Defence to Claim for Compensatory Damages for the Period from 18 October 2010 to 10 July 2013" dated 13 February 2015. I am not sure when that document was filed and served but it was, when dated, 4 days later than I ordered. It contains, as far as I can see, no submissions as to why anything other than full compensatory damages should be awarded by me for the fourth period of false imprisonment (11th July 2013 to 13th November 2013) that I found that the Claimant had been subjected to, nor does it contain any submissions as to the quantum of that claim, save a brief and uninformative reference in paragraph 48.

5. While I must, of course, have regard to the relevant authorities governing the assessment of quantum for false imprisonment in relation to that fourth period, there must be proper regard for judicial orders and some discipline in the "pleading" of parties' cases in the Administrative Court and, in the absence of any application by the Defendant for an amendment of her "Points of Defence" I therefore decline to take account of oral submissions made to me as to why I should reduce compensatory damages for the Claimant for that fourth period as a result of any "contributory" conduct by the Claimant.

6. As reference to my judgment in the liability hearing will show, I heard argument upon and ruled separately on four periods of detention, namely:

   (i) From 21st September 2010 (when the Claimant was due to be released from his sentence of imprisonment) until 18th October 2010 (the date of revocation of the first deportation order);

   (ii) From 18th October 2010 to 5th April 2011(the date of service of a liability to deportation questionnaire (ICD 0350));

   (iii) From 5th April 2011 to 11th July 2013 the date of service of the second deportation order);

   (iv) From 11th July 2013 to release on bail on 13th November 2013.

7. In relation to the first period I found that detention had been lawful but I ruled that the remaining three periods of detention had been unlawful for the reasons given in my judgment.

8. I now turn first to the arguments on why nominal rather than compensatory damages should be awarded.

9. The Defendant argues that in the second period, when I have found that, in fact, the Defendant did not actually detain under section 36 (1) (a) of the UK Borders Act 2007 (" the 2007 Act"), that the Defendant did in fact have the power to detain under that section and that it was inevitable, had the Defendant, through her staff, actually turned her mind to what was her correct power, that she would have detained under section 36 (1) (a).

10. Miss Chan, on behalf of the Defendant, conceded when I asked for an explanation of the revocation of the first deportation order, that that was done by mistake. On the face of the evidence, that mistake was not appreciated and the Defendant purported to continue to detain under the powers granted by the Immigration Act 1971 (" the 1971 Act"). There is no evidence on behalf of the Defendant to explain the "mistake" nor what the motivation was behind the revocation. It appears to have followed the refusal of the Portuguese authorities to accept that the Claimant was a Portuguese citizen.

11. It should be noted at this stage that the factual situation surrounding the revocation of the first deportation order is distinguishable from that in the case of *R. (ota Pryor) – v- SSHD [2013] EWHC 2853 (Admin.)* the reasoning in which I followed and applied in my judgment on liability, it having been accepted by counsel for the Defendant at that hearing that *Pryor* was correctly decided.

12. In *Pryor*, although the Defendant's position in relation to the revocation of the first deportation order made in respect of the Claimant in that case was similar to her position in this case in that it was contended to have been a mistaken revocation, there was in *Pryor's* case actual evidence of the motive for the revocation, namely, that where it was discovered that a deportation order had been made in ignorance of an outstanding application (for example, for leave to remain on Article 8 grounds) the Secretary of State, who would normally determine all such applications before making a deportation order, had a practice of revoking any deportation order made in ignorance of an outstanding application.

13. Thus, in *Pryor*, the Secretary of State's reason for revocation was to ensure fairness to the deportee. Here, the Secretary of State has not attempted to explain or justify the mistaken revocation of the first deportation order.

14. Miss Chan contends that there was no prejudice to the Claimant that the Secretary of State purported to detain him under the 1971 Act rather than section 36 (1) (a) of the 2007 Act. Under both Acts the power to detain was very similar with the same rights to bail and the same conditions under which detention would occur. Indeed, detention under the 2007 Act is mandated under section 36(2) where a deportation order has been made in accordance with section 32 (5) unless it is inappropriate, unlike the position under the 1971 Act where detention under Schedule 3 paragraphs 2 and 3 is discretionary. Thus, she contends, the Claimant was in a rather better position where the Defendant believed detention was under the 1971 Act and was certainly not prejudiced.

