Case No: 9CL10515

IN THE CENTRAL LONDON COUNTY COURT

26-28 Park Crescent
London W1N 3PB

Date: 13/03/2012

Before :

HER HONOUR JUDGE GUGGENHEIM QC

- -

Between :

"AM" **Claimant**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

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- -

Mr G Denholm (instructed by **Bhatt Murphy Solicitors**) appeared for the Claimant
Mr M Barnes (instructed by **The Treasury Solicitor**) appeared for the Defendant

Hearing Dates 31 October, 1 November, 2 November and 5 December 2011

JUDGMENT

Her Honour Judge Guggenheim QC:

Page references are to the trial bundles: [trial bundle number/page number]

1. By a Claim Form issued on 23 December 2009 and Particulars of Claim served on 5 November 2010, the Claimant ("C") claimed declaratory relief and damages, including aggravated and exemplary damages, alleging against the Defendant ("D") false imprisonment of C between 30 November 2007 and 14 January 2009; misfeasance in public office; breaches of articles 5, 8 and 14 of the Human Rights Act 1998; breaches of the Data Protection Act 1998; and negligence, arising out of the conduct of officials of the United Kingdom Border Agency ("UKBA"), under D's direction and control, between 30 November 2007 and 14 January 2009.

2. During the hearing I received very helpful written arguments, as well as oral submissions, from Mr Denholm and Mr Barnes. I heard evidence from C; and from the following officials of UKBA: Mr John McGirr, Senior Executive Officer in the Specialist Appeals Team, Mr Graham Chapman, Immigration Inspector in the Criminal Casework Directorate (equivalent to SEO grade) and Mr Kieran Kennedy, Executive Officer in the Criminal Casework Directorate. At the conclusion of the hearing I reserved judgment. After

reading the judgment of Mitting J in *Othman v SSHD [2012] UKSIAC B1* given on 6 February 2012, I invited further written submissions from the parties, which I received on 23 February 2012.

THE CLAIMANT'S IMMIGRATION AND DETENTION HISTORY

3. C is a national of Zimbabwe, now aged 29. He entered the United Kingdom with a visitor's visa on 15 September 2001 and was thereafter granted leave to remain as a student until 31 August 2004. An application to extend this leave was refused on 8 October 2004; and an appeal against that decision was dismissed on 15 March 2006. Thereafter C remained in the UK unlawfully, as an overstayer. He failed to remain in contact with UKBA and took no steps to regularise his stay. Mr Chapman's evidence was that had he maintained contact with UKBA, C would have been placed on reporting restrictions. As it was, his whereabouts were unknown to the authorities until his arrest about a year later.

4. On 30 May 2007 at Snaresbrook Crown Court C pleaded guilty to an offence of robbery, having been remanded in custody by Stratford Magistrates' Court on 31 March. On 30 March 2007, he had forcibly snatched a woman's handbag, in the street, at night time. He had been employed at Sainsbury's in Golders Green, London, at the time but had gambled away his monthly wages. He admitted the offence during interview with the police and showed the police where the incident happened and where the victim's property was. The property was recovered. C was sentenced to 16 months imprisonment. The sentencing judge did not recommend his deportation; nor was he liable to automatic deportation, as the UK Borders Act 2007 did not come into force until 1 August 2008.

5. A Pre-Sentence Report dated 24 July 2007, which included an OASYS assessment, concluded that the risk of C re-offending or causing serious harm was low. The sentencing judge concluded that C was not dangerous, within the meaning of section 229 of the Criminal Justice Act 2003 (ie that he did not pose a significant risk of causing serious harm to others by the commission of further violent offences). In the course of the trial Mr Barnes, on behalf of D, did not contest these assessments, although he did draw attention to the PSR author's finding that risk would increase if C did not address his gambling habit or if he were in financial need.

6. On 24 October 2007, anticipating C's expected release date of 30 November 2007, D served C with a Notice of a Decision to make a Deportation Order. On 27 November 2007 C's detention under paragraph 2 of Schedule 3 of the Immigration Act 1971 was authorised by a Form ICD.0257, and a letter was prepared giving reasons for C's detention, stating that he was to be detained because he was likely to abscond if granted temporary admission or release, and in order to effect his removal from the UK. A Minute of the decision to detain dated 29 November 2007 recorded that detention was proposed since C had been convicted of a serious criminal offence; lacked a fixed abode or family ties; was unlikely to comply with reporting restrictions; and would abscond.

7. As a result C was not released on 30 November 2007. He remained in detention until being granted bail by the Asylum and Immigration Tribunal ("AIT") on 14 January 2009. C had made two previous applications for bail, on 26 August 2008 and 11 November 2008; these applications were refused, on the grounds that C had no incentive to comply with bail conditions and was considered an absconding risk. It is common ground between the parties that the grant of, or refusal of, bail by the AIT is not determinative of whether or not detention is lawful. Since being granted bail C has complied with a reporting condition, initially to report twice-weekly; this has since been reduced to weekly and then monthly reporting.

8. Two matters of Home Office policy, which affected the conduct of UKBA officials during the period of time to which this claim relates, are relevant. First, in July 2005 the then Secretary of State for the Home Department had given an undertaking to the High Court not to carry out enforced removals to Zimbabwe of persons liable to be deported to that country. This suspension of enforced removals to Zimbabwe remained effective (save for a brief period in July and August 2006) until October 2010, when D announced her intention to recommence enforced removals. The suspension applied only to enforced removals; voluntary removals were unaffected and continued during the period to which these proceedings relate.

9. Second, in April 2006 there was concern that UKBA had "lost track", after their release from custody, of significant numbers of foreign nationals who had received custodial sentences for serious offences and were liable to be deported after serving those sentences. The Secretary of State at the time instituted the operation of an unpublished policy of detaining foreign national prisoners who were liable to deportation and had been convicted of certain specified offences, such that they remained in administrative detention awaiting removal, after the time when they would otherwise have been entitled to be released from prison. This policy was the subject of consideration by the Supreme Court in *Lumba (WL) v SSHD [2011] UKSC 12 [2011] 2 WLR 671* and held to be unlawful. For the sake of brevity I shall refer to this policy as the "blanket detention" policy. This policy ceased to operate on 9 September 2008, when D introduced amendments to Chapter 55 of the UKBA Enforcement Instructions and Guidance ("EIG") (these are set out in the Particulars of Claim at 1A/13; EIG 55 is at 3/tab 4).

10. Relevant parts of D's *published* policy on the use of detention pending removal are quoted at paragraph 31 of the Particulars of Claim, (1A/12) drawn from Chapter 33 of the operations and enforcement manual ("OEM") and subsequently Chapter 55 of the EIG. Relevant changes to the published policy which took effect in September 2008 are quoted at paragraph 32 of the Particulars of Claim (1A/13-15).

