Neutral Citation Number: [2013] EWHC 2115 (Admin)

Case No: CO/9315/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17th July 2013

Before :

HIS HONOUR JUDGE McKENNA

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Between :

The Queen on the application of DAVID FRANCIS	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr Alex Goodman and **Ms Heather Emmerson** (instructed by **Leigh Day**, Solicitors, Priory House, 25 St John's Lane, London, EC1M 4LB) for the **Claimant**
Mr Robert Kellar (instructed by the **Treasury Solicitor**, 1 Kemble Street, London, WC2B 4TS) for the **Defendant**

Hearing dates: 15th and 16th May 2013

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Approved Judgment

HHJ McKenna :

Introduction

1. In this action the Claimant, David Francis, challenges his immigration detention for a total period of in excess of 3 years and 9 months between 4th December 2007 and 29th September 2011, when the Claimant was released on bail by an Immigration Judge.

2. The Claimant was born on 10th November 1979. In April 2008 the Asylum and Immigration Tribunal ("AIT") found that the Claimant was a citizen of Jamaica who entered the UK in around 1996 (2/126 at 130). The Claimant has never accepted these findings and consistently maintained that he is a British national who was born in Britain, brought up in Britain and has never in fact been to Jamaica.

3. The Claimant came to the attention of the Defendant on 13th March 2007 when he was returning to the UK from Amsterdam after being refused entry on 9th March 2007 for using a counterfeit British passport bearing the name "David Francis". When interviewed, he claimed that he did not know that the passport he was using was forged and that he had found it in among his mother's effects after her death. On 16th July 2007 the Claimant was convicted for possessing a passport relating to another person with the intent of using it to establish facts about himself. He was sentenced to 18 months' imprisonment and the Crown Court made a recommendation for deportation (2/24 at 25). The Claimant did not appeal against that conviction.

4. The Claimant was served with a Liability for Deportation Notice on 12th September 2007 (2/2/27) and on 16th September 2007 the Claimant wrote to the Defendant stating that he should not be deported because he was a British Citizen born in Park Royal Hospital and gave some details of his family (2/2/29). On 8th October 2007 the Claimant was interviewed by UKBA and he informed them that he was British, was born in Park Royal Hospital and had attended Aylestone School in Queen's Park, London (2/2/35). The Claimant was served with a Decision to Make a Deportation Order Notice on 15th November 2007 and this was subject to an appeal on 23rd November 2007 on the basis that the Claimant was a British citizen.

5. On 30th November 2007 the Claimant was sent a notice of intention to make a deportation order and informed that, as the subject of deportation action, he was liable to detention under Schedule 3 to the Immigration Act 1971 ("IA 1971") (2/2/62).

6. The Claimant served half his sentence and was due to be released on licence on 4th December 2007. However, he was detained by the Defendant pending the making of a deportation order (2/2/59). Reference to paragraph 2(2) is recorded as the relevant power in a number of bail summaries, for example, the bail summaries dated 22nd July 2011 (2/650) and 27th September 2011 (2/703). However, it is now said by the Defendant that the Claimant was detained pursuant to paragraph 2(1) of Schedule 3 to the IA 1971 until 21st May 2008 when a deportation order was made. The minute of detention is dated 26th November 2007 (2/59-61).

7. In February 2008 the Claimant was interviewed for the purposes of obtaining a travel document for Jamaica. The Claimant continued to maintain that he was born in the UK. He was asked for information about family members. However, he was unable to provide his siblings' dates of birth. He was also unsure about his mother's maiden

name and did not know if his parents were married. He claimed that his own birth certificate was lost when his mother died albeit that he had previously claimed that his mother may not have registered his birth (2/91 and 2/29).

8. On 7th April 2008 the Claimant was assessed as being a "medium" risk of reconviction and a "medium risk" of serious harm to the public by the National Offender Management Service (NOMS) (2/115-118).

9. On 18th April 2008 the AIT dismissed the Claimant's appeal against deportation (2/126-133). In summary, before the AIT the Claimant maintained that he was a British Citizen, born in London who had been a resident of the UK for 28 years (i.e. since birth) and had never visited Jamaica. The Tribunal rejected that account and held that the Claimant was a Jamaican citizen (paras. 1; 23). It was found that he had spent the first 17 years of his life in Jamaica (para. 37). He was not born in the UK as claimed (para. 22). In fact, he had entered the UK illegally in 1996 or thereabouts (para. 22). He had subsequently worked in the UK illegally (para. 29). His attempt to claim that he was a UK citizen was damaging to his credibility (paras. 22 and 23). The Claimant could return to Jamaica and obtain employment (para. 30). He had close family members in Jamaica with whom he was in contact and could reunite (paras. 30; 37).

10. The Claimant did not appeal the findings of the AIT and his appeal rights were exhausted on 28th April 2008 and the Claimant was served with a signed deportation order on 21st May 2008. From this date he was detained pursuant to paragraph 2(3) of Schedule 3 to the IA 1971 (2/147-148).

11. For the past five and a half years, therefore, the Defendant has asserted an intention to deport the Claimant to Jamaica, but has not been able to obtain recognition from the relevant authorities that the Claimant is Jamaican in the face of the Claimant's consistent assertion that he was born in this country and in fact had never even visited Jamaica.

12. On 28th September 2011 the Claimant challenged his detention by the Defendant by way of judicial review, relying on the well-known *Hardial Singh* principles. The Claimant sought a mandatory order directing his release from detention, a declaration that his detention was unlawful and damages.

13. Following the Claimant's release on bail and disclosure by the Defendant, the Claimant re-pleaded his case seeking declarations that his detention was unlawful, nominal damages in respect of his detention to 28th September 2009 and substantive damages in respect of his detention from 29th September 2009 until his release on 29th September 2011.

Summary of the parties' respective cases

14. The Claimant's grounds of challenge and the Defendant's response to those grounds are summarised in the following three paragraphs.

15. The Claimant asserts that he was falsely imprisoned between 4th December 2007 and 9th September 2008 ("The First Period") on the basis that he was detained pursuant to an unpublished and blanket policy of detaining foreign national prisoners (FNPs) at

the expiry of their prison sentence irrespective of individual circumstances. This policy was operated by the Defendant between April 2006 and 9th September 2008. The Claimant has sought nominal damages only for detention during the First Period and has not sought to argue that he is entitled to substantial damages in this period. The Defendant, for her part, asserts that this ground is without merit because the Claimant, having been recommended for deportation, was detained pursuant to a statutory warrant under paragraph 2(1) to Schedule 3 of the IA 1971 and hence no claim for damages lies.

16. The Claimant asserts that he was falsely imprisoned between 9th September 2008 and 29th September 2009 ("The Second Period") on the basis that he was detained pursuant to a policy that his detention would only be reviewed by persons without authority to release to him; and prohibited any person below the Chief Executive Officer ("CEO") of the UK Border Agency from releasing him. The policy imposed bureaucratic hurdles which in practice rendered it impracticable to effect release. The policy was, it is said, a material cause of the failure to release the Claimant from detention and it was unlawful. Further or alternatively, in breach of the Defendant's policy, while the case was repeatedly expressed by officers to be considered suitable for referral to the CEO, no referral to the CEO was ever made. Again, the Claimant accepts that, absent this allegedly unlawful policy, he would have been detained in any event during this Second Period and therefore only claims nominal damages. The Defendant asserts that this ground is also without merit for the same reason as the first ground and in addition asserts that the policy did not in any event render the Claimant's release either impracticable or impossible and was a lawful policy, lawfully applied.

17. The Claimant asserts that he was unlawfully detained between 29th September 2009 and 29th September 2011 by reason of breaches of the *Hardial Singh* principles ("The Third Period"). By at least 29th September 2009, or alternatively some later date prior to his release, it is alleged that the Claimant had been detained for an unreasonable period of time and/or it had become apparent that the Claimant could not be removed to Jamaica within a reasonable period by reason of an inability to obtain a document permitting his return to Jamaica. The Claimant had provided as much information as he was able to enable the Defendant to make enquiries as to his nationality. He had participated in interviews with the Defendant and provided details of his family, background and date and place of birth, had completed a bio data form (21.05.09) and had been interviewed by the Jamaican Embassy on 6th June 2009. Further, on 27th April 2010 the Jamaican Embassy had refused to issue the Claimant with travel documents. Moreover, in the 18 months since his release the Defendant has been unable to establish that the Claimant had Jamaican nationality or make any progress in obtaining travel documentation. In respect of this ground, the Defendant asserts that there was a statutory warrant throughout the Claimant's detention such that a claim for damages cannot succeed but that, in any event, the Claimant's detention was *Hardial Singh* compliant. Thus it is said that the Defendant was entitled to conclude that the detention was unduly prolonged by the Claimant's own failure to co-operate. In this regard the Defendant points to what she asserts was his refusal to accept that he was a Jamaican national notwithstanding admissions and clear findings to that effect in prior criminal and AIT proceedings. Moreover, it is said that notwithstanding the obstructive position adopted by the Claimant, the Defendant made assiduous and continuing efforts to verify the Claimant's true nationality such that there remained

throughout a sufficient prospect of removal to justify continued detention taking into account what was said to be the Claimant's high risk of absconding, his risk of re-offending and his failure to co-operate.

