Neutral Citation Number: [2017] EWCA Civ 48

Case Nos: C4/2015/2682 and C4/2015/3466

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT AT CARDIFF
His Honour Judge Bidder QC
[2014] EWHC 3894 (Admin)
[2015] EWHC 1748 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2017

Before :

LADY JUSTICE GLOSTER
LORD JUSTICE IRWIN

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
R (ON THE APPLICATION OF PAULO ANTONIO)	**Respondent**

- -
- -

Julie Anderson (instructed by **Government Legal Department**) for the **Appellant**
Alex Goodman (instructed by **Duncan Lewis LLP**) for the **Respondent**

Hearing date: 14 December 2016

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Approved Judgment

Lord Justice Irwin :

Introduction

1. This appeal consists of a challenge to two successive judgments of HHJ Bidder QC, sitting as a Deputy High Court Judge. In his judgment of 21 November 2014, HHJ Bidder QC quashed a Detention Order made on 9 July 2013 and ruled that the Respondent's detention was unlawful between 18 October 2010 and 13 November 2013, periods when the Appellant was seeking to deport him as a foreign criminal. The case was begun in the Administrative Court, since at that point the Respondent remained in custody and was seeking his release. Following the first judgment, the issue of quantum was transferred to the Queen's Bench. In his subsequent judgment of 26 June 2015, the judge awarded nominal damages in respect of the period up to 22 January 2013, but awarded £50,000 in damages in respect of the remaining 293 days of unlawful detention. The Secretary of State for the Home Department appeals both judgments. She argues the learned judge was in error in quashing the deportation order and in finding that there had been any unlawful imprisonment and, in the alternative, that the damages for the later period were excessive.

2. The principal case turns on the relevant statutes, applying from time to time, which are said to found or affect the Appellant's power to detain; and in some aspects of the case, whether the power was exercised lawfully in accordance with the principles laid down in *R (Hardial Singh) v SSHD* [1984] 1 WLR 704, as approved in subsequent authority.

3. There is an argument between the parties as to the proper ambit of the appeal, which I address below.

The Facts

4. As will be clear, a key point in this case is the extent to which the Respondent has been uncooperative and less than frank about his origins and history, and thus his nationality.

5. The written evidence demonstrates the following matters, summarised here and expanded below. The Respondent has given two dates of birth: 27 May 1975 and 1977. On his account, he was born in Portugal, the son of a Portuguese diplomat. He says his mother had Jamaican nationality. Both are dead. On a biodata form completed on 10 September 2010, he gave his father's name as Juan Carlos Antonio. When interviewed on 2 December 2011 he gave the name as Jorge Silva Antonio. In the letter before action of 6 December 2011 he said his father was Carlos Hugo Antonio. In a subsequent letter of 8 April 2013, the name was said to be George Carlos Hugo Silva Antonio. In interview, he gave his mother's name as Stella Yvette Wilson. On the biodata form she was recorded as Wilhelmina Wilson.

6. He claims to have arrived in the United Kingdom in February 1992 and official records appear to confirm that he was present by October 1993. The Respondent's account has been that after being born in Portugal, he was educated in the USA. Neither in the relevant period of detention, nor during his previous imprisonment, has he had a Portuguese passport or travel documents. He claims his Portuguese passport was disposed of by police officers following his arrest in 2005. In an application for a

job in 2002 he stated he had been educated in Jamaica between 1988 and 1992. He has suggested he has living relatives in the USA.

7. He has acquired criminal convictions. The most serious (and most recent) consist of convictions for robbery, attempted robbery and two offences of possession of an imitation firearm, for which he received nine years' imprisonment in total in the Shrewsbury Crown Court on 21 July 2005.

8. The Respondent has never claimed that he has British nationality. It is therefore not in issue but that he is a "foreign criminal" for immigration purposes, within the definition in Section 32 of the United Kingdom Borders Act 2007 ["the 2007 Act"].

9. In 2008, apparently in simple reliance on the information provided by the Respondent, he was made subject to a decision to make a deportation order. That decision was made on 11 September 2008. A deportation order was made on 21 October 2008, under section 5(1) of the Immigration Act 1971 ["the 1971 Act"], on the basis that the Respondent's presence in the UK was not conducive to the public good. He was to be deported to Portugal.

10. That first decision and order were made under the European Economic Area ["EEA"] Regulations, since if the Respondent was Portuguese, he was an EEA national. Although the Respondent fulfilled the definition of foreign criminal under the 2007 Act, if he was an EEA national he would fall into a relevant exception from the automatic deportation provision under that Act.

11. Although the Respondent initially sought to appeal the decision to deport, he withdrew his appeal on 6 October 2008. The order was served on him on 24 October 2008.

12. On 20 September 2010, he was served with a Notice of Deportation, deportation being set for 28 September. The custodial part of his prison sentence expiring on the following day, the Respondent was thereafter detained by the Appellant. The Appellant specified that the detention was pursuant to the power under Schedule 3, paragraph 2(3) to the 1971 Act.