15. She further contends that the factual bases for detention under section 36 (1) (a) undoubtedly existed.

16. Section 36 (1) provides that:

"(1) A person who has served a period of imprisonment may be detained under the authority of the Secretary of State-

(a) While the Secretary of State considers whether section 32(5) applies, and

(b) Where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order."

17. Here the Claimant had served a period of imprisonment and even when the first deportation order was revoked, Miss Chan argues that, on the authority of *R. (George) v Home Secretary [2014] 1 WLR 1831*, he remained liable to deportation as a person whose presence in the UK remained not conducive to the public good. Section 36 (1) (a) applies in the period before a decision is made that section 32 (5) applies. Section 32 of the 2007 Act states (so far as is relevant):

> *"(1) In this section "foreign criminal" means a person:*
>
> *(a) who is not a British citizen,*
>
> *(b) who is convicted in the United Kingdom of an offence, and*
>
> *(c) to whom Condition 1 or 2 applies.*
>
> *(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months….*
>
> *(4) For the purpose of section 3 (5) (a) of the Immigration Act 1971 the deportation of a foreign criminal is conducive to the public good.*
>
> *(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).*
>
> *(6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless-*
>
> *(a) he thinks that an exception under section 33 applies*"

18. Section 33 lists the exceptions to the automatic deportation provisions, the most important of which, under section 33 (2) is where removal of the foreign criminal in pursuance of the deportation order would breach his Convention rights or the United Kingdom's obligations under the Refugee Convention.

19. Here, Miss Chan contends, the Claimant was not a British Citizen and condition 1 applied, meaning that there was a presumption that his deportation was conducive to the public good in which case the Defendant was obliged to make a deportation order in the Claimant's case unless an exception to section 32 (5) applied under section 33.

20. The Defendant, through Miss Chan, again argued that, before making a deportation order it was open to her to make investigations to determine the Claimant's nationality as the issue of which country he would be sent to was relevant to the question of whether returning him to that country might breach his human rights. Breach of his human rights by deportation would be an exception to the application of section 32 (5). The period of investigations might be a long one and the witness statement of Bridget Carter relied on by the Defendant sets out (at page 72 of the original hearing bundle, from paragraph 8 onwards) the detailed efforts made by the Defendant to ascertain the Claimant's nationality.

21. As to the third period of detention, the Defendant contended that, on the basis that my determination on the evidence that a decision under section 32 (5) had not been made until the end of the period, making it impossible for the Defendant to have relied on section 36 (1) (b) to have detained, nevertheless, had the Defendant not made that error it would have been inevitable, for similar reasons as those put forward in relation to the second period, that the Claimant would have been detained under section 36 (1) (a). Miss Chan indicated that she was puzzled that it should ever have been argued that periods 2 and 3 were distinguishable (the distinction appearing with the

service of the detention questionnaire). The answer to that was that the distinction was drawn by the Defendant when answering the request for particulars posed by Mr Goodman immediately prior to the liability hearing.

22. On the basis that in both the second and third periods there would have been the power to detain under section 36 (1) (a) had the Defendant thought fit to rely on that power and that, having regard to the danger of further offending and absconsion that the Claimant posed, it would have been inevitable that the Defendant would have exercised that power, Miss Chan argued that this was a clear case for purely nominal damages for the detention in those periods.

23. As authority for that proposition she first cited the decision in *R (ota da Silva) – v- Secretary Of State For The Home Department [2015] EWHC 1157* in which Mr Ockelton, sitting as a deputy High Court Judge found that the Defendant had purported to detain the Claimant under section 36 (1) of the 2007 Act despite the fact that a deportation order had been made against the Claimant. Had that misapprehension not been made, there would have been a clear power to detain under section 36 (2) and while, on *Lumba* principles, as appears to have been conceded by the Defendant, the detention had, therefore, been unlawful, damages were merely nominal (see paragraphs 45 and 46 of the judgment). The judge specifically found that the Claimant had not been prejudiced in any way by the mistake.