Review of Defendant's Documentary Evidence as to Continued Detention

18. On 9th July 2008 the Claimant was again interviewed for the purposes of obtaining an ETD. Notwithstanding the unequivocal findings of the AIT, the Claimant continued to maintain that he was a British citizen, had never been to Jamaica, was born in Park Royal Hospital and attended school in London (2/165).

19. On 22nd July 2008 the Claimant was offered removal under the Facilitated Removals Scheme (FRS) but declined (2/177).

20. On 19th August 2008 a nationality check was conducted on the Claimant's mother. These checks failed to confirm that she was a British citizen (2/169).

21. On 22nd August 2008 the Claimant's representatives sought leave to remain in the UK as the fiancé of a British national (2/170-172). These representations were rejected by the Defendant on 29th August 2008 (2/182-183).

22. On 28th October 2008 the AIT refused bail (2/201-202). It was noted that the Claimant had asserted that he was born on 10th November 1979 at the Park Royal Hospital but enquiries with the Family Records Office and the Primary Care Trust had been negative. The AIT was of the view that notwithstanding the length of the Claimant's detention, there were circumstances where the risk of an applicant absconding outweighed the length of time in detention. On the facts available, it was not satisfied that the Claimant was who he said he was. The risk of absconding was high.

23. On 17th December 2008 the Claimant was interviewed again. He continued to maintain that he was a British citizen and offered to try to get his birth certificate. The Claimant was warned that he was not complying with the removal process (2/219).

24. On 30th December 2008 the Claimant was again interviewed. He was seen by Immigration Officers and stated that he would provide a telephone contact number for his brother who was in the UK. On 31st December 2008 he provided what he claimed to be his brother's telephone number. On the same day an attempt was made to contact his brother on that number (in the Claimant's presence) but without success (2/228).

25. On 23rd January 2009 the Claimant was again seen by Immigration Officers. He stated that he had asked his partner and brother to find documentary evidence but "didn't think they had put much effort into it" (2/223). It was noted that he had a strong Jamaican/Caribbean accent at all times (2/223).

26. On 30th January 2009 the Claimant's representatives wrote to the Defendant requesting release on the basis of no recent efforts to remove and that the Claimant had co-operated to the extent he was able (2/226).

27. On 3rd February 2009 in a detention review, the caseworker having recommended detention in the light of the Claimant's history, low risk of harm but high risk of absconding, non-compliance and having noted that removal was not imminent, Deputy Director Moynihan concluded "given the risk of harm refer case to Chief Exec via normal route for release." He also suggested that contact be made with the Dutch authorities (2/227-232).

28. On 25th March 2009, the Claimant was seen in detention and maintained that he had never lived in Jamaica and was born in Middlesex. He stated that his father had a USA passport and his mother had a British passport with USA residency but they were both deceased. However, he stated that he was willing to complete an ETD application (2/243).

29. Further detention reviews were completed on 31st March and 29th April 2009 in the latter of which it was noted that efforts to obtain any useful information regarding nationality had failed so far and that removal was not imminent. A Deputy Director confirmed detention on the basis that risk outweighed the presumption towards release (253-256).

30. On 21st May 2009, a further interview was conducted with the Claimant. He completed a bio-data form. He continued to maintain that he was born in the UK, that his mother had dual British/USA status and that his father was a US citizen and he supplied his last address (2/271).

31. On 26th May 2009 a further detention review was completed noting removal was not imminent. The detention was confirmed by a Deputy Director (2/261-264).

32. On 1st June 2009 the Claimant maintained he was British and disagreed with monthly progress reports which stated that he was non-compliant. He also claimed that he could have been registered as "David Anthony Francis." (2/271).

33. On 17th June 2009 DVLA searches revealed no trace of any application for a UK driving licence by the Claimant (2/272-274).

34. On 22nd June 2009 a further detention review was completed noting that release was not imminent. On this occasion detention was authorised by a Director, Jonathan Nancekivell-Smith (2/280-287).

35. On 25th June 2009, the Claimant wrote to the Defendant stating that his detention was in breach of Art. 5 and explaining that when he was refused entry to Amsterdam, the Dutch authorities took his provisional licence, national insurance card, bank card and mobile phone (2/294). The same day, the Defendant wrote requesting further information from the Claimant in support of his claim (2/295).

36. On 29th June 2009 an ETD application was submitted to the Jamaican High Commission having been completed on 24th June 2009. Detention was again authorised on the basis that the risk of further offending and the likelihood of absconding outweighed the presumption of release (2/299).

37. On 6th July 2009 the Claimant was interviewed by the Jamaican High Commission and he continued to maintain that he was a British citizen (2/309).

38. On 29th July 2009 the Claimant's brother (Morvel Francis) submitted a hand written letter dated 1 July 2009 from a C. A. Zilli. He stated that he was the Claimant's landlord for 2½ years. Morvel Francis also submitted an appointment letter from Addenbrooke's Hospital for 19th June 2006. No other evidence was received (2/309).

39. On 19th August 2009 the Defendant conducted a nationality check which failed to confirm that the Claimant's mother was a British citizen.

40. On 10th September 2009 the Claimant was asked to provide his birth certificate as he had not submitted sufficient evidence to support his claims (2/317).

41. On 14th September 2009 the Claimant stated that he was still trying to obtain his birth certificate and was advised to contact the hospital concerned.

42. On 16th September 2009 a detention review was completed in which it was recorded that whilst the Claimant was not co-operating, his removal was not imminent and "in view of the low risk of harm I believe the time has come to consider managing Mr F via robust contact management. We should therefore arrange to submit this case to the CEO for consideration". In the meantime, detention was authorised by an Assistant Director (2/322).

43. On 16th October 2009, the Defendant applied to the Department for Work and Pensions for any information to assist in verifying the Claimant's nationality (2/336-337).

44. On 13th October 2009 a detention review was completed noting that the Jamaican High Commission was unable to give a realistic time as to when the document would be issued. It was noted that a release proforma had been forwarded to senior management to consider Mr Francis for rigorous contact management. An Acting AD recommended IDT to consider carrying out an assertive interview to see if that would throw any light on his identity (2/338-342).

45. On 19th October 2009 the Defendant responded to a letter dated 25th September 2009 from Richard Spring MP in relation to the Claimant's continuing detention. The Defendant observed that the Claimant had "repeatedly failed to co-operate with the documentation process". Although he had claimed to be a British citizen, he had not provided any evidence. He had failed to accept an invitation to depart the United Kingdom via the FRS scheme (2/346-347).

46. On 22nd October 2009, the Jamaican High Commission had the ETD application but were prioritising according to level of documents. "This would suggest (C) will not be going anywhere for a long time".

47. On 11th November 2009 a detention review was completed. It noted that the documentation panel would consider the Claimant's case on 19th November 2009. There is a note from the Director that, in the absence of evidence that the Claimant posed a risk of harm to the public, the case should be referred to the Strategic Director to consider whether the risk of absconding could be mitigated through robust contact management (2/351-355).

48. On 8th December 2009, a further detention review was completed. It noted that the documentation panel had instructed that further checks be carried out to establish identity. It further records that the Jamaican High Commission would not issue an ETD unless there was a copy of a valid or expired passport (2/374-278).

49. On 23rd December 2009 the documentation panel indicated a need to check NINO for siblings to see if any addresses were known (2/373).

50. On 23rd December 2009 the Claimant's employment records were received. The Defendant looked up the Claimant on an ancestral website but found no trace. Checks were made with negative results to Park Royal Hospital, schools, NDFU, IFB and Jamaican archive files (2/373).

51. On 24th December 2009 a further detention review was completed. JA Gallop stated:

> "I am unclear what the suggestion of a risk of harm to the public is based on. There is however a risk of absconding given his use of false documents. One wonders why, if he is British as claimed, he felt the need to attempt entry on a counterfeit passport.… I am, however, concerned about the length of detention and it may be that the risk of absconding can be mitigated by rigorous contact management. On balance, if not already considered, I think a referral should be made to the CEO" (2/379-383).

52. On 19th January 2010, letters were sent to various members of the Claimant's family with a view to obtaining any further information or documentary evidence to assist with the documentation process (2/387,394).

53. On 3rd February 2010, further research into the Claimant's asserted identity against various databases (including Jamaican archive files) returned negative results (3/388). On 23rd February 2010, HMRC advised the Defendant that it had no trace of the Claimant (2/403).