11. C appealed the order for his deportation, asserting that he would be at risk on return to Zimbabwe because of family connections to the opposition Movement for Democratic Change party ("MDC"). His appeal was dismissed by the AIT on 16 January 2008 and all appeal rights were exhausted on 24 January 2008. The Tribunal noted that he had not claimed asylum until after being served with notice of deportation; and found that there was no

independent evidence that his brother was a member of MDC, or that he had died, as C contended; that C did not fall within the risk categories identified in the then current country guidance; and that he would not face risk on return as an asylum seeker. On 23 February 2008 C completed a written application to return voluntarily to Zimbabwe, under the Facilitated Returns Scheme ("FRS").

12. In March 2008 elections took place in Zimbabwe, accompanied by violence, which worsened thereafter. On 14 April 2008 C withdrew his agreement to voluntary return, asserting that he would be at risk of persecution and/or serious harm if returned to Zimbabwe. C made further representations on his asylum claim in April and June 2008, which were rejected.

13. On 22 May 2008 Ms Anna Pitt, a Deputy Director of UKBA, summarised the position regarding removals to Zimbabwe thus, in an email to Mr Chapman and other senior officials, following meetings of senior officials on 20 and 21 May [2B/226A]:

"Zimbabwe: The current legal position means that we are still unable to enforce removal; voluntary returns are therefore the only viable route for deporting ZWE nationals at present."

14. C did not appeal the rejection of his fresh representations. Mr Barnes, for D, drew attention to the fact that, since the exhaustion of his appeal rights on 24 January 2008, although he had made further representations, C had had no appeal outstanding regarding his immigration status. C also requested, and was refused, temporary admission. In a letter of refusal dated 1 August 2008, D stated *"at present there are no immediate plans to return [C] to Zimbabwe"* and *"we have no plans to return [C] to Zimbabwe until the courts state that it is safe to do so."*

15. On 12 November 2008 a deportation order was signed, but not served on C until December 2009. At paragraph 12 of the Defence (1A/24) it was pleaded that it was not served because D considered that she was obliged to reconsider C's case in the light of the decision in *RN* (below).

16. On 18 November 2008 the AIT promulgated its determination in the Country Guidance decision *RN (Returnees) Zimbabwe [2008] UKAIT 00083 ("RN").* The AIT held that asylum seekers returned to Zimbabwe would face a real risk of serious harm, and thus were entitled to a grant of asylum or subsidiary protection, unless they could demonstrate loyalty to the ruling ZANU(PF) regime. It is common ground between the parties that the application of this guidance to C's case would have resulted in the grant to him of some sort of leave to remain.

17. C again applied for release on temporary admission on 26 November 2008; this was refused on 4 December 2008. C's solicitors made further representations relying on *RN* on 5 December 2008. There are email exchanges around this time indicating that officials were expecting a grant of leave of some sort to C. On 31 December 2008 D served notice excluding C from the protection of the Refugee convention. This notice was subsequently

abandoned. On 8 January 2009 C applied again for release on temporary admission, which was refused by a letter dated 9 January 2009. C's detention came to an end on 14 January 2009 when he was granted bail by the AIT. In February 2009 a grant of 6 months' leave to remain was approved by a chief caseworker, but then reconsidered on 6 April 2009, in the light of revised Operational Guidance, and rendered void. C then made a fresh asylum claim which was processed, and refused, by a decision dated 17 December 2009. An appeal to the First Tier Tribunal was dismissed on 22 February 2010. Permission to appeal to the Upper Tribunal was given on 15 March 2010; this appeal remains outstanding.

THE CHALLENGE TO THE DECISION TO DETAIN/ CONTINUE DETENTION

18. In the Amended Defence dated 14 June 2011 (1A/32 @35) D admitted that the effect of the application of the unpublished blanket detention policy was to render C's detention unlawful from its inception on 30 November 2007 until 9 September 2008, when the (amended) published policy came into operation. D contends, however, that had the blanket detention policy not been in operation, and had D's published policies been applied throughout , a lawful decision to detain C pending removal could and would have been made. It is agreed between the parties that D bears the burden of proving that C's detention could have been lawfully justified; and that the present state of the law is that, in the event that D succeeds in discharging this burden, C would be entitled only to nominal damages for false imprisonment.

19. In the Particulars of Claim, C's primary case [1A/16] was that, had the blanket detention policy not been applied to his case, C's detention would in any event have been unlawful from the outset, because it was or should have been apparent to D, in view of D's policy of not effecting forced returns to Zimbabwe, and the fact that there was no prospect of an end to that policy, that D had no realistic prospect of effecting C's removal within a reasonable period of time. Detention in these circumstances would not, it is said, have been in compliance with the third of the four principles identified by Dyson LJ (as he then was) in *R(I) v SSHD [2002] EWCA Civ 888* (the *Hardial Singh* principles)*:*

"(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose.

(ii) The deportee may only be detained for a period that is reasonable in all the circumstances.

(iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention.

(iv) The Secretary of State should act with reasonable diligence and expedition to effect removal."

20. C's case had developed somewhat by the start of the trial. In his skeleton argument for the trial, and in his opening submissions, Mr Denholm conceded that, had the blanket detention policy not been in operation, D could have made a lawful decision to detain C from 30 November 2007 onwards, pending the making of arrangements for his removal. In his supplementary skeleton argument Mr Denholm accepted that there was some risk of C absconding, if released; and that this, together with the fact that D was reasonably entitled to believe C might imminently depart voluntarily, meant that there was sufficient prospect of removal to justify detention until 14 April 2008. He submitted, however, that the situation changed significantly once the violence in Zimbabwe worsened after the elections in March 2008 and C, on 14 April 2008, withdrew his agreement to being returned there voluntarily under the FRS. It is from this point onwards, Mr Denholm argued, that continued detention became unlawful, because there then ceased to be a realistic prospect that C would be removed within a reasonable period of time.

21. The concession in relation to the 125 days' detention between 30 November 2007 and 14 April 2008 was a sensible one, given that C, having been served with notice of deportation in October 2007, had neither said nor done anything to suggest that he would refuse to return voluntarily and indeed, in February 2008, he had expressed a willingness to return voluntarily under the FRS. In these circumstances, the continuing suspension of enforced removals to Zimbabwe would have been no impediment to C's removal between 30 November 2007 and 14 April 2008.

22. C's case as presented at the trial was therefore that from 14 April 2008 onwards there was no lawful justification for his detention. Put briefly, C's argument is that, between April 2008 and January 2009, it was obvious that the situation in Zimbabwe was deteriorating and that the clear meaning of Ministers' statements to Parliament at the time (quoted at paragraph 40 below) was that failed asylum seekers were not going to be forced to return to Zimbabwe, until such time as the situation there stabilised. Put another way, during this period there was no end in sight to the policy of suspension of forced removals, and no timescale could be envisaged within which forced removals were likely to recommence. More generally C alleged that his detention was unlawful because it endured for a period of unreasonable duration, particularly in the light of the low assessed risk of his reoffending or causing serious harm. Mr Denholm submitted that the risk of absconding, such as it was, could have been managed satisfactorily with the monitoring tools at D's disposal.