24. Miss Chan contended that the Claimant here had, in a way similar to Mr. da Silva, sustained no prejudice, indeed, like da Silva, had not been subject to the regime of section 36 (2) mandated detention.

25. She also relied on the case of *Bostridge – v – Oxleas NHS Foundation Trust [2014] EWCA Civ 79* for her contention that detention under a wrong statutory power when another power existed justifying the detention gave rise only to nominal damages.

26. The Court of Appeal in *Bostridge* considered and applied the judgment of the Supreme Court in *R.(Lumba) v Secretary Of State For The Home Department [2012] 1 AC 245* and Miss Chan relies on a number of passages from that judgment which establishes that nominal damages should be awarded where technical breaches of statutory powers have resulted in unlawful detention where use of the correct powers would have led to correct and lawful detention.

27. On this issue, however, I need only cite a short passage from the decision of Lord Dyson, as he then was, 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 in 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 which I discuss at paras 129-148 below), 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.*"

28. Lord Collins of Mapesbury agreed with Lord Dyson and rejected the argument that "vindicatory" damages rather than nominal damages should be awarded. Lord Kerr of Tonaghmore also agreed with Lord Dyson, as did Lord Phillips of Worth Matravers on the issue of damages (at para. 335) and Lord Brown of

Eaton-under- Heywood (at para. 362). It should be noted that Lord Dyson attached the important caveat to his conclusion that only nominal damages should be awarded in circumstances similar to those of Mr Lumba, namely, that he assumed that the *Hardial Singh* principles had been properly applied.

29. *Bostridge* applies *Lumba* where the detention would have been effected by third parties as opposed to the defendant who held the original power to detain which was exercised unlawfully and, in relation to that issue, takes the position here no further. However, the judgment of Lord Justice Vos, at paragraph 23, does contain helpful guidance for a court seeking to assess damages in a case like this:

> "*As I have said, the principle dictates that the court, in assessing damages for the tort of false imprisonment , will seek to put the claimant in the position he would have been in had the tort not been committed. To do that, the court must ask what would have happened if the tort had not been committed. In each of Lumba and Kambadzi the answer was obvious. Had the torts of false imprisonment not been committed, the Secretary of State would have applied the published policy or undertaken the appropriate custody reviews. In both cases, the claimants would still have been detained. They sustained no compensatable loss. The majority of the Supreme Court determined, in addition, that vindicatory damages were not available in these circumstances*."

30. Lord Justice Vos also considered the case of *Kuchenmeister v Home Office [1958] 1 QB 496*, in which it was held that vindicatory damages were appropriate in a case of false imprisonment even when the claimant could have been lawfully detained and held that that aspect of the case was now inconsistent with *Lumba*.

31. In *Langley –v- Liverpool City Council [2006] 1 WLR 375,* although the constable did have an alternative power of detention, he was not able lawfully to use it where he knew that a court granted power existed.

32. The case of *R(Abdollahi) –v- Secretary Of State For The Home Department [2013] EWCA Civ 366* establishes the test of whether nominal damages should be awarded is not whether the defendant proves that it would have been inevitable that the claimant would have been detained in any event, even had the defendant not falsely imprisoned him, but whether on a balance of probabilities he would have been detained.

33. In both the second and third periods, not only does the defendant contend that there was a power to detain under section 36 (1) (a) while the defendant considered whether section 32 (5) applied, but that on a balance of probabilities, he would have been so detained because of the gravity of the offences of which he had been convicted, the fact that in custody he had shown that he could not be trusted to comply with rules (he was the subject of three adjudications for drug possession) and because he had a strong motive to abscond.

34. In response, Mr. Goodman for the Claimant, questions first whether the defendant did have a power to detain, having revoked the first deportation order and then argues that the defendant has not established on a balance of probabilities that any such power would have been exercised.