54. On 28th February 2010, the Claimant was moved from Brook House to Oakington as a result of the Claimant's suspected involvement in gang culture and with drug/theft issues (2/417).

55. On 11th March 2010, the Claimant was interviewed and stated that he would sign anything and be removed anywhere. The case note states "He appears very keen to comply and said he would sign anything to be moved anywhere". The Claimant states that he is vegan and there is not enough suitable food for him in detention and since arrival he has not eaten any breakfast as there is nothing suitable (2/413).

56. On 31st March 2010, a further detention review was completed. The case owner stated they were "at a standstill" with regard to the Claimant's identity. Detention was authorised by a Director, Jonathan Nancekivell-Smith (2/414-419).

57. On 21st May 2010, there was a further detention review completed. It noted that the Jamaican High Commission had refused to issue an ETD as they required more evidence of nationality (2/438-444).

58. On 30th June 2010 the Defendant obtained a copy of the original application for the passport that had been the subject of the criminal proceedings against the Claimant in July 2007. The application was in the name of "Mike John Plowman". It had been made on 18th January 1996. On 19th July 2010 a letter was sent to Mr. Plowman at his last known address (2/465). The letter was returned as undelivered on 9th September 2010.

59. On 20th July 2010, a further detention review was completed. Acting SEO and an Assistant Director of CCD maintained detention due to the "unacceptably high" risk of the Claimant absconding (2/467-472).

60. On 6th August 2010, the Claimant was again interviewed by the Defendant. He continued to maintain he was a British Citizen born at Middlesex Hospital. It was put to the Claimant that the Defendant's checks had confirmed that the Claimant had not been registered as a British Citizen. He maintained his claims. It was also put to him that checks on the passport that were the subject of the earlier criminal proceedings had established that it belonged to someone else. He maintained his claim that he found it amongst his mother's belongings after she passed away (2/491).

61. On 9th August 2010, the Claimant's application for bail was refused by the AIT (2/491).

62. On 18th August 2010, a further detention review was completed. It recorded that there was a relatively low risk of harm and that the drug issues while worrying looked to be unproven. The Assistant Director stated "I am concerned at the lack of progress" in this case (2/498-493).

63. On 15th September 2010, a further detention review was completed (2/497-502). The DD concluded that the Claimant's own behaviour had prolonged his detention: his lack of full co-operation suggested a high risk of absconding and this together with the likelihood of re-offending (as indicated by the gang issues whilst in detention) outweighed the presumption of release.

64. On 12th August 2010 the Defendant made contact with the police with a view to obtaining his original custody records (2/488).

65. On 7th October 2010 the Defendant initiated a search for the original passport applications for the Claimant and his mother (2/506).

66. On 27th October 2010 and 3rd November 2010 contact was made with the US Embassy with a view to seeking confirmation of passport details for the Claimant's mother (2/516). On same day the Defendant initiated a search for records relating to Claimant's fingerprints in the USA, Jamaica and Holland (2/516). A request to Interpol for relevant records was made on 15th November 2010 (2/516).

67. On 5th November 2010, a further detention review was completed (2/520-524).

68. On 8th December 2010, there was a further detention review. A team leader, although agreeing with the proposal to continue to detain, expressed concern about the length of detention and failure to make any real progress and expressed the view that consideration should be given towards initiating a release referral having now

explored all the various usual avenues for help/guidance. Detention was authorised by an Assistant Director (2/530-535).

69. On 22nd December 2010, the Claimant was offered section 4 support from NASS if bail were granted (2/539-542).

70. On 31st December 2010, the Defendant telephoned the Suffolk Constabulary for custody and address records (2/546).

71. On 5th January 2011, a further detention review was completed. It was noted by a Deputy Director that the Claimant's detention had been for a considerable period but that this had been caused largely by his lack of compliance. There were some avenues to pursue and therefore detention was authorised but with the caveat that "if there is no progress soon we should prepare a release referral" (2/543-547).

72. On 2nd February 2011, a further detention review was completed. CCD was to continue to follow up/chase remaining leads and sources of potential information. SEO Operational Manager confirmed the decision (2/550-556).

73. On 21st February 2011, the Defendant wrote to the Claimant's partner (Kerry McDonald) and the Claimant's brother (Samuel Francis) seeking further information/documentary evidence for the purposes of verifying the Claimant's nationality (2/560-562).

74. On 24th February 2011 UKBA discussed outstanding Jamaican cases that required verification in Kingston with Jamaican officials. The Jamaican officials provided a commitment to chase Kingston on these cases.

75. On 2nd March 2011, there was a further detention review. A caseworker stated that a release proposal would be drafted before the next review due to the length of time in detention. An AD added "We need to thoroughly review this case with CSIT and ensure that all avenues are being pursued and progressed" (2/565-571).

76. On 3rd March 2011 the Defendant wrote to the Claimant's brother Samuel Francis seeking further documentary evidence for the purposes of verifying the Claimant's nationality (2/572). On 22nd March 2011 the Defendant received a reply stating that he was wheelchair bound and unable to assist with obtaining documents (2/573).

77. On 8th March 2011, the Defendant was advised by Country Returns Unit that their business expert had discussed the cases that required certification in Kingston with the Jamaican officials at a meeting on 24th February 2011 and officials provided a commitment to chase Kingston on these cases.

78. On 28th March 2011, a further detention review was completed. It noted the view of the Assistant Director that the length of detention was unacceptable, albeit that in his view that was very much of the Claimant's own making. (2/574-579).

79. On 30th March 2011, a monthly progress report recorded that the Claimant had endeavoured to obtain documentation to substantiate his claim that he is British but with little or no success. The report also recorded that the Claimant had expressed a

desire to comply and willingness to sign anything to be removed anywhere (2/580-582).

80. On 11th April 2011 the Defendant wrote again to Samuel Francis seeking names and dates of birth for the Claimant's mother and father (2/585). On the same day the Defendant wrote to the police seeking records relating to the Claimant's initial arrest and charge and any property he might have had on his person (2/586-587). The Defendant also wrote to several prisons at which the Claimant had been detained in order to establish whether they were in possession of any documentation/information which might assist. Letters were written to HMP Peterborough (2/588), HMP Chelmsford (2/590) and HMP Bullwood Hall (2/592). Those prisons confirmed subsequently that they were unable to assist further (2/600-606).

81. On 21st April 2011, a further detention review was completed. It confirmed checks made with the client's previous HMPs. The client had a sealed bag and suitcase which were later sent to him in prison, requests were sent to the former prisons for further information on client. "Note to SEO – (C) has not been proposed for release on contact management due to his non-compliance and his behaviour whilst at the detention centres but due to the length of detention which it is felt is his own doing, do you agree a proposal should be forwarded before the next review?" Continued detention was authorised by SEO Operational Manager on 21st April 2011.

82. On 12th May 2011 a response to the Defendant's enquiries with Interpol was received. It was indicated that the Claimant had been arrested on 9th March 2007 in the Netherlands in connection with forged documentation/human trafficking (2/529 and 584). Based upon the name and date of birth given the Claimant was not criminally known to the Jamaican authorities. A further search of the fingerprints supplied confirmed that he was not identified on their national files.

83. The Claimant's detention review on 18th May 2010 had indicated that prison visitor records had now been obtained. These showed that the Claimant had been visited on 6th October 2010 by a Nadine Francis. Checks were undertaken by the Defendant which suggested that she had a Jamaican passport (2/613).

84. On 10th June 2011 a chasing letter was sent to Samuel Francis seeking a response to the letter dated 11th April 2011 (2/620).

85. On 13th June 2011 the Defendant wrote to HMP Chelmsford seeking a record of the contents of the Claimant's possessions when he was transferred into custody (2/621).

86. On 21st June 2011, a further detention review was completed. A Deputy Director confirmed agreement to continue detention on 21st June 2011 but also stated "I am conscious that detention has become prolonged, but this is due to Mr Francis' failure to produce any evidence of his nationality" (2/621-28).

87. On 4th July 2011 Samuel Francis responded to the Defendant providing the dates of birth for the Claimant's mother and father. He also provided an address for Movel Francis "who would be able to help you with information regarding Mr. David Francis" (2/632).

88. On 19th July 2011, a further detention review was completed. A request was sent to DPMU to transfer the Claimant to another IRC in an attempt to "take him out of his comfort zone" as the Claimant appeared too relaxed and complacent. It confirmed no reply to requests for original passport application form from Nadine Francis to establish if she has the same parents as the Claimant. Request to be re-sent. It noted due to length of detention it is considered appropriate to send a release proposal for the Strategic Director which will be sent before the next review is due. SEO Ops Manager and HEO TL confirmed agreement on 19th July 2011 (2/633 and 634-640).