23. D's case, set out at paragraph 19 of the Amended Defence, (1A/35) , in Mr Barnes' skeleton argument and during the trial, was that the following factors justified C's initial and continued detention:-

    (a) A high risk of C absconding

    (b) C's failure to comply with immigration controls

    (c) The fact that C had remained as an overstayer for a substantial period of time without contacting the authorities

(d) The fact that C had committed a serious criminal offence

(e) The risk of C re-offending and causing harm to the public (as mentioned above, Mr Barnes drew attention to the finding in the Pre Sentence Report that C would present a significant risk of committing further similar offences, should he fail to address his gambling problem or get into financial difficulties)

(f) C's lack of strong family ties in the UK

(g) C's refusal to consent to voluntary repatriation

(h) C's behaviour in custody.

24. In relation to compliance with the *Hardial Singh* principles, D's case (see the Amended Defence paragraphs 22-26, 1A/37-38) was, in summary, that

(a) There can be a realistic prospect of removal without it being possible to specify or predict the date by which, or the period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all (relying on *R (MH) v SSHD [2010]EWCA Civ 1112*)

(b) There was a *sufficient* prospect of removal to warrant C's initial and continued detention

(c) C's detention was a product of his own making: the risk of absconding, and his refusal voluntarily to return, strongly favoured its continuation

(d) C's deportation was the genuine purpose of his detention (and not, as alleged, a wish to pressurise him into agreeing to voluntary repatriation.)

25. Mr Barnes accepted on behalf of D that compliance with the *Hardial Singh* principles plainly called for C's detention to be reviewed after the promulgation of the Zimbabwe country guidance case, *RN*, in November 2008 (since, were he to fall within the category of those at risk on return, he would be entitled to some sort of leave to remain); but that the six weeks which then elapsed until C was released on bail was not an unreasonable period during which to maintain detention, whilst the decision in *RN* was digested and incorporated into guidance for UKBA officials, enabling them to form a judgment as to whether it was likely to result in a grant of leave to C. C made a fresh application for leave to remain in the wake of *RN* and D – reasonably, it is said – regarded the question of his future detention or release as dependent upon the outcome of that application.

REVIEWS OF THE CLAIMANT'S DETENTION

26. During the period of C's detention, D's published operational policies required that his detention be reviewed at specified intervals, giving on each occasion *"robust and formally documented consideration"* to his removability; and that an officer of specified seniority authorise continued

detention, if appropriate. Written reasons were to be issued to the detainee in a Monthly Progress report (Form IS151F).

27. It is not in dispute that D wrongly failed to carry out reviews on the following dates: days 1,7,14, and 21; and months 3 and 4. D admitted in the Amended Defence that the failure to carry out reviews rendered C's detention unlawful between days 1 and 43, and during months 3 and 4. (1A/37 para 21). D's case is that C is entitled only to nominal damages for these errors, since if reviews had been carried out, D could lawfully have ordered the continuance of C's detention.

28. C's detention was reviewed by officials on 12 January 2008. They recommended that detention be maintained because of the risk of absconding. In the record it is noted that although removals to Zimbabwe were not at that time in effect, C could not be relied upon to comply with restrictions imposed upon him if granted temporary release. The next review was carried out on 27 April 2008. It was noted that C had withdrawn from the FRS. Reasons given for maintaining detention were that C had committed a serious criminal offence; had failed previously to comply with conditions of his permitted leave; and had no incentive to maintain contact with the Home Office if granted leave. The fact that enforced removals to Zimbabwe were currently barred was noted; and C was reminded in the Monthly Progress Report that voluntary return could be arranged, with financial assistance, under the FRS. The next review, by Mr Kennedy on 3 June 2008, reached the same conclusion.

29. The official conducting the next review, on 28 June 2008, noted that a decision was expected shortly on C's latest representations on his asylum claim; that moves were to be made towards obtaining a signed deportation order if C could not be persuaded to leave voluntarily; and that detention appeared to be *"in line with current criteria whilst these matters are pursued"*. The senior reviewing official recorded that there were public safety considerations and that the previous failure to observe conditions attached to his leave indicated an increased risk of absconding.

30. Mr Kennedy conducted the next four reviews on 25 July. 27 August, 26 September and 28 October. Reasons given for continued detention were, in summary, the same as before: chiefly, the nature of the offence committed and the risk of abscond. In the September review, the senior reviewing officer, Mr David Bisgrove, suggested that the question of voluntary return should be revisited with C; failing which, a deportation order needed to be obtained for C's return to Zimbabwe *"once the situation improved sufficiently to enable an enforced removal."*

31. Until the abandonment of the unpublished, "blanket detention" policy on 9 September 2008, the above reviews were more or less an academic exercise in C's case. I accept the evidence of Mr Chapman that in his experience, the caseworkers and managers in the Leeds section of Criminal Casework Directorate ("CCD") were carrying out honest appraisals of C's detention (paragraphs 27 and 28 of his witness statement [1A/146]); but I am satisfied that, even if release upon suitable restrictions had been recommended, more

senior officials would have authorised C's continued detention, in line with the unpublished policy. I cannot therefore agree with Mr Chapman's description of reviews of C's detention before 9 September 2008 as *"meaningful"* (paragraph 28 of his witness statement [1A/147]): at least, not if he meant to suggest that they had any real influence over the decision to maintain detention.

32. Officials at the level of caseworkers and managers conducting these reviews were placed in an extremely difficult position: purporting to apply the published policy, whilst knowing that any recommendation for release would be overruled at a higher level. Mr Chapman, in oral evidence, put it mildly: *"This made many officials uncomfortable."* Senior officers were well aware of the artificiality of these procedures. As one Assistant Director of CCD put it, in an email dated 22 March 2007, quoted by Lord Dyson JSC in the *Lumba* case:

"We just detain as instructed and choose the most defendable option in our opinion." [supra @718C]

33. There was, moreover, widespread awareness amongst senior officers that the legality of the unpublished policy was in question. Lord Dyson JSC expressed agreement with the following observation of Davis J, in *Lumba*:

"...almost from day one the new unpublished policy was perceived in virtually all quarters within the department to be at least legally "vulnerable" and in some quarters positively to be untenable and legally invalid." [supra @717G]

34. Mr Chapman himself was involved in approving detention following the last two reviews, on 25 November and 22 December 2008. He concluded that continued detention remained just and proportionate because it was still expected that C would be deported, and he considered there to be a high risk of C absconding, if released. Mr Chapman stated in his witness statement, at paragraph 54 [1A/153] that he also thought that it was reasonable to consider that C might yet change his mind and return voluntarily. In the November review, he had put it more pessimistically:

"This man is from Zimbabwe and we are currently unable to enforce his return. The scheduled FRS interview for yesterday did not take place; we are trying to find out why. However he was seen at his own request by an IO on 21st November and stated then that Zimbabwe wasn't safe for him to return so it seems unlikely he will sign up for FRS at this stage. We will, though, endeavour to have him spoken to by an FRS IO as the increased amount may tempt him to go home. He has been convicted of a grave offence, and had previously failed to report as required." [1B/157]

In the December review, Mr Chapman concluded:

"It may subsequently become apparent that it will not be possible to return this man to Zimbabwe, but for the time being I am content, given the nature of

his crime and the possibility of s.72 action, as well as what I still consider to be a high risk of him absconding, that detention remains just and proportionate." [2B/88]

35. These last two monthly reviews were carried out after the promulgation of the decision in *RN*; but the question of whether the outcome of that decision would affect the prospects of deporting C was not considered. Mr Denholm submits that the reviews carried out from April 2008 onwards suffered from persistent errors and omissions: in particular, a failure to tackle in any meaningful way the difficult question of the likelihood of removing C within a reasonable timescale; persistent reliance upon the gravity of the offence committed (a largely irrelevant consideration in itself, save for purposes of the application of the unpublished policy); persistent failure to address how long the suspension of removals to Zimbabwe might continue; unevidenced assertions that C posed a threat to public safety; persistent failure to have regard to the Pre Sentence Report or the views of the sentencing judge; and repeated suggestions that lack of a travel document was an impediment to removal, when UKBA had a copy of C's passport on file.

RISK ASSESSMENT

36. The amendments to the EIG introduced on 9 September 2008 included the following, at paragraph 55.3.2.6:

"Risk of harm to the public will be assessed by NOMS unless there is no Offender Assessment System (OASYS) or pre-sentence report available."

37. D did not dispute that the caseowner responsible for reviewing C's detention after the introduction of this amendment (Mr Kennedy) erroneously failed to seek an assessment from NOMS in accordance with this policy.

ISSUES

38. Following exchange of the skeleton arguments for the trial, the following areas of agreement, and issues requiring decision, were identified by the parties:-

(1) Has D proved that, applying published policies and complying with the *Hardial Singh* principles, she could lawfully have decided to continue to detain C between 14.4.08 and 15.1.09?

(2) Has D proved that it was lawful that C's detention continued for as long as it did after the promulgation of the decision in *RN* on 18 November 2008, whilst D considered the effect of *RN*? (D contends that detention until 14 January 2009 did not extend beyond a reasonable period within which to consider the fresh representations made on C's behalf by his solicitors on 5 December 2008.)

(3) It is agreed that D is liable for falsely imprisoning the Claimant as a result of public law errors relevant to the decision to detain or maintain detention, arising from:

(a) application of the blanket detention policy, between 14.4.08 and 26.9.08; and

(b) failure to conduct reviews on days 1-43 and in months 3 and 4.

(4) C alleges that those reviews which were conducted were affected by material errors; D denies this.

(5) It is agreed that it was an error of law to fail to seek an updated NOMS assessment after September 2008: C contends that such an assessment would have led to a referral for release and was therefore causative of detention, entitling C to substantial damages regardless of the answer to (1) above. D contends that a further assessment would not have changed the decision to maintain detention and that accordingly C is entitled only to nominal damages.

(6) It is agreed that if the answer to (1) is yes, C can recover only nominal damages in respect of the errors referred to in 3(a) and (b) and - if resolved in his favour- 4 above.

(7) If the answer to (1) above is no, substantial damages fall to be assessed in respect of 3(a) and (b) above and, if appropriate, 4 and 5 above.

(8) Is C entitled to aggravated and/or exemplary damages?

EVIDENCE

39. I considered C's witness statement [1A/4], and heard oral evidence from him. I shall summarise C's evidence about his attitude to returning to Zimbabwe very briefly. He said he had been afraid of returning to Zimbabwe because his family had connections with MDC. His brother, a supporter and member of MDC, had been beaten up by, he believed, the police, who suspected him of having *"backup from white people"* because he had relatives in the UK. His brother died a few months later. This left him with no family in Zimbabwe (he still had a brother in the UK who suffered from bipolar disorder and has since died). After serving his prison sentence he was shocked to be detained without an end date. He knew that the British Government was not forcibly returning people to Zimbabwe. In early 2008 he became more optimistic about the prospects of an MDC breakthrough in the elections and, given that the alternative appeared to be indefinite detention in the UK, he signed up for the FRS. He completed the bio data forms to assist in the obtaining of a travel document from the Zimbabwean authorities on 25 February 2008. He had lost his passport (it was not disputed, however, that D held a copy of his passport). His optimism vanished after seeing media reports of the ZANU(PF) regime's violent reaction to MDC's success in the elections on 29 March 2008. He

feared that on return he would be at risk of serious harm or death at the hands of the regime because he had sought asylum in the UK. He therefore felt that he had no choice but to withdraw his agreement to voluntary removal, which he did during an induction interview at Dover immigration removal centre on 14 April 2008, following his transfer from HMP Peterborough. He then instructed solicitors to make fresh representations on his behalf, highlighting the deteriorating situation in Zimbabwe.

40. Mr Denholm also adduced in evidence the following extracts from Hansard, recording statements by Government Ministers to Parliament concerning policy on Zimbabwe, and enforced returns thereto, during the relevant period.

    (a) 31 March 2008 - Mr Byrne, Minister of State for Immigration:

    "On 29 November 2007 the [AIT] promulgated the determination that Zimbabweans who have claimed asylum in the UK and who return to Zimbabwe, voluntarily or otherwise, are not at risk of mistreatment just because they have claimed asylum in the UK or otherwise been in the UK for an extended period. The Border and Immigration Agency will continue to defer enforced returns until the application for permission to appeal the AIT's determination is disposed of."

    (b) 3 April 2008 – Lord Malloch-Brown, Minister of State, Foreign and Commonwealth Office:

    "The enforced removal of failed Zimbabwean asylum seekers was suspended, pending the outcome of the so-called AIT litigation. That position will be maintained until any and all applications for permission to appeal the determination are dealt with. In light of those current circumstances, we are of course looking at this whole issue with great care."

    (c) 28 April 2008 – Mr Byrne:

    "While there is no policy not to return to any country or territory, our ability to return may of course from time to time temporarily be affected by legal challenge. This is currently the case with Zimbabwe, where we have undertaken to the High Court that we will not enforce the return of failed asylum-seekers to Zimbabwe until the current country guidance litigation is resolved, and that remains the case."

    "We undertook to the High Court on 26 September 2006 that we would not enforce the return of asylum seekers to Zimbabwe until the current country guidance litigation is finally resolved, and that remains the case."