13. The Respondent was flown to Lisbon on 28 September 2010, but was turned away by the Portuguese authorities on the basis there was no evidence he was Portuguese. He was not accepted by them as a Portuguese national. He returned to England on a flight the same day. He continued to be detained apparently on the same legal basis until 18 October 2010.

14. In addressing the facts, the learned judge divided the time under consideration into four periods, the first period of detention running from 21 September until 18 October 2010.

15. On that day, the Appellant revoked the Deportation Order, but continued to detain the Respondent. It is convenient to describe the period from 18 October 2010 to 5 April 2011 as the Second Period of detention. According to the findings of the Judge, there was throughout this period no explicit basis of detention set down or referred to in any record or correspondence. The Secretary of State simply never spelled out the legal basis for detention.

16. Throughout this period the Respondent continued to maintain that he was Portuguese (2014 judgment paragraph 3; appeal bundle D39/40). There was a review of detention on 7 January 2011, noted by the judge (2014 judgment, paragraph 80). The Respondent sought release on bail, but was refused by an immigration judge on 10 February 2011 (bundle E305). The Respondent was interviewed further about his home history on 23 February 2011. He repeated that he was born in Portugal and said he had moved to the USA when he was three. The Appellant notes this sequence is inconsistent with the detail he placed in the job application of 2002. He gave a degree of detail about his schooling in the USA, naming school friends, teachers and qualifications. He reiterated that his father was a Portuguese diplomat who had died in 1991 and he said that his mother had died in Nebraska in 1996. The Appellant notes that in a questionnaire of 2008 he stated his mother was alive. At another interview, he stated that his mother's house was destroyed by Hurricane Katrina. The hurricane affected the Southern States of America, not Nebraska, and took place in 2005, nine years after the claimed date of death. He provided a mobile telephone number for his brother and stated that the brother may have supporting material to establish the history. Subsequent enquiries have failed to find the brother.

17. On 3 March 2011, a further detention decision was taken in the following terms:

> "I have considered Mr Antonio's case in accordance with chapter 55 of the latest Enforcement Instructions Guidance and with the presumption to release. However, he has received a nine year criminal conviction for firearms related offence. The length of the sentence demonstrates the seriousness of the crime and that he poses a risk of harm to the public. Mr Antonio has not been accepted as a Portuguese national by the Portuguese authorities and his use of deception indicates no reliance can be placed on his adherence to restrictions if released. Whilst investigations remain ongoing to identify Mr Antonio's true identity and nationality removal remains a realistic prospect. However, the process could be greatly speeded up with Mr Antonio's cooperation. In the light of the evidence I agree the risk of harm to the public and absconding outweighs the presumption to release. Detention authorised for 28 days."

18. The Appellant's case before the Judge was that, despite the absence of any contemporaneous documentation referring to the 2007 legislation, detention during the Second Period was maintained pursuant to the Secretary of State's powers under Section 36(1)(a) of the 2007 Act.

19. The next review of the Respondent's detention was on 5 April 2011. On that day the Appellant wrote to the Respondent, giving him notice that he might be liable to deportation (paragraph 31). As the matter was presented to the Judge by the Appellant, 5 April 2011 is the end of the period on which the Appellant sought to rely on the powers derived from Section 36(1)(a) of the 2007 Act. It should be noted that no reference to the 2007 Act or to "automatic" deportation appears in this letter or any earlier document.

20. In paragraph 32 of his 2014 judgment, the learned Judge quoted the comments made in that review of 5 April 2011, by an Assistant Director of the Home Office, as follows:

> "At present, Mr. A's case is in limbo as we have yet to establish his true nationality. A previous DO obtained on the back of an EEA decision has been revoked on the basis that he was rejected by the Portuguese authorities and a new decision cannot be served until we have established who he is and where he is from. Enquiries are ongoing in respect of this but we need to make greater progress."

21. The Judge went on to note (2014 judgment, paragraph 33) that a copy of a letter of 5 April was served on the Respondent on the following day, along with a questionnaire. These documents, as the Judge found, indicated that the Appellant was "considering" the Claimant's immigration status and his liability to deportation. The Respondent was told that he should submit in writing any reasons why he should not be deported. In the absence of such information, the Appellant "will decide the question of deportation on the basis of information known to us".

22. The Respondent relies on the terms of this letter as indicating that no decision on deportation had been made at that stage. The questionnaire was never completed.

23. A little over eight months later, a senior case worker at the Criminal Case Directorate recorded in an email of 19 December 2011 a conversation in the following terms, set out in paragraph 35 of the 2014 judgment:

> "Having just spoken to …… she has been very helpful with some advice on the best way forward. Deportation action can be pursued under the 2007 Act.
>
> Firstly the subject is currently detained and was served with an 0350 under the 1971 Act in April 2011. This situation needs to be remedied immediately by the service of an 0350AD under the 2007 Act. We can then legitimately detain him under section 36 of the 2007 Act while we consider whether or not Automatic Deportation applied to him. It may also give us some information on the subject's nationality."

This appears to be the first occasion on which any representative of the Appellant considered the 2007 legislation.