89. On 21st July 2011, a meeting took place between SROS CCD and an official of Jamaican Passport, Immigration and Citizenship Agency to review cases with the Jamaican High Commission (2/713-719).

90. On 26th July 2011 bail was refused. (2/656). However, on 20th September 2011, the Claimant was granted bail by the AIT.

LEGAL FRAMEWORK

91. The Claimant was initially detained under paragraph 2(1) of Schedule 3 to the IA 1971. This applied pending the making of a deportation order. Following the making of a deportation order, the Claimant was detained under paragraph 2(3). The relevant provisions are as follows:

> "2.—
>
> (1) Where a recommendation for deportation made by a court is in force in respect of any person, [and that person is not detained in pursuance of the sentence or order of any court] , he shall, unless the court by which the recommendation is made otherwise directs [or a direction is given under sub-paragraph (1A) below,] be detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary of State directs him to be released pending further consideration of his case [or he is released on bail] .
>
> (2) Where notice has been given to a person in accordance with regulations under [section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision)] of a decision to make a deportation order against him, [and he is not detained in pursuance of the sentence or order of a court], he may be detained under the authority of the Secretary of State pending the making of the deportation order.
>
> (3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless [he is released on bail or] the Secretary of State directs otherwise)."

92. The effect of these provisions has been analysed in a number of Administrative Court authorities from which the following propositions relied on by the Defendant emerge:

(1) There is an important distinction between detention under paragraph 2 (1) and paragraph 2 (2) (see *WL (Congo) v SSHD* [2010] 1 WLR 2168 para. 88):

i. Under paragraph 2 (2) the warrant for detention derives from the discretionary exercise of a statutory power by the Defendant.

ii. However, where (as here) a foreign national prisoner has been sentenced to a term of imprisonment and subject to a recommendation for deportation, paragraph 2 (1) itself provides the legislative authority for the detention.

(2) Where the warrant for detention arises from an exercise of the Defendant's statutory discretion under paragraph 2 (2), a failure to follow a policy or the application of an unlawful policy will undermine the warrant for detention and thus render the detention unlawful: applying *Lumba v SSHD* [2011] UKSC 12.

(3) Conversely, a policy error by the Defendant will not undermine the warrant for detention of a person detained under paragraph 2 (1) because the warrant for detention derives not from any exercise of a discretionary power by the Defendant but from the terms of the statute itself (see *MI (Iraq) v SSHD* [2010] EWHC 764 (Admin) at para. 8 and *R (BA) v SSHD* [2011] EWHC 2748 (Admin) at para. 157)

(4) If it is suggested that the Defendant had failed unlawfully to direct the release of a person detained under paragraph 2(1) that decision may be challenged in judicial review proceedings and the Defendant may be required to take the decision again but the legislative authority for the detention is unaffected and there will be no claim for false imprisonment (see *MI (Iraq*) at para. 8; *R (Solomon) v SSHD* [2011] EWHC 3075 (Admin) at para. 41, and *BA* at para.132).

(5) Paragraph 2(1) provides a statutory warrant pending the making of a deportation order. However - where the Court has recommended deportation - the effect of paragraph 2(3) is to *continue* the statutory warrant for detention for the period after a deportation order has been made. It follows that a policy error by the Defendant in such circumstances under paragraph 2(3) will not undermine the legislative warrant (see *R* (*Choy) v SSHD* [2011] EWHC 365 (Admin) at para. 22 and *Solomon* at para. 39).

93. It is said, however, on behalf of the Claimant that these propositions must be revisited in the light of the decisions of the Supreme Court in *Lumba* and *Kambadzi* and of the Court of Appeal in *R (Muqtaar*) v SSHD [2013] 1 W.L.R. 649. I will consider these arguments when I consider Ground 1.

Hardial Singh Principles

94. The Defendant's powers of detention under paragraph 2 of Schedule 3 to the IA 1971 are limited, *inter alia*, by the common law principles that where detention has been unreasonably long or the Defendant will be unable to effect removal within a

reasonable period of time, she should not seek to exercise her powers of detention. In R (*Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB) Woolf J, as he then was, held (at page 706) as follows in respect of the Defendant's power under paragraph 2:

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

95. In *R (on the application of) Mafoud v Secretary of State for the Home Department* [2010] EWHC 2057 (Admin) Hickinbottom J restated the position as follows:

> "6. The jurisprudence has been built up through these cases, but consistently and upon firm foundations. I consider that the principles in respect of the lawfulness of administrative detention under Schedule 3 to the 1971 Act relevant to this claim are now well-settled, as follows:
>
> > (i) The power of detention exists for the purpose of deporting the relevant person ('the deportee').
> >
> > (ii) The power exists until deportation is effected: but it can only be exercised to detain the deportee for a period that is reasonable in all the circumstances.
> >
> > (iii) Whilst in some cases a reasonable time will have expired already and immediate release will be inevitable, in most cases the crucial issue will be whether it is going to be possible in the future to remove the deportee within a reasonable time having regard to the period already spent in detention. In considering such prospects, it is necessary to consider by when the Secretary of State expects to be able to deport the deportee, and the basis and degree of certainty of that expectation. Where there is no prospect of removing the deportee within a reasonable time, then detention becomes arbitrary and consequently

unlawful under Article 5, and the deportee must be released immediately.

(iv) There is no red line, in terms of months or years, applicable to all cases, beyond which time for detention becomes unreasonable. What is a 'reasonable time' will depend upon the circumstances of a particular case, taking into account all relevant factors.

(v) Those factors include:

(a) The extent to which any delay is being or has been caused by the deportee's own lack of cooperation in, for example, obtaining an emergency travel document ("ETD") from his country of origin.

(b) The chances that the deportee may abscond (which may have the effect of defeating the deportation order).

(c) The chances that the deportee, if at large, may reoffend. If he may reoffend, of particular importance is, not simply the mathematical chances of reoffending, but the potential gravity of the consequences to the public of reoffending if it were to occur.

(d) The effect of detention on the deportee, particularly upon any psychiatric or other medical condition he may have. The conditions in which the deportee is detained may also be relevant, although less so if he is required to be detained in particular conditions (e.g. in prison estate as opposed to a detention centre) because of his own behaviour.

(e) The conduct of the Secretary of State, including the diligence and speed at which efforts have been made to enforce the deportation order including obtaining an ETD.

That list of factors is not, of course, exhaustive.

(vi) Any relevant factor may affect the length of time of detention that might be regarded as reasonable. Whilst in a specific case one or more factors may have especial weight, no factor is necessarily determinative. There is no 'trump card'. Therefore, even where there is a high risk or even inevitability of reoffending and/or absconding, nevertheless there may still be circumstances in which Article 5 requires a deportee's release.

(vii) The burden of showing that detention is lawful lies upon the Secretary of State."

96. Dyson LJ, as he then was, in *R (I) v SSHD* [2002] EWCA Civ 88 at § 46-48 encapsulated the relevant principles as follows:

> "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 a 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.
>
> 47. Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person "pending removal" for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired.
>
> 48. It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences."

97. The *Hardial Singh* principles, and Dyson LJ's exposition of them in *(*I) have been approved by the Supreme Court in *Lumba* and *Kambadzi*. In *Lumba* Lord Dyson SCJ, addressing the application of the *Hardial Singh* principles, stated as follows at para 103:

> "A convenient starting point is to determine whether and if so when, there is a realistic prospect that deportation will take place. As I said in *R (on the application of I)* at (47) there may be situations where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a period that is reasonable in all the circumstances, having regard in particular to time that the person has already spent in detention…. But if there is no realistic prospect that deportation will take place within a reasonable time, then continued detention in unlawful."

98. As the period of detention gets longer, the greater the degree of certainty and proximity of removal expected to justify the continued detention: per Richards LJ in *R (MH) v Home Secretary* [2010] EWCA Civ 1112 at para 68.

99. Allegations of non-cooperation are not relevant where any alleged behaviour by a detainee has no causal connection to the inability to remove him (*Lumba* at para 127). If an allegation of non-cooperation is made out, whilst this may incline a Court to lengthen the time span over which it would regard continued detention to be lawful, where no realistic prospect of removal within any timeframe can be demonstrated, this factor does not assist the Defendant (see *Raki v SSHD* [2011] EWHC 2421 (Admin)). Non-cooperation is not a trump card; it does not enable the Defendant to continue to detain until deportation can be effected whenever that may be: per Lord Dyson in *Lumba* at § 128. Where it can be shown that a detainee had been co-operating in the process of documentation and/or genuinely wished to return then this is a factor in the detainee's favour: per Woolf J in *Hardial Singh*.