    (d) 7 May 2008 – Lord Malloch-Brown:

"[Asked what new policies the Government has towards Zimbabwe:]

My Lords, the Zimbabwe crisis must be resolved quickly and in accordance with the will of the Zimbabwean people. We are engaging with leaders in the region and the international community to promote a resolution, including the deployment of sufficient international observers if a second round takes place. We are pressing for a UN mission to investigate state-sponsored violence and intimidation. We are also supporting the call for a temporary arms moratorium until democracy is restored."

"[Asked to confirm that in the present situation it would be quite wrong to return Zimbabwean asylum seekers; and that none is being sent back:]

My Lords, the noble Lord is right. Several cases are currently going through an appeals process, but it has always been the case that the British Government would not want to return people to a country where conditions like this prevail."

(e) 23 June 2008 – The Prime Minister:

"[Asked to consider possible sanctions against Zimbabwe; and allowing Zimbabwean asylum seekers to work in the U:]

I agree with what the right honourable gentleman said about Zimbabwe. All of us are appalled by the violence taking place, and all of us are looking for a way forward. Each asylum case is dealt with on an individual basis, but I will consider what he has said about that. However, he must agree that the priority is to see an end to the violence in Zimbabwe and a way forward that allows democracy to be properly in existence there, and then, once democracy is restored, to see how we can help with the reconstruction of that country."

(f) 30 June 2008 – Lord Bach, Foreign and Commonwealth Office Spokesman in the House of Lords:

"My Lords, it is clear to the world that the so-called election last Friday was a complete sham and that, as African observers have already said, it did not reflect the will of the people. It is not surprising that Morgan Tsvangirai and the MDC felt that they had to withdraw, given the horrendous levels of violence and intimidation. We will continue to press for a resolution that reflects the political choice of the people as they voted on 29 March."

"My Lords, on asylum, I make it clear that we have no current plans to enforce returns to Zimbabwe and will not do so until the current political situation is resolved."

(g) 10 July 2008 – The Prime Minister:

"[Referring to the exchange on 23June, quoted at (e) above:]

The right honourable gentleman did raise with me the question of people seeking asylum from Zimbabwe, and I did say that we dealt on a case-by-case basis with the right to asylum, and that is still the policy. However, I can confirm that no one is being forced to return to Zimbabwe from the United Kingdom at this time – no one. I can confirm also that we are actively looking at what we can do to support in this country Zimbabweans who are failed asylum seekers, who cannot work and who are prevented from leaving the UK through no fault of their own ... However, I repeat to the right honourable Gentleman that no one is being forced to return to Zimbabwe at the present time."

41. Much of Mr Chapman's witness statement [1A/142] was concerned with explaining C's immigration history and the history of his detention. At paragraph 53 onwards he addressed the question of what decisions would have been made, had the blanket detention policy not been in operation. He stated that he believed that both he and the other decision makers involved in C's detention would, in all probability, have recommended or authorised his continued detention on the basis that there was a high risk of him absconding, and because it was reasonable to consider that he might change his mind and return voluntarily. As to the timescale for an enforced removal of C, Mr Chapman stated [1A/153]:

"The situation regarding removals to Zimbabwe was not viewed as being a permanent state of affairs. The situation was being constantly monitored with a suggestion that we may be able to resume returns to Harare at any time.

...

"At the time the Claimant was detained UKBA was awaiting resolution of the various country guidance cases involving Zimbabwe. As I recall, the view at the time was that positive result [sic] in those cases, especially in RN, would have enabled enforced returns to resume."

42. During his oral evidence Mr Chapman's attention was drawn to the statement of Lord Bach to Parliament on 30 June 2008, quoted at paragraph 40(f) above. He was asked whether the rational view was that, after the March 2008 elections, there was no end in sight to the suspension of removals. His answer was that the situation was certainly deteriorating by June 2008; and that by the date of the decision in *RN* the view of the Tribunal was clearly that there was no end in sight. He was unable to comment on the failure to conduct reviews in the early stages of C's detention, as until April 2008 the case was managed from casework in Croydon; save to say that, in his view, the failures were the result of incompetence and overwork, rather than policy. Asked about the relevance of C's withdrawal from the FRS, he said that he had thought that C might yet change his mind. He agreed that, with hindsight, it was clear that C would not have changed his mind, but at the time it was, in his view, a

possibility. He agreed that detention would be a big factor in making an individual more likely to agree to voluntary removal; but added that he would not have considered extending detention for that reason, as this would not be fair. He agreed that the gravity of the detainee's offence was not in and of itself a factor, unless there was a risk of harm. He agreed that the Pre Sentence Report and the judge's sentencing remarks were the best evidence of risk of harm; and that those senior officials who had recorded, upon authorising C's detention, that detention was justified because of the degree of risk of harm to the public which C would pose if released, could not have come to that conclusion, had they read the PSR and the judge's remarks. He agreed that it was an unreasonable conclusion to draw, that C posed a risk to the public.

43. The authorisations in question, to which Mr Denholm drew Mr Chapman's attention, were dated 30 June 2008 [1B/118], 28 July 2008 [1B/125], 30 September 2008 [1B/141] and 28 November 2008 [1B/157]. It may be that the influence of the unpublished policy was at work here - despite its abandonment in September 2008: I refer to the attitude of another senior official, reflected in the email quoted in paragraph 32 above. The Secretary of State did not rely upon evidence from any of the senior officials who signed off these reviews (Ms Anna Pitt, Mr Austin Greenwood and Ms Angela Pearce) so I was unable to reach any firm conclusions as to why they thought C posed a significant risk of harm to the public.

44. Asked about his approval of C's detention on 25 November and 22 December 2008, after the promulgation of the decision in *RN*, Mr Chapman agreed that, had he on those occasions considered the guidance in *RN,* he could not possibly have concluded that there was a realistic prospect of deporting C. In explaining what was going on at this time, he said *"we were waiting for further information from Croydon Criminal Case Directorate, where the policy people were"*. By 22 December 2008 he hadn't seen the decision in *RN* nor the new Operational Guidance Note. He had seen information received by Mr Kennedy from the Asylum Processes and Procedures Unit. Advice *"from the centre"* was slow and unforthcoming. He maintained that, in recommending detention should continue, he still considered the risk of C absconding to be very important: he thought C was just trying to find ways of staying here; as an overstayer, he had disappeared under the radar; he had no UK ties and no stable address or employment. He agreed, nonetheless, that had he been aware on 22 December of the revised Operational Guidance Note and of the determination in *RN* that there was a risk to anyone who was unable to demonstrate loyalty to Zanu(PF), there would have been no option but to release C.