24. The Respondent has argued that the email of 19 December indicates clearly that during the Second Period, from 18 October 2010 to 5 April 2011, the Appellant was not detaining under Section 36(1)(a) of the 2007 Act, but believed the detention still to be authorised under paragraph 2(3) of Schedule 3 to the 1971 Act, despite the revocation of the earlier deportation order on 18 October 2010. The Respondent went on to argue that the email makes it clear, as late as 19 December 2011, that the Secretary of State was not of the view that the provisions of automatic deportation under the 2007 Act necessarily applied to the Respondent. This was accepted by the Judge (2014 judgment, paragraph 37, see D59/E305).

25. On 20 December 2011, the Appellant served on the Respondent a further "Liability to Deportation Notice", indicating that he would be subject to automatic deportation in accordance with Section 32(5) of the 2007 Act, unless he fell within one of the exceptions set out in Section 33 of that Act. The Notice indicated that if the Respondent sought to rely on any exception, he had in-country appeal rights, pursuant to Section 82(1) and 92(4)(a) of the Nationality Immigration and Asylum Act 2002. As I have noted, the Respondent had raised no issue of Convention Rights in relation to the first Deportation Order.

26. The learned Judge dealt with this Notice in the following terms:

> "It is clear from the terms of this notice that any appeal is in prospect, that is, following any decision by the Secretary of State that section 32(5) applies. In order to form that decision the Secretary of State would have to consider whether any of the section 33 exceptions applied, hence the request in the letter for the Claimant to raise any such exception." [2014 judgment, paragraph 38]

It seems clear therefore that the judge considered there could have been no settled decision to deport until the question of exceptions had been disposed of.

27. The Appellant continued investigations as to whether the Respondent had Jamaican nationality. On 10 January 2012, the Home Office received confirmation the Appellant had no convictions in the USA, and there was no trace of family in the USA. On 20 January 2012, the Jamaican High Commission wrote to the Respondent's solicitors indicating that they could not verify the Respondent's nationality from the information provided.

28. Matters continued through 2012. According to the witness statement of Bridget Carter, of the Home Office Criminal Casework Team 12, which was before the judge, the Respondent failed to comply with a number of requests to obtain information, from the Department of Work and Pensions, HMRC, the Portuguese Consulate, and in obtaining a birth certificate. He asked for release, before seeking the information. While that was being considered, he was then found in possession of cannabis and to have been disruptive in detention. On 19 July 2012, the Appellant wrote to the Respondent indicating that his release referral had been refused by senior management of the UK Borders Agency on the grounds that he had been deceitful about his nationality, could speed the process if he were to be honest and compliant, had been convicted of a very serious offence, presented a high risk of absconding and could be moved within a reasonable timetable if he complied with the emergency travel document process (2014 judgment, paragraph 42). According to the statement of Ms Carter, little of significance happened as summer 2012 turned to winter.

29. On 17 December, an interview was arranged with the Jamaican High Commission. The interview took place on 10 January 2013. The Jamaican authorities did not accept that the Respondent was Jamaican (2014 judgment, paragraph 44). On 14 January, the Respondent sent a Pre-Action Protocol Letter to the Appellant restating his version of his family background and requesting a decision on his case within 14 days. It is in response to this letter that the Appellant wrote in relation to the interview of 10 January:

> "The Jamaican authorities confirmed your client is not Jamaican."

30. There were further meetings in February and March 2013. It was at the latter meeting the Home Office first considered the Respondent's job application of 2002, which mentioned a period of education in Jamaica.

31. There was a further interview with the Respondent on 16 April 2013. He gave no fresh information. In May 2013, it appears enquiries were made by the Jamaican Immigration Authorities, on the Appellant's behalf, about a Jamaican resident who was a former husband of a lady the Respondent had advanced as a surety in a previous bail application. It is not clear whether anything was actually done as a result of this.

32. A further detention review was conducted on 19 June 2013. In the course of this review (pages E301/305) the Appellant's officials identified the legal basis for detention as being "Section 36(1)(a)/(1)(b)" of the 2007 Act. There was said to be no bar to removal arising from any Convention right. The learned Judge relied on the terms of this review as a "useful summary" of the Appellant's position (2014 judgment, paragraphs 45 and 46). The history is recited reasonably fully, the key elements of the story, by now familiar, being the Respondent's assertion that he is Portuguese and had spent time in the USA, Portugal had declined to admit him on the basis that the was not Portuguese; enquiries in the USA had not resolved matters, and that:

> "The Home Office are now aware of extensive investigations with various countries and governmental departments of the United Kingdom, Mr Antonio is not a Portuguese nationality (sic), however, he has claimed that his mother …. is of Jamaican nationality and that he travelled with her on her Jamaican passport, and therefore the possibility that Mr Antonio is a Jamaican national is far greater than of his being of any other nationality."

The Respondent had been disruptive in detention, had very serious convictions, and represented a high risk of harm and of absconding. For those reasons, on-going detention was authorised.