100. In *Chen v SSHD* [2002] EWHC 2797 (Admin) Goldring J, as he then was, said as follows:

> "22. It seems to me I am entitled to approach the present case on this basis. Non-co-operation may not be decisive. It is, however, a relevant, possibly highly relevant, factor. If that were not so, the purpose of these provisions could deliberately be defeated by a determined applicant. It would be open to such a person simply to sit there and do nothing until return was no longer a realistic prospect. Such a person might well then disappear, having been released into the community. That person may, moreover, be somebody convicted of most serious criminal offences (as has the applicant in this case). It cannot have been Parliament's intention that the Act could be frustrated in that way."

101. In *R (on the application of A) v Secretary of State for the Home Department* [2007] EWCA Civ 804, Toulson LJ said as follows at paragraphs 54 and 55:

> "54. I accept the submission on behalf of the Home Secretary that where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, and likely often to be decisive factors, in determining

> the reasonableness of a person's detention, provided that deportation is the genuine purpose of the detention. The risk of absconding is important because it threatens to defeat the purpose for which the deportation order was made. The refusal of voluntary repatriation is important not only as evidence of the risk of absconding, but also because there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss of liberty involved in the individual's continued detention is a product of his own making.
>
> 55. A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring and the potential gravity of the consequences."

102. However, as Dyson LJ noted in *I* there are two important points to be made in relation to the possibility of absconding:

> "53. First the relevance of the likelihood of absconding, if proved, should not be overstated. Carried to its logical conclusion it could become a trump card that carried the day for the Secretary of State in every case where such a risk was made out regardless of all other considerations, not least the length of the period of detention. That would be wholly unacceptable outcome where human liberty is at stake
>
> Secondly, it is for the Secretary of State to satisfy the court that it is right to infer from the refusal by a detained person of an offer of voluntary repatriation that, if release, he or will abscond"

103. The risk that a detainee will re-offend if released and the gravity of re-offending are both relevant to the assessment of what constitutes a reasonable period of detention: *Lumba* per Lord Dyson SCJ at paras 108 – 110 and 121.

Article 5

104. Article 5 to Schedule 1 of the Human Rights Act 1998 provides:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with procedure prescribed by law:
>
> ....
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person

> against whom action is being taken with a view to deportation or extradition".

GROUND ONE

105. It is not in dispute that during the First Period the Defendant was operating an unlawful blanket policy of detention of foreign national prisoners regardless of their individual circumstances. The detention policies in operation were unlawful because they were blanket policies, inconsistent with the published policies and were not themselves published.

106. However, the Defendant contends that it does not follow that the Claimant's detention during that period was unlawful, citing a line of authority in the Administrative Court in which in a number of cases it has been held that where detention was pursuant to paragraph 2(1) to Schedule 3 or to the parenthetic part of paragraph 2(3) to Schedule 3, the authority for detention derives from the statute and not from the exercise of a statutory power. In this case the Claimant was initially detained until 21st May 2008 pursuant to the Court's recommendation for deportation under paragraph 2(1) of Schedule 3 to the IA 1971. Following the service of a signed deportation order on 21st May 2008, he was detained pursuant to the bracketed part of paragraph 2(3). It follows, therefore, argues the Defendant, that the lawful authority for the Claimant's detention arose from the terms of the statute and not from any decision by the Defendant.

107. There are obvious differences between the wording of paragraph 2(1) and paragraph 2(2) of Schedule 3 to the IA 1971 not least of which is the use of the word "shall" in paragraph 2(1) and the use of the word "may" by contrast in paragraph 2(2). Moreover, the basis for the authority to detain is different. In paragraph 2(1) the authority is the statute itself flowing from the decision by the sentencing court to recommend deportation whilst under paragraph 2(2) the warrant for detention is derived from the discretionary exercise of a statutory power by the Defendant and the nature of the discretion is also said to be different in the two cases.

108. These differences, it is said, underpin the different approaches to damages where the detention is under paragraph 2(1) of Schedule 3 to IA 1971 as opposed to paragraph 2(2) in the line of cases decided in the Administrative Court beginning with *WL (Congo)* and culminating in *Soloman* which, although not strictly binding on this court, should be followed as a matter of judicial comity and because, taken cumulatively, they are highly persuasive.

109. The Claimant, for its part, submitted that I should not follow this line of cases for a number of reasons including that they were based on what was admittedly *obiter dicta* in *WL (Congo)*, that they were internally contradictory and, more importantly, could not survive the decisions of the Supreme Court in *Lumba* and *Kambadzi* and the decision of the Court of Appeal in *Muqtaar* albeit that both *Lumba* and *Kambadzi* pre-dated some of the Administrative Court decisions relied upon by the Defendant.

110. The genesis for the line of authorities relied on by the Defendant is to be found in passages from the decision of the Court of Appeal in *WL (Congo)* where Stanley Burnton LJ, delivering the judgment of the court, said as follows:

> "[88] We consider, first, that it is necessary to distinguish between the detention of FNPs under sub-para (1) of para 2 of Sch 3 to the 1971 Act and detention under sub-paras (2) or (3). Sub-paragraph (1) is itself legislative authority for the detention of a FNP who has been sentenced to imprisonment and who has been the subject of a recommendation for deportation. If an unlawful decision is made by the Secretary of State not to direct his release, the court may quash the decision and require it to be retaken, but the legislative authority for his detention is unaffected. It follows that the FNP will have no claim for damages for false imprisonment in such circumstances. Furthermore, the *SK (Zimbabwe)* case [2009] 1 WLR 1527 is authority, binding on us, that a failure in breach of procedural rules to review his detention does not necessarily render the detention unlawful.
>
> [89] The position is different when the decision to detain is made under sub-paragraph (2) or (3). In these cases, there is no lawful authority to detain unless a lawful decision is made by the Secretary of State. The mere existence of an internal, unpublished policy or practice at variance with, and more disadvantageous to the FNP than, the published policy will not render a decision to detain unlawful. It must be shown that the unpublished policy was applied to him. Even then, it must be shown that the application of the policy was material to the decision. If the decision to detain him was inevitable, the application of the policy is immaterial, and the decision is not liable to be set aside as unlawful. Once again, however, once a decision to detain has lawfully been made, a review of detention that is unlawful on *Wednesbury* principles will not necessarily lead to his continued detention being unlawful."

111. In *R (MI) (Iraq) v Secretary of State for the Home Department* [2010] EWHC 764 (Admin) Burnett J relied on the reasoning of the Court of Appeal in *WL (Congo)* as follows:

> "41. Mr Symes did not suggest that the Secretary of State lacked the intention to deport MI (Iraq). There is no breach of the first *Hardial Singh* limitation. He submitted that having regard to the second limitation, the detention was unlawful from the outset or became unlawful before MI (Iraq)'s release in September 2008.
>
> 42. In outlining the legal framework between paragraphs [5] and [14] above, I referred to the conclusion of the Court of Appeal in *WL Congo* that the period of detention pursuant to Paragraph 2(1) of Schedule 3, authorised as it was by the recommendation for deportation made by the criminal court, remains lawful even if subsequently it can be shown that the Secretary of State's decision not to release a detainee was vitiated by a public law error. It follows in MI (Iraq)'s case that

> his period of detention between 3 August 2007 (the start of immigration detention) and 11 October 2007 was on any view lawful. Nonetheless, I do not consider that the period during which the lawfulness of Mr Ibrahim's detention is vouched safe by the recommendation of the criminal court falls out of account altogether when considering the second *Hardial Singh* limitation. However, the focus should be on the period that follows. That approach is consistent with that established by the authorities with respect to the period of detention during which the detainee is pursuing his appeal rights. The focus should be on the period after appeal rights have been exhausted: see *R (SK) v Secretary of State* [2008] EWHC 98 (Admin) per Munby J at [108] and *Abdi* per Davis J at [36] – [39]. The underlying reason for this approach is that whilst the appellate machinery is engaged the Secretary of State cannot lawfully remove the person concerned. Assuming that detention is otherwise justified on the facts, it is reasonable to maintain detention whilst the appeals machinery is in action. Yet that period is not ignored when looking at an overall period that is reasonable because it is part and parcel of the overall immigration detention. In *MI (Iraq)*'s case his detention pursuant to Paragraph 2(1) of Schedule 3 and the appeals process exactly coincided."