45. In his brief witness statement [1A/137] Mr Kieran Kennedy, Executive Officer in the Criminal Casework Directorate in Leeds, recorded his dealings with C's detention, which commenced in April 2008. On 1 August 2008 he had responded in writing to further representations from C's representatives, refusing C Humanitarian Protection or Discretionary Leave. His letter included the following observations about the timescale to removal:

"At present, all non-voluntary removals to Zimbabwe have been suspended and their resumption is dependent on an imminent test case regarding the

safety of those returned to the country ... [C] will not be returned to Zimbabwe until the United Kingdom judiciary conclude that it is safe to do so ... We have no plans to return [C] to Zimbabwe until the courts state that it is safe to do so ... I am not willing therefore to grant your client a period of up to three years' leave to remain in the United Kingdom when a resolution to the issues of returning Zimbabwean subjects to their country of origin will, in all likelihood, be resolved in the coming months."

46. When giving oral evidence, Mr Kennedy said that he was aware throughout 2008 that if he had recommended C's release, it would have been turned down by someone higher up the chain, because of the unpublished policy (which he knew as "Operation Cullen"). Commenting on his review dated 27 August 2008 [1B/133] he said that he had referred to C having committed *"a serious crime"* because his offence was on the list of serious crimes identified as one of the factors under Operation Cullen. He accepted that as from September 2008, he should have obtained an updated NOMS assessment in order to assess C's risk of re-offending and harm; and agreed that no one reading the PSR or judge's remarks could have concluded that there was a high risk of harm. Had he had regard to the PSR when he should, Mr Kennedy said that he would have referred C on for consideration of contact management (ie release upon restrictions such as electronic tagging or daily reporting) as there remained a risk of abscond. In common with Mr Chapman, once *RN* had been promulgated, he had been waiting for guidance from more senior officials as to its application. He agreed that he had been aware of the decision by 4 December 2008; and that, had the guidance in *RN* been applied to the known facts of C's case, C should have been granted leave to remain. He said that he would not have read the judgment and made that decision himself – he would have referred it to someone more senior.

47. In his witness statement [1A/128] Mr John McGirr, Senior Executive Officer in the UKBA Specialist Appeals Team, stated that D's policy concerning removals to Zimbabwe during the period of C's detention was determined by developing case law, concerning categories of returnee who were, or were not, deemed to be at risk on return. He stated that the undertaking to defer involuntary removals to Zimbabwe was given in September 2005, pending the outcome of an appeal from the AIT to the Court of Appeal in the country guidance case *AA (Risk for Involuntary Returnees) Zimbabwe CG [2006]UKAIT 00061*. Litigation, arising from this and other country guidance cases concerning Zimbabwe (listed in Annex A to his statement), led to the continuance of the suspension of removals during the next three years. The AIT heard *RN* in September and October 2008; and the decision handed down on 19 November was not appealed by D. The "no-returns" policy – and a backlog of Zimbabwean claims - were then reviewed. This led to the issue of the new operational Guidance Note in December 2008; and a review, applying the new criteria to all Zimbabwean failed asylum-seekers, took place in the first half of 2009.

48. The following passages from Mr McGirr's statement were the subject of criticism by Mr Denholm:

"I can confirm that a colleague has searched UKBA records and was unable to find any documents discussing the timing of the lifting of the stay on enforced returns between 26 September 2005 and the decision not to appeal RN. The reason such documents do not exist is that until that point the reason we were not effecting returns was solely related to and tied to resolution of the outstanding litigation. Following this review of policy post RN, it was decided to extend the suspension of forced returns for foreign policy reasons, and in particular HM Government's wish not to destabilise progress on implementation of the Global Political Agreement in Zimbabwe. There were no public statements made by Ministers or officials about the enforced removal of failed asylum seekers to Zimbabwe during the dates of [C's] detention.

I can therefore confirm that during the period of the [C's] detention (30 November 2007 to 14 January 2009) there was a policy in place not to enforce removals of failed asylum seekers to Zimbabwe. However, as stated above, the reason we were not enforcing returns was solely related to and tied to resolution of outstanding litigation and there was at each stage of the progress of the litigation reasonable expectation of it being resolved early."

49. Mr Denholm submitted, and I agree, that this evidence was unsatisfactory in a number of respects. In particular:

(a) It omits to mention, or explain the reasons for, the continuance of the suspension of enforced removals until October 2010. The change of basis for the suspension post-*RN* is explained only tersely and no documents are exhibited.

(b) It is silent on the subject of any assessment by the Secretary of State of the impact of the deteriorating situation in Zimbabwe upon the prospects for returning detainees, between the elections in March 2008 and the date of the decision made at the conclusion of the review of policy post-*RN* (presumably sometime in December), to extend the suspension *"for foreign policy reasons"*. In oral evidence Mr McGirr said that the decision to suspend was made at ministerial level. I accept that he could not be expected to have knowledge of discussions at ministerial level; but he was the most senior official upon whose evidence D relied in this case. The best he could do by way of explanation was to say that he thought the litigation and the political situation were two different aspects of the same issue, in that the litigation was intended to take into account the political situation. This is hard to square with what Ministers were saying to Parliament (see (d) below).

(c) It seems remarkable that no records exist in UKBA of any discussion of the issue of how long the suspension might remain in place, between September 2005 and December 2008; particularly given Mr McGirr's evidence that the suspension was an issue of major importance to the Secretary of State, holding up the removal of thousands of asylum claimants, whose claims she considered unmeritorious, and possibly incentivising many more such claims.

(d) The assertion that there were no public statements made by Ministers about the enforced removal of failed asylum seekers to Zimbabwe during the dates of C's detention was clearly erroneous. When this was pointed out, Mr McGirr said it was *"just something I was advised to put in for context"*; and later he agreed that he may not have scrutinised his statement as much as he should have done. In re-examination he said that the information about public statements had been given to him during a telephone conversation with *"the person responsible"*.

(e) The assertion that the reason for not enforcing returns, throughout the period of C's detention, was solely related to the progress of the country guidance litigation, is plainly contradicted by the Ministerial statements being made to Parliament from 7 May 2008 onwards (quoted at paragraph 40(d) above).

50. In oral evidence Mr McGirr stated that he believed it had been the Secretary of State's view throughout the period of the suspension of removals that, subject to refugee claims in individual cases, it was safe forcibly to return all other Zimbabwean failed asylum seekers. The Secretary of State had been optimistic of a successful outcome of the *RN* case. This would have meant the identification of a clear list of risk categories for those facing persecution, such as credible political activists or people who were of interest to the Zimbabwean authorities: in other words, a profile of a refugee. Instead, he said, *RN* had created an initial burden of proof on the Secretary of State.

51. When asked what the response would have been, to an enquiry made on 30 June 2008 (the date upon which Lord Bach made the statement to Parliament quoted at paragraph 40 (f) above) as to how long the suspension might remain in place, he agreed that the most reasonable conclusion would have been that it would be a very long time indeed.

THE PARTIES' SUBMISSIONS AND FURTHER MATTERS OF LAW

52. I have already set out the principal contentions of the parties. Counsels' written arguments were thorough and detailed and I shall not recite them here. I mention here matters of law arising, and summarise the parties' cases, in the light of the evidence recounted above.