35. It was, perhaps, understandable, that Mr Goodman should, as I initially did, have thought from the points of Defence of the Defendant (not prepared by Miss Chan) that the Defendant was initially relying on the powers of detention

under the 1971 Act to justify nominal damages for the second and third periods but, correctly, in my judgment, Miss Chan, abandoned any such reliance.

36. Mr Goodman misrepresented my judgment on liability in relation to period 2 when he submitted that I found that there was no power to detain under section 36 (1) (a) during that period. In contrast to that submission, in fact, what I found, as can be seen from paragraph 84 of my judgment, was that the Defendant had not proved that she had relied on section 36 (1) (a) during the second period. Rather, as seems obvious from the evidence before me, either the Defendant still believed she was detaining under the 1971 Act or had not turned her mind to a determination of what power the Claimant was being detained under. It was for the Defendant to justify the detention on a balance of probabilities and this she failed to do.

37. I found, similarly, in relation to the third period, where the Defendant pleaded that she had relied on section 36 (1) (b) there was no evidence that she had relied on that section (or indeed, on section 36 (1) (a) at all - paragraphs 122 and 123 of the judgment).

38. That is a different finding from a finding that there was no power to detain which could have been exercised during those 2 periods.

39. I agree with Mr Goodman's submission that the refusal of Portugal to accept the Claimant under the first deportation order was not, of itself, a justification for revoking the first order and, as I have already indicated, there is no evidence as to why that first order was revoked. The identification of a country to which the deportee is to be sent is not a requirement of the

deportation order, though I accept the argument of Miss Chan that, in practical terms, both under the 1971 Act and the 2007 Act, assessment of whether there is a human rights obstacle to deportation requires consideration of the country to which it is intended to deport to.

40. However, as the first of the *Hardial Singh* principles make clear, the powers of the Defendant to detain, whether it be under schedules 2 and 3 of the 1971 Act or under the 2007 Act, are dependent upon the Secretary of State intending to deport. As Mr. Goodman correctly stated article 5 of the Convention prohibits deprivation of liberty save in the circumstances prescribed in the article and in accordance with procedure prescribed by law. Article 5 (1) (f) permits the "*lawful arrest or detention…….of a person against whom action is being taken with a view to deportation or extradition*."

41. In *R (Hussein) –v- Secretary Of State For The Home Department [2009] EWHC 2492 (Admin)*, Nicol J. accepted that some slight modification of the first *Hardial Singh* principle was necessary to reflect the power to detain under section 36 (1) (a) of the 2007 Act and at para. 44 of his judgment he said this:

> "*In any case, I would express the implied limitations in this context in this way:*
>
> *(i)* ***The Secretary of State must intend to deport the person unless one of the exceptions in s.33 applies and can only use this power to detain for the purpose of examining whether they do****.*
>
> *The Secretary of State must* ***have*** *this conditional intention because otherwise it would not be possible for him to say that detention was pursuant to action with a view to deportation. It is clear that the s.36(1)(a) power may be used by the Secretary of State while the issue of whether one or more of the exceptions in s.33 is applicable."*

42. Mr Goodman submits that the rephrasing will be correct in most cases but is not in this case because in the case of this Claimant, the Secretary of State did not have the power to make a deportation order. In making that submission, Mr Goodman relies, of course, on my finding in relation to period 4, that the making of the second deportation order was unlawful on the basis that there had, in fact, been no change of relevant circumstances to justify the making of the second deportation order. What had changed was that the Secretary of State had come to the conclusion that the Claimant was, in fact, Jamaican. There still remained no article 8 restrictions on his being deported and, as far as the facts which allowed a deportation order to be made, they remained the same.