112. In *Choy* Bean J, having cited paragraphs 88 and 89 in *WL (Congo)*, said as follows:-

> "21. Mr. Chirico has three submissions about this passage. Firstly, he argues, when read in context, it has nothing to say about the assessment of the legality of a paragraph 2(1) detention by reference to the *Hardial Singh* principles. Secondly, even if it did, it means no more than what it says. There can be no claim for false imprisonment when detention is pursuant to a recommendation for deportation (paragraph 2(1) of the Schedule), but once the deportation order is made, even in a case where it had been recommended by the court, the authority to detain derives from paragraph 2(3) and damages for false imprisonment are therefore available. Thirdly, he submits, the observations of the Court of Appeal are in any event *obiter* and erroneous and I should not follow them. (I should add that the Claimants in *WL (Congo)* and its associated case *KM (Jamaica)* appealed to the Supreme Court who heard the appeals in November 2010 and whose judgment is awaited; both Mr. Chirico and Ms. Anderson, however, asked me not to adjourn this case until the Supreme Court delivers judgment).
>
> 22. I do not accept that on proper analysis the decision in *WL (Congo)* indicates that a convicted offender recommended for deportation by a court, though excluded from claiming damages for false imprisonment until the deportation order is made, is not excluded thereafter. Such a distinction would be

> irrational, and would render the words in brackets in paragraph 2(3) otiose. In paragraph 2(1) Parliament created a presumption of detention deriving from the criminal court's recommendation. Paragraph 2(3) continues that presumption in favour of detention following the making of the deportation order where the prospective deportee was already detained before the making of the order pursuant to a recommendation. The origin of the detention continues to be the recommendation of the court. In a paragraph 2(2) case, since there has been no recommendation, the origin of the detention is a discretionary decision of the Secretary of State. I therefore reject the submission that the Claimant is entitled to damages for false imprisonment on a daily or weekly basis if he can show any delay in the handling of his case."

113. In *BA* Elizabeth Laing QC considered that the statutory mandate for detention under paragraph 2(1) could be destroyed by a breach of the *Hardial Singh* principles but not by a breach of public law. At paragraph 148 she identified the alternatives as follows:

> "… The alternatives are that a breach destroys the statutory mandate for detention, or that it is a breach of public law on which an application for judicial review could be based, requiring the Secretary of State to reconsider her decision, but leaving the statutory authority for detention intact. In the first case, a claimant would have a cause of action in tort, and in the second, he would not. The answer depends on whether the *Hardial Singh* principles are no more than relevant considerations, in a *Wednesbury* sense, or whether, as a matter of the construction of paragraph 2, they are essential elements of statutory detention."

114. At paragraph 149 she indicated that she preferred the second view:

> "I prefer the second view. The approach to provisions about detention is to construe them narrowly (see per Lord Dyson SCJ at paragraph 108 of *Lumba*). In my judgment, the principle that provisions affecting liberty should be strictly construed means that fulfilment of those principles is a condition precedent to detention under paragraph 2, even where, as in paragraph 2(1) and the parenthesis to paragraph 2(3), the statute requires a person to be detained."

115. In *Solomon*, Cranston J, having referred to the Judgments of Burnett J in *MI (Iraq)* and Bean J in *Choy* summarised the position as follows at paragraph 39:

> "39. These two authorities analyse the implications of the distinction between paragraphs 2(1) and 2(2) of schedule 3, first raised in the Court of Appeal in WL (Congo), for claims of false imprisonment. Both are binding on me. They were decided prior to the Supreme Court decision in WL (Congo), but nothing said by the Supreme Court undermines the analysis

> offered by Burnett J. and Bean J. Paragraph 2(1) creates the presumption of detention for a foreign national prisoner deriving from the recommendation for deportation made by the judge when sentencing for the criminal offence. Paragraph 2(3) continues the presumption following the making of the deportation order where the person was already detained before it was made. The basis of detention throughout is the court's recommendation to deport and is pursuant to statute, not to any discretionary decision of the Secretary of State, as is the case with detention under paragraph 2(2). Since detention is by virtue of statute a claim for false imprisonment must, on ordinary principles, fail: Clerk and Lindsell on Torts, 20th ed, 3-142 - 3-151; Markesinis and Deakin's Tort Law, 6th ed (Deakin, Johnston & Markesinis), 2007, 467, 469."

116. In *Lumba*, the Supreme Court was concerned with the application of an unpublished policy whereby from April 2006 all foreign national prisoners continued to be detained after the end of their sentence irrespective of individual circumstances. It was held that the tort of false imprisonment was complete where the authority for the detention was vitiated by a public law error which bore on the decision to detain (per Lord Dyson SCJ) at paragraph 68. However, in *Lumba*, the distinction between paragraph 2(1) and paragraph 2(2) whilst recognised, was not explored. At paragraph 55, Lord Dyson SCJ, commented as follows:

> "Whatever the position may be in relation to para 2(1) and the parenthesis in para 2(3), para 2(2) and the remainder of para 2(3) do not *create* any presumption at all. They simply give the Secretary of State discretion to detain. In relation to para 2(2) and (3), therefore, so far as it goes, the declaration granted by Moses J is correct."

117. As it seems to me, the whole thrust of the reasoning of the Supreme Court is directed to the exercise of discretion and leaves open what would apply in the case of a statutory warrant flowing from a recommendation by the sentencing court. Moreover, the Supreme Court did not suggest that the Court of Appeal in *WL (Congo)* was wrong.

118. In *Kambadzi*, the Court was concerned with a Claimant who was detained from March 2006 until July 2008 and during that period he should have been, but was not, reviewed monthly in accordance with published policy. It was held that the failure to carry out detention reviews at the frequency stipulated by the Defendant's policy was a material public law error which vitiated the authority for the detention and therefore gave rise to a claim for false imprisonment and moreover, where the review did not partake of the quality or character required to justify the continuance of detention, it became unlawful.

119. Lord Hope of Craighead DPSC, with whose judgment the majority of the court agreed, formulated the issue at paragraphs 34 and 35, a formulation quoted by Richards LJ in *Muqtaar* at paragraph 60 (see paragraph 123 below).

120. Although a paragraph 2(2) case, what is said on behalf of the Claimant is that the argument put forward by Lord Hope at paragraphs 40 – 42 (again quoted by Richards LJ in *Muqtaar* at paragraph 123 below) applies with equal force in a paragraph 2(1) case so that where there is an executive discretion to detain someone without limit of time the right to liberty demands that the cause of action should be available if the detention has not been lawfully exercised. Moreover, the policy narrowed the power of the executive detention by requiring regular review which was necessary to meet the objection of arbitrariness.

121. Reliance is placed on the following paragraphs from the Judgment of Lord Hope which it is said resonates in the instant case:

> "49. I cannot find in these authorities anything that requires us to hold that the claim for damages for false imprisonment is untenable or which points conclusively in the other direction. I would start therefore with principle that must lie at the heart of any discussion as to whether a person's detention can be justified. The liberty of the subject can be interfered with only upon grounds that the court will uphold as lawful..... We are dealing in this case with the power of executive detention under the 1971 Act. It depends on the exercise of a discretion, not on a warrant for detention issued by any court. That is why the manner of its exercise was so carefully qualified by Woolf J in *Hardial Singh*. The power to detain must be exercised reasonably and in a manner which is not arbitrary. If it is not, the detention cannot be lawfully justified.
>
> 50. The initial decision to detain will be held to be lawful if it is made under the authority of the Secretary of State pending the making of a deportation order. But it cannot be asserted, in the light of what was said in *Hardial Singh*, that the initial decision renders continued and indefinite detention lawful until the deportation order is made whatever the circumstances. Nor can it be said that it has that effect after the deportation order is made pending the person's removal from the United Kingdom when the person is being detained under para 2(3). The authority that stems from the initial decision is not unqualified.
>
> 51. The question then is what is to be made of the Secretary of State's public law duty to give effect to his published policy. In my opinion the answer to that question will always be fact-sensitive. In this case we are dealing with an executive act which interferes with personal liberty. So one must ask whether the published policy is sufficiently closely related to the authority to detain to provide a further qualification of the discretion that he has under the statute….
>
> 52. The relationship of the review to the exercise of the authority is very close. They too go hand in hand. If the system works as it should, authorisation for continued detention is to be found in the decision taken at each review…."

122. Similarly reliance is also placed by the Claimant on paragraphs 63 and 73 in the speech of Lady Hale and paragraphs 79 – 86 in the speech of Lord Kerr on the basis of which it was submitted that the proposition that a failure to review is a public law error will sound in damages is based on high principle related to the rule of law rather than on narrow arguments as to the construction of Schedule 3 of IA 1971.

123. It is clear from paragraph 53 of *Muqtaar* that it concerned the lawfulness of detention pursuant to paragraph 2(3) of Schedule 3 of the IA 1971 in circumstances where the claimant was already in detention by virtue of paragraph 2(2) when the deportation order was made. It too, therefore, is not a paragraph 2(1) case.