53. I found the following passages particularly helpful in providing guidance upon the application of the *Hardial Singh* principles. First, the words of Dyson LJ (as he then was) in *R(I) v SSHD [2002] EWCA Civ 888* at paragraph 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 ... But in my view, they include at least: the length of 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 the 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.

54. Next, the following passages from the judgment of Lord Dyson JSC in *Lumba:*

"A convenient starting point is to determine whether, and if so when, there is a realistic prospect that deportation will take place ... 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 is unlawful." (Paragraph 103)

"The risks of absconding and re-offending are always of paramount importance, since if a person absconds he will frustrate the deportation for which purpose he was detained in the first place." (Paragraph 121)

"It is common ground that a refusal to return voluntarily is relevant to an assessment of what is a reasonable period of detention if a risk of absconding can properly be inferred from the refusal. But I would warn against the danger of drawing an inference of a risk of absconding in every case. It is always necessary to have regard to the history and particular circumstances of the detained person" (Paragraph 123)

55. Mr Denholm submitted that C's refusal to accept voluntary repatriation did not evidence an increased risk of absconding, and referred to the following words of Lord Dyson JSC in *Lumba* at paragraph 128:

"*What about those who have no outstanding legal challenges? Here, the fact that the detained person has refused voluntary return should not be regarded as a "trump card" which enables the Secretary of State to continue to detain until deportation can be effected, whenever that may be ... If the refusal of voluntary return has any relevance in such cases even if a risk of absconding cannot be inferred from the refusal, it must be limited."*

56. Mr Denholm argued that, once C had withdrawn his consent to voluntary removal, there was no rational basis upon which the Defendant could have reached the following conclusions: that deportation could be effected within a reasonable period of time; that C would pose a high risk of harm if released; that the possibility of C changing his mind was anything more than speculation; that the risk of C absconding could not be met by "rigorous contact management" such as C being subject to tagging and regular reporting - in which case there was a clear alternative to detention. In the premises, detention could not have been justified, upon the proper application of D's published policy and the *Hardial Singh* principles .

57. In relation to the third *Hardial* Singh principle, both counsel drew my attention to the following passage from the judgment of Richards LJ in *R(MH) v SSHD [2010] EWCA Civ 1112* (at paragraph 65):

    "if a finite time can be identified, it is likely to have an important effect on the balancing exercise: a soundly based expectation that removal can be effected within, say, two weeks will weigh heavily in favour of continued detention pending such removal, whereas an expectation that removal will not occur for, say, another two years, will weigh heavily against continued detention. There can, however, be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur and without any certainty that removal will occur at all. Again, the extent of certainty or uncertainty as to whether and when removal can be effected will affect the balancing exercise. There must be a sufficient *prospect of removal to warrant continued detention when account is taken of all other relevant factors.*

58. In his closing submissions Mr Barnes submitted, in summary, that the Secretary of State could, and would, lawfully have concluded after 14 April 2008 that C should be detained, most importantly because he presented a high risk of absconding by reason of his poor immigration history, the fact that he had shown contempt for UK law by committing a serious criminal offence, his lack of family ties, the fact that he had exhausted his appeal rights and did not challenge the rejection of his fresh representations, and his refusal to return voluntarily. He maintained that senior officials had properly concluded that C posed a risk, or substantial risk, of re-offending; and that he might yet be tempted to return under the FRS. As to the timescale for removal, he submitted that "*the Defendant was entitled to conclude that whilst the situation in Zimbabwe was in flux, there was some prospect of reinstating enforced removals, and to allow time for that to occur, as evidenced by Mr Chapman"* (Defendant's Closing Skeleton Argument paragraph 28).

59. It was common ground between the parties that Article 5 of the Human Rights Convention adds nothing, in this case, to C's rights under domestic law and does not require separate consideration.

60. I was assisted by the parties' supplementary submissions on the decisions of Mitting J in *Othman v SSHD [2012] UKSIAC B1* handed down on 6 February 2012, but concluded that the circumstances of that case were so far removed from C's situation that the decision had no bearing on the issues I have to resolve.

CONCLUSIONS

61. The evidence given by D's witnesses, to the effect that the timing of the decision in *RN* was critical to the timescale to C's removal, because it would determine for the Secretary of State who was, and was not, to be treated as being at risk of persecution, did not in my view reflect the statements being made by Government ministers to Parliament from 7 May 2008 onwards. The

thrust of those statements was that no failed asylum seeker would be forcibly returned from the UK to Zimbabwe, whilst conditions there remained unstable and dangerous. Those statements - which, I am bound to assume, involved no misrepresentation of the *policy* of the Secretary of State - gave a strong indication that, in the wake of the violence and instability following the elections in March 2008, the predominant reason for the continuance of the suspension of removals was no longer the need to await guidance from the AIT (or higher courts) as to which categories of returnee would be at risk from the Zanu(PF) regime, but a broader humanitarian concern for any failed asylum-seeker forced to return there from the UK. There may also have been other, more complex, foreign policy considerations, as alluded to by Mr McGirr. This analysis would be consistent with the longevity of the suspension of enforced removals, which endured until October 2010.

62. I am satisfied that a careful examination of the situation, as the situation in Zimbabwe deteriorated after the March 2008 elections, ought to have brought into focus the fact that the timescale for resuming enforced removals to Zimbabwe was no longer necessarily tied to the timetable for resolution of the country guidance litigation. It may not have been clear to caseworkers and managers in CCD, but it ought to have been clear to senior officials and the Secretary of State, soon after the elections in March 2008, that the timetable for resumption of removals was now at large and depended on the inherently unpredictable process of Zimbabwe achieving some political solution. And – without suggesting any criticism at all of Mr Barnes - I would have expected something more robust and rigorous than his formulation quoted in paragraph 58 above: "*whilst the situation in Zimbabwe was in flux, there was some prospect of reinstating enforced removals"*. In my view, Mr McGirr's agreement that it would have been reasonable to conclude by 30 June 2008 that it would be *"a very long time indeed"* before forced removals would resume, was closer to the mark.

63. The central question I have had to resolve is whether, if the unpublished blanket detention policy had played no part in the decision-making, a lawful decision to maintain C's detention after 14 April 2008 could and would have been made, applying D's published policies. It was for the Secretary of State to satisfy me of this, on the balance of probabilities. After giving careful consideration to all the evidence and to the submissions of both counsel, I came to the conclusion that this burden of proof had not been discharged. My conclusion was that, given the deterioration in conditions in Zimbabwe after the elections in March 2008, and C's withdrawal from the FRS on 14 April 2008, a correct application of the published policies and of the *Hardial Singh* principles to C's case ought to have led to the following conclusions:

    (a) C presented a moderate level of risk of abscond;

    (b) Whilst C had committed a serious offence, he had served the appropriate custodial term and now presented a low risk of re-offending and of causing harm to the public;

    (c) Whilst C was refusing to return voluntarily, had exhausted his rights of appeal and did not challenge the rejection of his further representations, he

had done nothing positively to obstruct the process of removal (and UKBA had a copy of his passport on file);

(d) The prospect of C changing his mind about voluntary return was no more than speculative;

(e) The obstacle to C's enforced removal was significant progress towards a political solution, and resolution of the dangerous and unstable situation prevailing, in Zimbabwe; and the time this would take was highly uncertain, but was likely to be more than a matter of a few months.