43. Miss Chan attempted to persuade me that *Pryor* was distinguishable from this case, as, indeed, it is, although the arguments she advanced were not put before me at the liability hearing. Insofar as she made an attempt to go behind my ruling in relation to the fourth period of detention, it was not open to her to do that. However, the fact that, when made, the second deportation order was unlawfully made, does not, it seems to me, mean that section 36 (1) (a) cannot be relied upon by the Secretary of State as a power to detain which could have been used during the 2nd and 3rd periods. Throughout those periods (and, indeed, to date) the Claimant has maintained that he was and is Portuguese. The refusal of the Portuguese immigration officials to accept the Claimant cast doubt upon the Claimant's account but it does seem to me that it was, nevertheless, necessary for the Defendant to investigate the continuing contention of the Claimant that he was Portuguese, which contention had not been fully investigated, for obvious reasons, prior to his being sent to Portugal

under the first deportation order. Until it was established, to the satisfaction of the Secretary of State, that the Claimant was, or was not, Portuguese, it was purposeless to investigate what his nationality truly was. I do accept the contention that the conditions in the country of origin of a potential deportee might well bear on the issue of whether it might be a breach of his human rights to deport him to that country. That would continue to be a factor which the Secretary of State would have to consider before determining whether section 32 (5) applied.

44. All the evidence points toward the Secretary of State intending, throughout periods 2 and 3, to deport the Claimant unless one of the exceptions in section 33 applied (to use the reformulation of the first *Hardial Singh* principles in *Hussein*) and until the Defendant had completed her investigations into the issue of whether the Claimant was indeed Portuguese it was reasonable for her not to investigate another nationality (unless further evidence came to light). During the period of reasonable investigation into whether the Claimant was Portuguese it was, in my judgment, reasonable for the Claimant to continue to detain because, if it were established that the Claimant was not Portuguese but had another nationality, the Secretary of State would then have to consider the conditions in that second country to determine if one of the exceptions in section 33 applied.

45. In fact, other material had come to the attention of the Secretary of State prior to 11th July 2013 which had caused her to make concurrent investigations as to whether the Claimant's nationality might be Jamaican. Until 11th July 2013

the Secretary of State had not reached a firm conclusion that the Claimant was Jamaican rather than Portuguese.

46. Therefore, when I consider, as Miss Chan invites me to do, whether the power to detain under section 36 (1) (a) existed during periods 2 and 3 and I consider the requirements for the exercise of that power, I conclude that the Secretary of State has established that they did throughout the period in that :

i) the Claimant was a foreign criminal;

ii) condition 1 of section 32 applied to him;

iii) the Claimant was a person who had served a period of imprisonment; and

iv) the Secretary of State was still considering whether section 32 (5) applied.

47. Thus I conclude that the Secretary of State did indeed have a power to detain during the entirety of periods 2 and 3 and, subject to the other Hardial Singh principles, would have, on a balance of probabilities (indeed, to a high degree of probability, in the Claimant's case) exercised it. That conclusion is not, I am clear, despite Mr Goodman's submissions to the contrary, inconsistent with my finding that *when made* the second deportation order was unlawful. Mr Goodman submits that in my judgment on liability the answer to the question "Following the revocation of the first deportation order, could the Defendant lawfully have made the second deportation order" must be answered, no. However, that is only the case when it became clear on the facts known to the Defendant, that the relevant circumstances giving rise to

the first deportation order had not changed. That was only when the decision was taken by the Defendant that the Claimant was not Portuguese but rather Jamaican and when the Defendant determined that there were no section 33 exceptions to a deportation order being made under section 32 (5).

48. I must, however, it seems to me, still consider, during the second and third periods, whether the power to detain under section 36 (1) (a) could lawfully have continued to be exercised consistent with the *Hardial Singh* principles. Mr Goodman submitted that during those periods detention fell foul of the first principle but, for the reasons I have given above, I reject that submission. What, then, of the remaining principles?

49. Principle 2 is that the detainee may only be detained for a period which is reasonable in all the circumstances. I have rightly been reminded that the 4 principles are not, as Lord Justice Carnwath, as he then was, said *in R (Krasniqi) v Secretary Of State For The Home Department [2011] EWCA Civ 1549,* the equivalent of statutory rules, but are applications of two propositions of English law, namely, that compulsory detention must be properly justified and that statutory powers must be used for the purposes for which they are given.