33. On 9 July 2013, the Appellant took a fresh decision to deport which was served on the Respondent on 11 July 2013. The Notice of Deportation was dated 8 July but was served alongside the decision itself. The decision was now explicitly based on Section 36(1)(b) of the 2007 Act. Service of this decision represents the end of the Third and beginning of the Fourth Period identified by the Judge (2014 judgment, paragraphs 23, 50 and 124).

34. In late July 2013, the Home Office Country Specialist Team requested further information about the individual in Jamaica whom it was suggested might be questioned. Ms Carter's witness statement makes it clear this was somewhat speculative:

> "The Home Office wanted the Jamaican authorities to question Mr Griffiths in Jamaica to obtain any information he has (sic) on any connection with the Claimant."

35. Ms Carter states that the Jamaican passport office was "investigating", but on 12 September a further case review was informed that the Jamaican authorities "can make no connection to Jamaica on the information provided by Mr Antonio". The Jamaican High Commission confirmed to a casework meeting on 17 October 2013, that:

> "None of the information provided yielded any connection to anyone with Jamaican identity."

36. The Respondent was detained pursuant to the decision to deport of 11 July until 13 November 2013, when he was released following an application for bail to an immigration judge. The latter date represents the end of the Fourth Period.

The Judge's Conclusions: 2014

37. I will not attempt to rehearse all of the detailed conclusions of the judge which are fully set out in the judgment. In my view the critical points are as follows. He found that detention between 28 September 2010 and 11 July 2013 was unlawful, in essence because the Appellant had revoked the first deportation order and was not considering the 2007 Act. Reliance on the duty under that Act was "an ex post facto justification", not a defence (2014 judgment, paragraphs 29, 36, 37, 84). Critically, he found that the deportation order of 11 July 2013 was unlawful, on the ground that, following the revocation of an earlier deportation order, "there must be some change of circumstances … to enable a fresh deportation order to be made" (2014 judgment, paragraphs 126 to 132, 136). He further found the detention had been rendered unlawful in the period between 22 January and 13 November 2013 by reason of a breach of the *Hardial Singh* principles (2014 judgment, paragraphs 132 and 134).

38. The judge rejected an argument from the Secretary of State that the Respondent should be precluded from succeeding since his conduct, in refusing to assist the authorities, in deceiving them and thereby frustrating his removal, was sufficient to engage the principle of *ex turpi causa non oritur actio*.

39. In considering the conduct of the Respondent, and indeed the actions of the Appellant's officials, the Judge noted more than once that he had heard no oral evidence, and thus no cross-examination, of the Respondent or of the Home Office representatives (2014 judgment, paragraphs 103 to 110). Insofar as fraud might be relevant to damages, that could have been cured by the time of the later damages hearing. However, as matters fell out, no such evidence could be brought to bear on liability.

40. In addressing the problematic conflicting accounts from the Respondent, the judge first considered whether there was sufficient in this to establish wrongdoing so as to support a defence based on *ex turpi causa*. He noted that there had never been any prosecution for the offences under Section 26 of the 1971 Act, of failing to produce information or making false statements [2014 judgment, paragraph 105/106]. The judge concluded there was no basis for the application of *ex turpi causa*. In my view,

he was right. His conclusion on this has not been appealed. I need not expand on the point beyond observing that it is clear even active deception by a detainee cannot prevent an application for release from detention, or access to the court in order to establish the legality of detention. To conclude otherwise would be to undermine the rule of law. Such conduct may of course be relevant to the level of damages to be awarded for wrongful detention.

41. However, the judge moved rather briefly from that decision to conclude that the Appellant had failed to "establish any defence … to the Claimant's claim that he was falsely detained" (2014 judgment, paragraphs 112 *et seq*). I return to this below.

The Judge's Conclusions: 2015

42. In his second judgment, the Judge concluded that nominal damages only should be awarded for the false imprisonment he had found between 18 October 2010 and 22 January 2013. This was because during that period, although the Appellant:

> "…still believed she was detaining under the 1971 Act, or had not turned her mind to a determination of that [ie which] power the Claimant was being detained under." (2015 judgment, paragraph 36)

she would have been able lawfully to justify detention during that period, pursuant to Section 36(1)(a) of the 2007 Act, and the Respondent would undoubtedly have been detained in fact. Thus, following the approach in *R (Lumba) v SSHD* [2012] 1 AC 245 and *R (Abdellahi) v SSHD* [2013] EWCA Civ 366, the judge awarded damages of £1 [2015 judgment, paragraphs 8 to 47, and 55].

43. The judge went on to dismiss an argument that, where it was appropriate to award compensatory damages, they fell to be reduced by reference to the Respondent's "contributory conduct". He did so essentially on procedural or case-management grounds. The Appellant had served, a little later than directed, a document containing "Points of Defence to Claim for Compensatory Damages". No mention was made therein of the Respondent's conduct as a basis for reduction of the measure of damage. Counsel for the Appellant sought to raise the point in oral argument, but the Respondent objected to the late introduction of the issue, and the judge declined to take that argument into account [2015 judgment, paragraphs 3 to 5, and 57]. He indicated that were such an argument to have been open, he would probably have had to hear oral evidence [2015 judgment, paragraph 64].