124. Richards LJ reviewed the line of Administrative Court authorities and, after quoting from paragraphs 88 and 89 of the judgment of Stanley Burnton LJ in *WL (Congo)* and referring to the analysis of Burnett J in *MI (Iraq)* and Bean J in *Choy* and Cranston J in *Solomon*, he continued as follows:

> "56. *The Choy* and *Solomon* cases were both cases where there had been a recommendation for deportation and the original detention had therefore been by virtue of para 2(1). Miss Anderson's submission, as I understand it, is that the same effect is to be attributed to the parenthesis in para 2(3) in the case of a person originally detained by virtue of para 2(2) (though it will be apparent that a possible point of distinction is that the origin of detention in such a case is a *discretionary* decision of the Secretary of State).
>
> 57. Whatever attractions that line of argument might otherwise have, in my judgment it cannot survive the Supreme Court decisions in *Lumba [2012] 1 AC 245* (itself on appeal from the Court of Appeal ([2010] 1 WLR 2168) and the *Kambadzi case [2011] 1 WLR 1299*.
>
> 58. The Appellants in the *Lumba case* were detained originally under para 2(2) of Schedule 3 of the 1971 Act but this became detention pursuant to para 2(3) on the making of the deportation orders against them. The court held that their detention was unlawful and that they had a claim in false imprisonment because the Secretary of State's decision to detain and to maintain detention was vitiated by reliance on an unlawful, unpublished policy. The court rejected an argument that the Appellants could not succeed in false imprisonment because the unlawful policy had no causative effect, in that their detention would have been inevitable if the decision had been taken lawfully: that point was held to go only to the quantum of damages. Lord Dyson JSC, with whose judgment the majority of the court agreed, made clear at para 68 that it is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment: "the breach of public law must bear on and be relevant to the decision to detain". When commenting on an illustrative case where a claim would lie, he said, at para 69, that the detainee in that case was the victim of

"a material public law error" which was "relevant to the decision to detain him" and "was capable of affecting the decision to continue to detain him and did in fact do so". In holding that the decision to detain the Appellants was tainted by public law error in the sense described, he drew no distinction between their original detention under para 2(2) and their later detention pursuant to para 2(3), although it is clear from para 55 that he was aware of the words in parenthesis in para 2(3).

59. The Secretary of State did not contend in terms in the *Lumba* case that, as a matter of statutory language, continued detention is authorised by the parenthesis in para 2(3) until such time as the Secretary of State takes a decision to release, and that the statutory authority remains effective even if a decision not to release is vitiated by a material public law error. Such a contention, however, is simply inconsistent with the court's reasoning and conclusion.

60. That is confirmed by consideration of the *Kambadzi* case, in which the court, applying the *Lumba* case, held that the Appellant's detention was rendered unlawful by the failure to carry out monthly reviews of detention in accordance with the Secretary of State's published policy. Here too the original detention was under para 2(2) but was continued under para 2(3) following the making of the deportation order. Lord Hope of Craighead DPSC, with whose judgment the majority of the court agreed, made express reference to this when formulating the issue before the court at [2011] 1 WLR 1299, paras 34-35:

> "34 . . . Until 24 August 2007, when the deportation order was made and served on the Appellant, the Appellant was being detained under paragraph 2(2) pending the making of a deportation order. From that date onwards he was being detained under paragraph 2(3) because he had not been released on bail and the Secretary of State had not directed otherwise. On the other hand Mr Tam [for the Secretary of State] accepts that the breakdown in the system was a breach of duty owed by the Secretary of State to the Appellant in public law. The Appellant could have obtained a mandatory order at any time requiring the reviews to be carried out if he had asked for this.
>
> 35. The focus of attention therefore is on the authority to detain. Is the review essential to the legality of the continued detention? Or is it a sufficient answer to the claim for damages for the Secretary of State to say that, unless and until he directed otherwise, the authority to detain is there throughout in terms of the statute?"

61. Lord Hope DPSC referred to *R (Nadarajah) v Secretary of State for the Home Department* [2004] INLR 139 as showing that lawful authority for an executive power of detention may be absent when there is a departure from the executive's

published policy. He accepted that the published policy in *Nadarajah* entitled the detainee to release because it narrowed the grounds on which the power of detention was exercisable, whereas the policy in *Kambadzi* was concerned not with the grounds for detention but with procedure, in providing for review at regular intervals. He continued:

> "41 . . . But I do not think that this difference means that *Nadarajah's* case offers no assistance in this case. On the contrary, it seems to me to indicate that a failure by the executive to adhere to its published policy without good reason can amount to an abuse of power which renders the detention itself unlawful. I use this expression to describe a breach of public law which bears directly on the discretionary power that the executive is purporting to exercise . . . .
>
> 42 . . . The published policy narrowed the power of executive detention by requiring that it be reviewed regularly. This was necessary to meet the objection that, unless it was implemented in accordance with a published policy, the power of executive detention was being applied in a manner that was arbitrary. So it was an abuse of the power for the detainee to be detained without his detention being reviewed at regular intervals. Applying the test proposed by Lord Dyson JSC in *Lumba*, it was an error which bore on and was relevant to the decision to detain throughout the period when the reviews should have been carried out . . . ."

62. He engaged in further discussion of the issue at paras 49ff, where he made clear once more that he was considering detention under para 2(3) as well as under para 2(2). For example, he said at paras 50-51 that the initial decision to detain will be held to be lawful if it is made under the authority of the Secretary of State pending the making of a deportation order; but it cannot be asserted, in the light of what was said in ex parte *Hardial Singh*, that the initial decision renders continued and indefinite detention lawful until the deportation order is made, whatever the circumstances; nor can it be said that it has that effect after the deportation order is made and the person is being detained under para 2(3). The authority that stems from the initial detention is not unqualified. The question is "whether the published policy is sufficiently closely related to the authority to detain to provide a further qualification of the discretion that [the Secretary of State] has under the statute": para 51. He went on to answer that question in the affirmative, holding that the review provisions in the policy were "limitations on the way the discretion may be exercised": para 52"

63. Again, it appears that the Secretary of State did not contend in terms in *Kambadzi* that continued detention was authorised by the parenthesis in para 2(3) despite the failure to apply the policy; and it may be said that Lord Hope DPSC's references to a "discretion to detain" beg the question that arises in relation

> to the parenthesis. Again, however, it seems to me that the contention is simply inconsistent with the court's reasoning and conclusion.
>
> 64. It follows that if the present claimant is able to show that the decisions to maintain his detention were vitiated by public law errors in the sense described in *Lumba*, he will succeed in establishing that detention was unlawful and will have a claim in false imprisonment. I refer to "decisions" because Mr Husain contended, and Miss Anderson did not dispute, that the decision reached at each monthly detention review was a separate decision amenable in principle to challenge on public law grounds."

125. What is said by the Claimant is that the court in *Muqtaar* expressly held, as part of the ratio of the case, that the detention pursuant to the parenthetic part of paragraph 2(3) does not preclude a challenge to the authority for detention on the grounds of public law error and that that decision is binding on this court so that the defence fails in respect of the period of detention after the making of the deportation order and the publication of the new policy relating to FNPs. Moreover, it is said that the rationale of paragraph 64 of *Muqtaar* must apply equally to detention under paragraph 2(1) and detention under paragraph 2(3) as when that detention follows a detention under paragraph 2(2).

126. The Defendant, by contrast, submits that the Court of Appeal only decided that the line of Administrative Court authorities relied upon by the Defendant did not apply where, in contrast to the present case, the Claimant's original detention was under paragraph 2(2) and thereafter paragraph 2(3) and that the only sustainable position was that what goes for paragraph 2(3) following paragraph 2(2) must go for paragraph 2(3) following paragraph 2(1).

127. For my part, I accept the submissions made on behalf of the Defendant. As it seems to me the Supreme Court cases of *Lumba* and *Kambadzi* and *Muqtaar* in the Court of Appeal were plainly not concerned with paragraph 2(1) but paragraph 2(2) of Schedule 3 to IA 1971 and the whole of the analysis in those cases is predicated on the warrant for detention deriving from the discretionary exercise of the power of detention rather than from the statute itself.

128. As Elizabeth Laing QC put it in *BA* having reviewed the effect of the Supreme Court decisions in *Lumba* and *Kambadzi* at paragraph 157:

> "Neither the decision in *Lumba*, nor that in *Kambadzi*, was concerned with detention under para 2(1). In my judgment, where the warrant for detention is not the exercise of a statutory power, but derives from the statute itself, it is difficult to see how a failure to follow a policy can undermine the statutory warrant for detention. There is such a warrant unless and until the Secretary of State takes a lawful decision to release a detainee. But, if I am right about the effect of the *Hardial Singh* principles, and if the court decides that detention breaches

> them, that will destroy the statutory warrant for detention, and will found a cause of action in tort."

129. Whilst her conclusions about the effect of the *Hardial Singh* principles do not bear close analysis, that does not to my mind detract from the force of her conclusions on the effect of the statutory warrant. Neither the Court of Appeal in *Muqtaar* nor the Supreme Court in *Lumba* and *Kambadzi* suggested that the reasoning in *WL Congo* and the line of Administrative Court cases which followed so far as paragraph 2(1) is concerned was flawed notwithstanding that the distinction drawn in the cases was identified. Had the Supreme Court or the Court of Appeal considered that the separate treatment in respect of paragraph 2(1) in *WL Congo* and the subsequent line of cases was wrong they would surely have said so.