50. I did not understand Miss Chan to doubt that, were I to find that, during the second and third periods, the second, third or fourth *Hardial Singh* principle had been breached, I should award compensatory damages, although it should be clear from my judgment that I was only specifically invited by Mr Goodman to make a specific finding in relation to those principles in relation to the fourth period and I made no such finding in relation to periods 2 and 3.

In *Lumba*, in the passage from Lord Dyson's judgment which I have already quoted, he appears to have assumed that compensatory damages would have been awarded had the *Hardial Singh* principles been breached and his judgment was supported by a majority of their Lordships. In *S. v Secretary Of State For The Home Department [2014] CSIH 91*, a decision of the Extra Division in Scotland, it was accepted that if a breach of the *Hardial Singh* principles were established, the resulting detention was ex hypothesi unlawful and that detention itself amounted to a loss for which compensatory damages must be awarded. I am content to accept that the reasoning in that case was correct.

51. It follows that I should consider whether the Defendant has satisfied me on a balance of probabilities that the period of detention from 18th October 2010 to 11th July 2013 was a period that was reasonable in all the circumstances, that it had not become apparent to the Secretary of State during that period that she would not be able to effect deportation within a reasonable period and that she acted with reasonable diligence and expedition to effect removal.

52. I have set out in detail in my judgment the chronology of the investigations by the Defendant which are extensively detailed in the statement of Bridget Carter. It is unnecessary for me to repeat that chronology in this judgment. I am satisfied that the Defendant was reasonably investigating whether the Claimant was Jamaican up to the time when the Jamaican authorities had interviewed the Claimant and had confirmed their view that he was not Jamaican on the 10th January 2013. It seems to me that a short period of time was necessary to assess that confirmation but as of the 22nd January 2013 a

release referral proposing release was completed by an officer of the Defendant and submitted. Although an interview was conducted with the Claimant on the 18th February 2013 it seems to me that it was improbable in the extreme that it could reasonably have been thought that any additional helpful information would have come from that interview and it did not. A job application obtained by the Defendant (exhibit BC 4) could, again, not, in my judgment, have reasonably have been expected to take matters further as proved, on investigation, to be the case. The investigations related to a Mr. Troy Griffiths who had stood as surety for the Claimant. I fail to see how investigations with him were reasonably likely to add to the knowledge gained by the Jamaican authorities who had already (on two occasions) indicated that the Claimant was not, as far as they were aware, Jamaican.

53. In my judgment, therefore, on the evidence available to me, after 22nd January 2013, it should have become apparent to the Secretary of State that it would not be possible to establish to the satisfaction of the Jamaican authorities that the Claimant was Jamaican and after that date, consistent with the third *Hardial Singh* principle, the Defendant should not have sought to exercise the power of detention, if exercising the power under section 36 (1) (a). Up to and including that date I am satisfied that the Defendant had the power to detain, that she would have exercised that power and that the exercise of that power would have accorded with the *Hardial Singh* principles.

54. I therefore conclude that compensatory damages should be awarded to the Claimant from and including the 23rd January 2013 to and including 12th November 2013, his last day of detention before his release on the 13th

November 2013. That is a period of 293 days, which includes the 4th period of detention.

55. As to the remainder of the second and third periods in which I do find that the Claimant would have been lawfully detained in any event, following Lumba, I simply award nominal damages of £1.

56. Mr. Goodman has submitted, relying on the decision of the ECHR in *Abdi –v- United Kingdom [2013] ECHR 299* that for that detention, which I have found to be unlawful and in breach of Article 5, I should award more than nominal damages for just satisfaction pursuant to article 41 of the Convention. Unlike the case of Abdi, in which there remained a possibility that Mr. Abdi's detention could have been held to be arbitrary as well as, by concession by the UK Government, not in accordance with the law, in this case, the only reason I have found the detention in periods 2 and 3 unlawful is because it was not in accordance with a procedure prescribed by law. I note that the Supreme Court in Lumba were considering a breach of article 5. I therefore consider that, in the circumstances which I have found to exist, the finding of a breach of article 5 in itself constitutes just satisfaction and I decline to order more than the nominal damages .