44. He proceeded to assess compensatory damages. After a review of authority, he fixed on the £50,000 awarded [2015 judgment, paragraphs 58 to 67].

Ambit of this Appeal

45. The Secretary of State lodged identical grounds in relation to each judgment. There are three grounds advanced, expressed as follows:

> "(1) Error of law in finding that the second Deportation Order was invalid (paragraphs 126-131 of the first judgment and 11-12 and 39 of the second judgment).

> (2) Application of the *Hardial Singh* principle in circumstances where there are reasonable grounds to consider that an individual may be failing to cooperate with or obstructing deportation (paragraphs 51-54 of the second judgment).
>
> (3) Error of law in approach to the assessment of the quantum of compensatory damage (paragraphs 58-67 of the second judgment)."

46. The first point to address is that Mr Goodman for the Respondent argues that all of those grounds address quantum of damage and not liability. He points to the paragraphs referred to in the Grounds and suggests (for the most part correctly) that the specific paragraphs identified address quantum. He asks the rhetorical question in regard to Ground 1, 'how could the lawfulness or otherwise of a deportation order made on 9 July 2013 affect liability where false imprisonment was found to commence in the previous January?' He states that in reliance on that understanding, and on the "guarantee" of significant compensatory damages, his client chose not to cross-appeal, thereby avoiding a costs risk.

47. I would reject those arguments. As will already be clear, the Judge made it explicit that the lawfulness of the second deportation order of 11 July 2013 was part of his finding on liability. For myself, I cannot see how there can have been any doubt that the first Ground addressed liability. As to the Second Ground, it is true that the paragraphs identified in the Ground proper are in the quantum judgment. However, the application of the third *Hardial Singh* principle affects whether detention was lawful, not the measure of damage if it is unlawful. The matter is made completely clear by the text which follows the formal statement of the Ground, challenging the finding of a "breach" of the principle, (and thus unlawful detention) from January 2013. As to reliance on the "understanding" that these Grounds addressed only quantum, that is a matter for those representing the Respondent. The choice whether or not to seek to cross-appeal was always there to be made.

48. By contrast, the Appellant sought to argue before us that "the whole trial had gone wrong" and the proper outcome of the appeal was, in effect, to open up every issue, which should be remitted for trial in the Queen's Bench. Ms Anderson formally accepted that, following the decision of the Supreme Court in *R (O) v SSHD* [2016] UKSC 19, it is disproportionate for judicial resources to be engaged in considering historic damages claims where nominal damages have been awarded. However, in a contradictory and in truth incoherent fashion, the Appellant's skeleton argument contends that "no part of the … Order should be preserved". Moreover, the Appellant seeks to make a general attack on the judge's approach as unfair and "in breach of natural justice". Little or no justification is offered for this suggestion beyond the assertion that:

> "The Deputy Judge adopted an unfair procedure by recognising the pleading in the Defence that raised the Respondent's failure to mitigate his loss and the contribution his conduct made to the prolonging of detention at paragraph 110 of the first decision (albeit as a reason to reject the Secretary of State's argument then being considered). However, the Deputy Judge went on to

> exclude any consideration of these matters in his second judgment on a basis that they were not pleaded."

49. In my view this suggestion is ill-founded and inappropriate. As will already be clear, the Appellant failed to comply with a direction. Neither in this particular nor elsewhere in either judgment, it appears to me, is there any proper basis for the suggestion of a breach of natural justice. Such a suggestion should not be made, particularly by experienced counsel, and by counsel who did not appear below, without a sound foundation. There is none here.

50. The proper ambit of the appeal is a consideration of the grounds advanced, affecting liability and quantum, but confined to the period in respect of which compensatory damages were awarded. The Appellant is correct in submitting that, if the appeal succeeds on Grounds 1 or 2, then Ground 3 will fall away.

The Legislation

51. The general powers in relation to deportation in the public interest are set down in the Immigration Act 1971 ("the 1971 Act"). By Section 3(5) of that Act:

> "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…."

52. The procedure is laid down in Section 5 of the 1971 Act:

> "**5.-Procedure for, and further provisions as to, deportation.**
>
> (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.
>
> (2) A deportation order against a person may at any time be revoked by a further order of the Secretary of State…"

53. Powers of detention are laid down in Schedule 3 paragraph 2 of the 1971 Act:

> "(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, 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)."

It will be seen that a power to detain under this legislation arises where notice of a decision to deport has been given, as well as attendant on a deportation order.

54. A right of appeal arises from a decision to deport, and not from a deportation order. The relevant right of appeal is laid down in Section 82 of the Nationality, Immigration and Asylum Act 2002 ["the 2002 Act"]. The relevant provisions read:

> "**82. Right of appeal: general**
>
> (1) Where an immigration decision is made in respect of a person he may appeal [to the Tribunal].
>
> (2) In this Part "immigration decision" means—
>
> …
>
> (j) a decision to make a deportation order under section 5(1) of that Act, and
>
> (k) refusal to revoke a deportation order under section 5(2) of that Act.
>
> (3A) Subsection (2)(j) does not apply to a decision to make a deportation order which states that it is made in accordance with section 32(5) of the UK Borders Act 2007; but –
>
> (a) a decision that section 32(5) applies is an immigration decision for the purposes of this Part, and
>
> (b) a reference in this Part to an appeal against an automatic deportation order is a reference to an appeal against a decision of the Secretary of State that section 32(5) applies.]"