64. I am also satisfied that the level of risk of abscond which C posed, whilst being a matter of paramount importance, ought reasonably to have been viewed as one which was manageable by electronic tagging or suitable reporting restrictions.

65. Weighing up all these factors, and bearing in mind that C had already been in detention since 30 November 2007, I am satisfied that the balancing exercise, described by Richards LJ in *(MH)* (see paragraph 57 above), ought to have led to a decision that there was no longer *"a* sufficient *prospect of removal to warrant continued detention when account is taken of all other relevant factors"* and that continued detention would be unlawful.

66. I therefore answer issues (1) and (2), set out in paragraph 38 above, in the negative and find that C is entitled to substantial damages for false imprisonment as from the date upon which the above decision ought to have been made. As Sedley LJ observed, in *Abdi & Khalaf v SSHD [2011] EWCA Civ 242* at paragraph 61, in some cases it may be very difficult, applying *Hardial Singh* principles, to identify any particular date on which detention has ceased to be lawful; and any date will inevitably be "arbitrary" to some extent. Doing the best I can on the available evidence, noting in particular C's withdrawal from the voluntary return scheme on 14 April 2008, Lord Malloch-Brown's statement to Parliament on 7 May 2008, and the need for the Secretary of State to review a developing situation in Zimbabwe, I have concluded that the decision to release ought to have been made by 14 May 2008.

67. It will be obvious that this conclusion is sensitive to the facts of C's case and in particular to the low risk of re-offending and of harm to the public which he posed. I was told that other Zimbabwean failed asylum-seekers, imprisoned for serious offences, were detained administratively in circumstances similar to C's. The risk to the public consequent upon the release of others, together with other factors affecting the balancing exercise, may have been significantly different; and in other cases the assessment of a "reasonable period", for purposes of the second and third *Hardial Singh* principles, would necessarily differ.

68. Given my conclusion that C is entitled to substantial damages for false imprisonment from 14 May 2008 onwards, and Mr Denholm's concession that the lawfulness of detention between 30 November 2007 and 14 April 2008 was not challenged, it appeared to me that issues (3) to (7), set out in

paragraph 38 above, fell away, leaving only the questions of assessment of damages for false imprisonment, consequent upon my conclusion in this judgment; and issue (8): is C entitled to aggravated or exemplary damages?

AGGRAVATED DAMAGES

69. Both counsel drew my attention to the guidance of the Court of Appeal in *Thompson v Commissioner of the Police for the Metropolis[1988] QB 498*, a decision concerning wrongful arrest, false imprisonment and malicious prosecution:

"[Aggravated damages are] primarily to be awarded to compensate the plaintiff for injury to his proper pride and dignity and the consequences of his being humiliated."

"Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted."

70. The evidence before me disclosed no behaviour on the part of UKBA officials responsible for C's detention which was high handed, insulting, malicious or oppressive. The mischief in the present case was unlawful imprisonment: I am satisfied that no features of the case merit additional compensation for humiliating treatment of C by way of aggravated damages.

EXEMPLARY DAMAGES

71. Mr Denholm drew attention to the familiar passages in the *Thompson* decision. The object of exemplary damages is not compensatory but punitive: they are to be awarded where there has been arbitrary or oppressive behaviour justifying an exceptional remedy; such damages are a windfall for the claimant and may divert resources which would otherwise benefit the public. He also drew attention to Lord Devlin's statement in *Rookes v Barnard [1964] 1 AC 1129 at 1226* that the conditions for an award of exemplary damages were oppressive, arbitrary or unconstitutional action by servants of the government. More recently, Lord Hutton in *Kuddus v Chief Constable of Leicestershire [2001] UKHL 29, [2002] AC 122* and Thomas LJ in *Muuse v SSHD [2010] EWCA Civ 453,* at paragraph 70, underlined Lord Devlin's additional qualification, that exemplary damages were only appropriate to punish "outrageous" conduct, to mark disapproval, to deter and to vindicate the strength of the law.

72. I also had regard to the views of the Supreme Court in the *Lumba* case, on the question of whether the application by the Secretary of State of the unpublished blanket detention policy to the appeals under consideration merited an award of exemplary damages: in particular, paragraphs 150 – 168 of the judgment of Lord Dyson JSC, with which all other members of the

Court agreed. Lord Dyson considered carefully the evidence about the conduct of D's officials in operating the unpublished policy. He concluded that

"there was a deliberate decision taken at the highest level to conceal the policy that was being applied and to apply a policy which, to put it at its lowest, the Secretary of State knew was vulnerable to legal challenge. For political reasons, it was convenient to take a risk as to the lawfulness of the policy that was being applied and blame the courts if the policy was declared to be unlawful."

73. Nonetheless, he also concluded that, given that the Secretary of State had the statutory power to detain the appellants and that, although she in fact exercised that power unlawfully, she could have done so lawfully, it was right to say that if her conduct was properly to be described as "unconstitutional, oppressive or arbitrary", it was at the less serious end of the scale; and noted that there was no suggestion that officials acted for ulterior motives or out of malice towards the appellants.

74. Features of the present case differ from the appellants' circumstances in *Lumba*: first, I have concluded that D could not lawfully have exercised the power to detain C from 14 May 2008 onwards. Second, the Supreme Court were not considering a situation in which the Secretary of State's own policy was the effective obstacle to the detainee's enforced return. These matters strengthen the argument that D's conduct was unconstitutional and oppressive.

75. Lord Dyson also addressed, however, two further points militating against an award of exemplary damages to the appellants in *Lumba*, which are of significance in the present case. First, given that the nature of exemplary damages is punitive and not compensatory, an award of damages to punish wrongful conduct which affected more than one victim should be shared between those victims, rather than awarded on an individual basis. Where there is potentially a large number of claimants and they are not all before the court, it is not appropriate to make an award of exemplary damages. Second, Lord Dyson considered that it was unsatisfactory and unfair to award exemplary damages where the basis for the claim is a number of serious allegations against officials and Government ministers of arbitrary and outrageous use of executive power and those persons have not been heard and their answers to the allegations have not been tested in evidence.

76. Taking into consideration the above principles of law and the circumstances of the present case, I have come to the conclusion that it would be inappropriate to award exemplary damages to C.

77. I invite the parties to consider what directions are required for a further hearing for the assessment of damages, if the outstanding issues are not capable of agreement.