130. Counsel for the Claimant put forward a number of additional points in support of his argument that the Defendant's reliance on the paragraph 2(1) argument, if I may so describe it, was wrong. Thus it was said that the Defendant's acceptance that the *Hardial Singh* principles apply exposed what was described as a fatal inconsistency in the Defendant's case since there could be no principled distinction between those species of public law error in deciding to detain identified in *Hardial Singh* and other recognised species of public law error capable of vitiating a decision to detain such as for example a failure to follow a published policy. If paragraph 2 (1) operated as a defence to detention being vitiated by some public law error, it must operate in respect of them all. Thus far I agree. The argument continues that any proposition by the Defendant that the terms of the statute precluded the application of the *Hardial Singh* constraints would be a radical innovation which would imply that numerous cases in which those principles had been applied to a person subject to a court recommendation for release were wrong. Here I would part company with the argument. It is not, in my judgment, a radical innovation to say that the terms of the statute preclude the application of the *Hardial Singh* principles. After all, that is exactly what happened in *Solomon* in paragraph 42.

131. Nor, to my mind is there any merit in the argument that such an interpretation leads to a divorce between right and remedy since it does not undermine the existence of the *Hardial Singh* principles. Moreover, and notwithstanding the submission of Counsel for the Claimant to the contrary, nor does the Defendant's interpretation negate the necessity for consideration of individual circumstances because in a detention under paragraph 2(1) the power derives from the recommendation of the sentencing court and individual consideration will be given by the sentencing court before recommending deportation.

132. It is also said that the interpretation contended for by the Defendant would render the power contrary to Article 5 such that the court is required not to read the statute in that way. However as it seems to me, there is nothing in Article 5 or indeed the common law that prevents a statutory presumption provided of course that the detention is sufficiently closely connected with the purpose of removal. Moreover, the presumption arises directly from primary legislation and if paragraph 2(1) requires detention in such cases and cannot be read down, as it cannot, under section 3 of the 1998 Act then, even if a statutory duty were incompatible with Article 5, I would have to give effect to it in any event.

133. It follows in my judgment that the Claimant, having been recommended for deportation by the sentencing court, was detained pursuant to a statutory warrant under Schedule 3 of the IA 1971 and no claim for damages lies. That is sufficient to dispose of this claim in its entirety. Nevertheless I will go on to deal with grounds two and three albeit shortly.

GROUND TWO

134. The relevant guidance is contained in Chapter 55.3.2.2 of the Defendant's. Enforcement Instructions & Guidance (EIG). The relevant extract states:

> "Any decision not to detain or to release a time served foreign national offender on restrictions must be agreed at Grade 7/Assistant Director level and authorised by the UK Border Agency's Chief Executive or board member deputising in her absence. Cases should be referred on the form below, which should cover all relevant facts in the case history, including any reasons why bail was refused previously. If it is proposed to release a serious criminal to rejoin a family including dependent children under the age of 18, advice should have been sought from the Office of the Children's Champion and it is likely that a referral to the relevant local authority children's service will be necessary."

135. To my mind there is nothing in the suggestion that the Defendant's policy was incapable of being applied lawfully. Nothing precluded regular reviews to ensure that detention continued to be justified in the light of the relevant common law principles and published policy. The requirement for senior review of release was not in my judgment an unduly bureaucratic measure. Its purpose was to ensure that the release of foreign national prisoners who might have committed serious criminal offences was approved at an appropriate level of seniority.

136. Where there is scope for criticism is in the way in which the policy was operated in this case. Thus it was submitted on behalf of the Claimant that during the entirety of the detention of the Claimant, his detention was not once considered by an official with authority from the Defendant to release him. Moreover the practice was that the Claimant continued to be detained in spite of the recognition by various officials that continued detention was no longer justified and the review of the Defendant's documentary evidence at paragraphs 18 to 91 above illustrates that caseworkers with responsibility for the Claimant's case and senior officials at Assistant and Deputy Director level also raised concerns about the Claimant's continued detention and sought that requests for referrals be made to the CEO so that release could be considered at various detention reviews.

137. Particular reliance is placed on three such detention reviews namely those which took place on the 3rd February 2009 (2/230) (see para 27 above) the 11th November 2009 (2/355) (see para 47 above) and the 24th December 2009 (2/383) (see para 51 above). Notwithstanding what was said in these reviews, it is common ground that at no stage during the Claimant's detention was a referral made to the CEO for release.

138. On this aspect, I accept the force of the submissions made by Counsel for the Claimant and was wholly unpersuaded by Counsel for the Defendant's submission that Mr Nancekivell-Smith who was involved in some of the reviews was someone with authority to release on the basis that it was submitted that he was a "board member" within the meaning of chapter 55.3.2 of the EIG in the absence of any proper evidence in support of that proposition put forward for the first time by counsel at the substantive hearing. But for the effect of my conclusions under ground one, therefore, I would have accepted that ground two was made out in that the Defendant acted in breach of its policy as no referrals were in fact made to the CEO for consideration in circumstances where it was considered that the Claimant should be considered for release.

GROUND THREE

139. On this ground what is said by the Claimant is that by the 29th September 2009 or alternatively at some point thereafter but prior to the Claimant's actual release, it had become apparent to the Defendant that there was no prospect of establishing Jamaican nationality and therefore of effecting removal within a reasonable period. An impasse had been reached and there was no evidential basis for supposing that the stalemate would be broken within a reasonable period or indeed at all so that the Claimant's detention became unlawful by virtue of the third *Hardial Singh* principle as well as the second *Hardial Singh* principle on the basis of the length of the detention.

140. It was the Claimant's submission that he did co-operate and that by non co-operation what was really meant was that the Claimant was unable to provide evidence to support the Defendant's theory that the Claimant was in fact Jamaican, an assertion which the Claimant disputed.

141. To my mind, the Defendant was plainly entitled to conclude that the Claimant had failed to co-operate with his removal and was at risk of absconding having regard to all the circumstances of this case including but not limited to the following:

(1) As recorded in the sentencing Judge's remarks, the Claimant had admitted in the course of the criminal proceedings that he came from Jamaica.

(2) The Claimant made no suggestion in the course of the criminal proceedings that he was a UK citizen.

(3) The Claimant did not appeal the sentencing Judge's recommendation that he be deported, the consequence of which is clearly provided for by section 6 (5) of IA 1971.

(4) The AIT made an unequivocal finding of fact that the Claimant was a Jamaican citizen and concluded that his attempt to deny the same was implausible and was expressly rejected and indeed a number of findings were made as to his connection with the United Kingdom and again the Claimant did not seek to appeal that decision.

142. That said, the question arises as to whether there was throughout the Third Period a prospect of removal within a reasonable period. As it seems to me, although steps were being taken to obtain and verify the Claimant's identity and nationality in order

to effect his removal, the fact of the matter is that by the end of April 2010 it was or should have been plain both that no ETD would be issued by the Jamaican High Commission without proof of identity and that the Claimant was not going to provide such proof. Nor, given the passage of time was any further information casting any light on the Claimant's nationality likely to emerge albeit that a number of attempts to follow up possible lines of enquiry were made. In my judgment, by that stage, it should have been apparent to the Defendant that there was no prospect of removal within a reasonable period. In common with Foskett J in *R (on the application of) Rostami v SSHD* [2009] EWHC 2094(QB*)* I do not reach that conclusion with much enthusiasm since in my judgment it is the Claimant's own failure to co-operate which has led to it. However, but for the effect of my finding on ground one therefore and allowing a reasonable period of time to enable the Defendant to review her position in the light of her understanding of the position of the Jamaican High Commission, I would declare that the Claimant's detention from 1st June 2010 until the date of his actual release was unlawful although he might well face a formidable argument that his own recalcitrance was the true cause of any loss. Until the decision of the Jamaican High Commission was appreciated, as it seems to me the Defendant, faced with a non co-operative Claimant should be afforded a good while in which to investigate whether arrangements for his removal could be made and until that date I am satisfied that the Defendant has proved on the balance of probabilities that there was a reasonable prospect of securing the Claimant's removal within a reasonable period.

CONCLUSION

143. It follows in my judgment that the Claimant's claim for damages should be dismissed.

144. Subject to receipt of any submissions to the contrary, it seems to me that costs should follow the event and the Claimant should pay the costs of and occasioned by the application for Judicial Review, such costs to be the subject of detailed assessment if not agreed.

145. I trust that the parties will be able to agree the terms of an Order that reflects the substance of this Judgment.

146. Finally I would like to take this opportunity to express my gratitude to both Counsel for the way in which they both conducted the trial and for their very helpful skeleton arguments.