55. The UK Borders Act 2007 ["the 2007 Act"] introduced automatic deportation. This legislation was commenced on 1 August 2008. Section 32 laid a duty to deport on the Secretary of State:

> **"32 Automatic deportation**
>
> (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 (c. 77), 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,
>
> (b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or
>
> (c) section 34(4) applies."

56. Section 33 of the 2007 Act deals with the exceptions to the duty to make, and the duty not to revoke, a deportation order in respect of a foreign criminal. Exception 1 (Section 33(2)) arises where deportation would breach the rights of the foreign criminal under the ECHR on the Refugee Convention. Exception 3 arises where the removal would breach the rights of the foreign criminal under the Community Treaties, in effect the free movement of people, as modified by Regulations.

57. Section 34 of the 2007 Act deals with procedure and timing. The relevant provisions read:

> **"34. Timing**
>
> (1) Section 32(5) requires a deportation order to be made at a time chosen by the Secretary of State.
>
> (2) A deportation order may not be made under section 32(5) while an appeal or further appeal against the conviction or sentence by reference to which the order is to be made—
>
> (a) has been instituted and neither withdrawn nor determined, or
>
> (b) could be brought.
>
> …

> (4) The Secretary of State may withdraw a decision that section 32(5) applies, or revoke a deportation order made in accordance with section 32(5), for the purpose of—
>
> …
>
> > (b) subsequently taking a new decision that section 32(5) applies and making a deportation order in accordance with section 32(5).”

58. It follows that the Secretary of State has discretion (Section 34(1)) to choose the timing for making a deportation order. In that context, one must keep in mind that notice must be given of the decision to make such an order, that being the trigger for appeal and the threshold for powers of detention under the 1971 Act, rather than the deportation order itself. There is no obligation as to time between the decision and the making of an order. It is also to be borne in mind that the Secretary of State faces statutory limits on her power to withdraw a decision that Section 32(5), applies or to revoke an “automatic” deportation order.

59. Section 36 of the 2007 Act sets out the relevant powers of detention arising under that Act:

> “**36 Detention**
>
> (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.
>
> (2) Where a deportation order is made in accordance with section 32(5) the Secretary of State shall exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 (c. 77) (detention pending removal) unless in the circumstances the Secretary of State thinks it inappropriate.”

Ground 1: Was the Second Detention Order Unlawful?

60. The decision of the judge on this issue was expressed as following that of Jeremy Baker J in *Pryor v SSHD* [2013] EWHC 2853 (Admin). In that case, the successful submission was made by Mr Goodman, counsel for this Respondent. Ms Pryor was a foreign criminal. She was notified by the Secretary of State in 2008 of a decision to deport her, made apparently under the 2002 Act. She appealed. Late in the life of the appeal, a question arose whether the decision had been made pursuant to the 2007 Act. Evidence was admitted and this was shown to be an error: the decision was taken pursuant to the 1971 Act.

61. Ms Pryor pursued an appeal and an application for reconsideration claiming that fresh consideration had arisen affecting her Convention rights. Those were rejected, the Defendant concluding that her circumstances had not changed. On 1 March 2012, the SSHD made a deportation order. Then on 14 March it was revoked. A further application for fresh consideration had been made. It seems that had led to the revocation, and there was evidence before the judge that:

> "… it is the policy of the defendant to determine all outstanding applications which could act as a "barrier to removal" prior to making a deportation order. Further that if it is discovered that a deportation has been made in ignorance of such an application, and which has therefore not been determined, then it is the practice of the defendant to revoke the deportation order in order to determine the outstanding application. Thereafter, if the outstanding application was determined against the applicant, the defendant proceeds to make a further deportation order." (paragraph 15)

62. Mr Goodman's submission on behalf of Ms Pryor was that:

> "… either upon the making of a deportation order, or its revocation, the previous decision to make such an order ceases to have effect such that if the deportation order is revoked for any reason the defendant is precluded from making another deportation order without first making another decision to make such an order, thus giving rise to a right of appeal. Applying this argument to the present case, as the defendant did not make another decision to make a deportation order following her revocation of the first deportation order, she had no power to make a second deportation order, which is therefore of no effect." (paragraph 21)

63. The Secretary of State resisted this argument before Jeremy Baker J , *inter alia* on the basis that a second deportation order made without a fresh decision (accepting it would have the effect of depriving the subject of the second deportation order of an appeal, since the decision not the order triggers an appeal) could be challenged by way of judicial review. The judge rejected this argument (*Pryor* paragraph 43). He went on to express his conclusions as follows:

> "44. To my mind, and having regard to the construction of the 1971 Act, the decision to make a deportation order has to be distinguished from the making of the deportation order itself. It seems to me that once a deportation order has been revoked the decision to make that deportation order falls away. Moreover, as this is a matter of principle, I do not consider that it is affected by the underlying motive of the Defendant's decision to revoke the deportation order.
>
> 45. In the event that the original decision to make a deportation order does not survive revocation of the subsequent deportation order, it matters not whether its extinguishment is caused by the

> making of the deportation order or its revocation, albeit on this I tend to the latter view. In any event, in order to make a further lawful deportation order, after the revocation of the former one, I consider that a further decision to make such an order is required. If none has been made, then it seems to me that any subsequent deportation will not have been made lawfully."