57. As I have already indicated, I do not consider it is now open to the Defendant to argue that compensatory damages should be reduced to reflect contributory conduct by the Claimant.

58. I therefore turn to the quantification of the unlawful imprisonment of 293 days.

59. This is a case in which I should not compensate for the initial shock of detention as the period I am considering came at the end of a period in which the Claimant would have been lawfully detained but for the Defendant's failure to follow lawful procedure. I start from the judgment of the Court of Appeal in *Thompson and Hsu –v- Commissioner of Police of the Metropolis [1997] 2 All ER 72*. Damages should be proportionate with those payable in personal injury cases (which means that I should award damages at a rate 10% higher than would have been awarded prior to 1st April 2013 – *Simmons – v- Castle [2012] EWCA Civ 1039*). Circumstances vary from case to case and the figures given for the assistance of a judge directing a jury in relation to a bracket within which they should be invited to place their award should not be applied mechanistically to future cases.

60. In *R (B) –v- Secretary Of State For The Home Department [2008] EWHC 3189* the judge awarded £32,000 as basic compensation for a period of detention of about 6 months, which period followed a period of lawful custody. That award would now, adjusted for the Simmons' uplift and inflation, be worth £42,227. It is to be noted that the learned judge in *B* was referred to earlier awards for shorter periods. He considered that a prorated approach should not, on the authorities cited to him, be mechanically applied (that follows from *Thompson* itself) and he considered that significant tapering of amounts in respect of longer periods of custody is necessary, in particular to ensure proportionality with other awards.

61. I should also have in mind the impact of the custody on the Claimant. He sets out his reaction to custody in paragraph 16 of his witness statement in the

original trial bundle at page 48. He has found detention draining psychologically, worries about the future and has sleepless nights. He has contemplated self harm.

62. The current Judicial College Guidelines on Damages give a suggested bracket for severe post traumatic stress disorder of between £48,400 and £81,400.

63. In *Miller v The Independent Assessor [2009] EWCA Civ 609* the Court of Appeal determined that an award of compensatory damages of £55,000 (inflated, now worth £73,685) for loss of liberty for 4 years and 1 month following a miscarriage of justice was "irrationally low". In *Muuse –v- Secretary of State [2009] EWHC 1886* an award of £25,000 (now worth, inflated, £32,912) was given for 126 days unlawful detention in an immigration detention centre. That period followed a period of lawful custody.

64. I should also cite (amongst a number of other cases put before me for my consideration) the decision of Irwin J. in *R (NAB) v Secretary Of State For The Home Department [2011] EWHC 1191 (Admin).* In that case, the learned judge was compensating a claimant who he found was guilty of persistent non cooperation with the Secretary of State in order to frustrate his removal. As Irwin J. said: "*the Claimant chose detention in the United Kingdom over freedom in Iran*". I have indicated in this case that the Defendant was ordered to plead why "reduced" damages should be awarded and failed to do so. I therefore award damages for the period of unlawful detention without reduction reflecting any lack of cooperation or positive non cooperation by the Claimant. If the Defendant had complied with my order and made positive

averments, I would have, in all probability, have had to hear oral evidence, including from the Claimant, to determine whether he was deliberately frustrating the efforts to deport.

65. In *NAB*, Irwin J. was assessing an additional 82 days of detention which, in his judgment, did not produce any identifiable incremental impact on the Claimant's mental health. He assessed damages at a level which he explicitly said was very much lower than in most of the reported authorities, at £75 per day, a total award of £6,150.

66. I agree with Mr Goodman that the case of *B* is, perhaps, the most helpful of the most recent authorities. There must, in my judgment be some element of tapering of the award towards the end of the period of detention but there must always be an irreducible minimum for even an extra single day's detention.

67. In the result, taking into account all the circumstances, I consider the appropriate award of damages for the 293 days of unlawful detention to be £50,000.