64. In the instant case, HHJ Bidder QC expressed himself as following *Pryor*. However, there is a key distinction between the cases: in this case there was a fresh decision to deport.

65. In addressing us, Mr Goodman had to extend the argument he advanced in *Pryor*. Since there was a fresh decision, his argument was that in such circumstances any fresh decision had to be based on a change in circumstances. The revocation of a deportation order, he said, has a number of consequences: the person may no longer be detained pursuant to paragraphs 2(2) or 2(3) to Schedule 3 to the 1971 Act; the person is no longer required to leave the United Kingdom; the person is no longer prohibited from re-entering the country; the person whose deportation is deemed to be conducive to the public good remains liable to deportation: (Section 3(5)(a) of the 1971 Act, Section 32(4) of the 2007 Act, *R (George) v SSHD* [2014] 1 WLR 1831 and *HA (Iraq) v SSHD* [2016] 1 WLR 4799) but they may be granted some form of leave (*R (Munir) v SSHD* [2012] 1 WLR 2192). Mr Goodman recognised that such a person may be "subject to the respective processes for the making of a further deportation order, but suggested that "revocation is not simply a whimsical change of mind", and thus a fresh decision could only be justified on the grounds of fresh consideration.

66. Ms Anderson rejected such arguments as over-complicated and as having no regard to the "automatic" regime under the 2007 Act. That regime, she said, changed everything. There was a continuing duty on the Secretary of State to make a deportation order, in respect of a qualifying foreign criminal. That duty trumped all the considerations advanced by the Respondent.

67. Mr Goodman's response to this position was to reject the Appellant's central proposition that the Secretary of State was placed under a duty (by Section 32(5) of the 2007 Act) simply to make successive fresh deportation orders in respect of a foreign criminal. He used a metaphor. The duty cannot operate as a self-igniting candle: once snuffed out by revocation, the statute cannot mandate repeated spontaneous re-ignition.

68. I would reject the submissions of both parties. The Respondent is right that the 2007 Act cannot compel the Secretary of State to issue numberless fresh deportation orders. In strict terms, such an order having once been made and revoked, the Secretary of State has discharged her duty under Section 32(5). There is no duty, willy-nilly, to make a second or subsequent orders.

69. It is also correct that revocation of a deportation order under either regime should not be a matter of whimsical action.

70. I also accept the force of the argument that, where it is the decision to deport which triggers appeal rights, then it is proper to proceed to a subsequent order only by way

of a fresh decision. The alternative would imply that revocation followed by the making of a second or subsequent order would preclude any appeal, and leave the subject of the order with judicial review as their remedy of first resort. That would be undesirable for many reasons.

71. However, I reject the argument that a fresh decision to make an order requires "fresh circumstances" in every case. If an order is revoked in error, it seems to me perfectly proper for the Secretary of State to decide on a second (or theoretically subsequent) order, on the basis that revocation was necessary for a technical reason (or as a matter of practice to consider an application based on fresh material) but to conclude that nothing has changed, the facts still justify deportation as they always did, and thus to decide to make a fresh order.

72. In acting in that fashion, the Secretary of State may not be acting under the compulsion of a duty under Section 32(5), but she will be acting in a way consistent with the clearest possible public policy, expressed by Parliament when enacting Section 32(5). Indeed, exactly that weighty policy is to be inferred from the restrictions of her powers of revocation, set down in Section 34 of the 2007 Act. There have been a series of decisions emphasising how weighty Parliament's intentions must have been, expressed in the terms of the Act: see *SS (Nigeria) v SSHD* [2013] EWCA Civ 550; *R (George) v SSHD* [2014] 1 WLR 1831 and *HA (Iraq) v SSHD* [2016] 1 WLR 4799.

73. For these reasons, I would allow the appeal on Ground 1. Here, there was a decision to make the July 2013 deportation order, and there was no requirement for a change in circumstances to justify that decision.

Ground 2

74. The first matter to consider is the Appellant's submission that if the First Ground succeeds, the Court need not proceed to consider the Second Ground. In my view that is not correct. The Judge found liability in respect of the relevant period on two successive bases, which may well be capable of operating independently of each other. It seems to me appropriate to consider the Second Ground.

75. As I have noted, the judge considered fully whether the Respondent's conduct founded a defence of *ex turpi causa*, but he addressed much more briefly whether the conduct was relevant to the application of the *Hardial Singh* principles. The Ground is premised on there being "reasonable grounds to consider that [the Respondent] may [have been] failing to co-operate with or obstructing deportation". In reality, the Appellant must begin by striking at the Judge's conclusion that the Respondent has been broadly consistent in his account (and thus by inference at least reasonably cooperative): see 2014 judgment, paragraphs 96(xiii) to 108.

76. It seems to me that the judge in essence rejected the claim that the Respondent had misled the authorities and had set out to frustrate deportation. It is certain that he did not reach detailed conclusions on the matters raised and did not consider the third *Hardial Singh* principle in the light of such conclusions.

77. I am fully conscious of the degree to which a judge at first instance is better placed than an appellate judge to reach factual conclusions. That is circumscribed here by

the fact that the judge heard no live evidence, although he made it clear he thought that would have been desirable. He certainly reached no conclusions on the detail of the matters advanced by the Appellant, nor did he link such findings to the proper approach to the application of the third *Hardial Singh* principle. It may be that he was not greatly helped in this regard by submissions on behalf of the Appellant.

78. With respect to the Judge, it seems to me that he was wrong not to reach clear conclusions as to the Appellant's conduct and move from such to consider the third *Hardial Singh* principle. In my view the conduct may be highly relevant to what should be regarded as a breach of that principle. Here too the strong policy of Parliament set down in the 2007 Act is an essential part of the context.

79. It also appears to me that the Respondent and the judge placed too much emphasis on the letter from the Appellant of January 2013, responding to the Respondent's protocol letter. The Appellant's letter wrongly stated that the "Jamaican authorities confirmed your client is not Jamaican". The Respondent's solicitors can of course be forgiven for relying on this at the time. However, it subsequently became clear that this was an overstatement, as the Jamaican High Commission had not gone so far: the position was they had not accepted he was Jamaican, but the door had not yet closed. That is evident from the fact that the Jamaican authorities cooperated in further steps to see if the Respondent was Jamaican. In January 2013 that remained in prospect, and the Appellant was aware of it. It was an essential part of the context.

80. In considering the application of the third *Hardial Singh* principle, particularly in the case of a foreign criminal in respect of whom none of the statutory exceptions arise, evasion or deception by the person whom it is desired to deport may well be relevant. It is clearly relevant, in my view, to what constitutes a "reasonable period", itself an element in the third principle as well as the second: see the formulation of Lord Dyson in *Lumba*, paragraph 22. It may be relevant to the question whether deportation will be able to be effected. Evasion or deception, precisely because constituting concealment of the truth, may often be overcome by a single central piece of evidence: a document, a fingerprint, a witness. For these reasons, careful consideration must be given to the alleged evasion or deception and the implications for deportation before a conclusion can properly be reached on the lawfulness of detention.

81. For these reasons, I would allow the appeal on Ground 2.

82. It is not necessary for us to consider Ground 3. I do add, however, that if in due course there is a finding that the Respondent failed to cooperate or set out to frustrate his deportation, then to the extent that he is nevertheless found to have been unlawfully detained, I am of the clear view that such conduct is or may be an important factor in assessing the level of damages, following earlier authority including my own judgment in the decision of *R (NAB) v SSHD* [2011] EWHC 1191 (Admin).

Summary of Conclusions

83. The duty placed on the Secretary of State by Section 32(5) of the 2007 Act to make a deportation order in respect of a foreign criminal is discharged by the making of an order, and there is no continuing duty to make repeated orders. However, the Act

indicates a clear policy in favour of deportation. A second (or subsequent) deportation order may often be appropriate.

84. Revocation of a deportation order may arise for a number of reasons, including error. Where an order has been revoked for any reason, including error, it is necessary to make a fresh decision to deport, since it is the decision not the order which gives rise to the right of appeal. There is no requirement for a "change of circumstances" before such a decision may be made, particularly if the revocation was in error. It may be the case, for example, that an order is revoked while allegedly fresh matters are investigated. Where such investigation shows no change, or no material change in the circumstances, a fresh decision to deport may perfectly properly be made.

85. The decision to deport made on 9 July and served on 11 July 2013, on the facts of this case, did not require a "change of circumstances" and was not unlawful. It was made in accordance with weighty policy laid down in the 2007 Act.

86. Evasion or deception by a detainee as to their identity cannot in my view justify successful invocation of the maxim *ex turpi causa non oritur actio*, at least in relation to a Claimant seeking release from detention, or seeking to establish whether detention is or was unlawful.

87. Evasion or deception by a detainee as to their identity may well be relevant when considering the third *Hardial Singh* principle. That is not to say that such conduct removes the obligation on the Secretary of State to justify detention, in accordance with the well-established principles. Continued detention is not justified as an occult and unexpressed punishment of the detainee for his deception or evasion. In some cases the deception or evasion will succeed, and the deportation will be frustrated. The powers laid down by Parliament do not permit detention beyond the point where, taking a reasonable view of the facts, that frustration should be recognised by the Secretary of State. The decision to deport may of course survive that point, and if the unexpected happens and deportation once more becomes a practical proposition, detention can be reconsidered.

88. For these reasons, I would quash the decision of the judge below and remit for a retrial as to the lawfulness of the Respondent's detention from 20 January to 13 November 2013.

Lady Justice Gloster:

89. I agree.