Easter Term
[2011] UKSC 23
On appeal from: [2008] EWCA Civ 1204

JUDGMENT

Shepherd Masimba Kambadzi (previously referred to as SK (Zimbabwe)) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Hope, Deputy President
Lord Rodger
Lady Hale
Lord Brown
Lord Kerr

JUDGMENT GIVEN ON

25 May 2011

Heard on 10 and 11 February 2010

Appellant
Raza Husain QC
Alex Goodman
Tom Hickman
(Instructed by Lawrence Lupin Solicitors)

Respondent
Robin Tam QC
Martin Chamberlain

(Instructed by Treasury Solicitors)

Intervener (Bail for Immigration Detainees)
Michael Fordham QC
Laura Dubinsky
(Instructed by Allen & Overy LLP)

LORD HOPE

1. This appeal was heard by this Panel on 10 and 11 February 2010. On 14 April 2010, while we were still considering our decision upon it, we were asked to consider applications for permission to appeal in two other cases in which foreign national prisoners had been detained pending their deportation after completing their sentences of imprisonment. Walumba Lumba, a citizen of the Democratic Republic of Congo, sought permission to appeal from a decision of the Court of Appeal [2010] EWCA Civ 111, [2010] 1 WLR 2168, dismissing his appeal from a decision of Collins J [2008] EWHC 2090 (Admin) on his claim for judicial review to refuse him a declaration that his detention by the Secretary of State for the Home Department was unlawful, for a mandatory order for his release and for damages. Mr Lumba together with Kadian Mighty, a citizen of Jamaica, also sought permission to appeal against the Court of Appeal's decision dismissing their appeals from a decision of Davis J [2008] EWHC 3166 (Admin) to dismiss their claims for judicial review of the Secretary of State's decision to detain them prior to their deportation and for damages for unlawful detention.

2. We decided to give permission to appeal in both cases, and a direction was given that the appeals should be heard by a panel of nine Justices. As there was plainly a close relationship between the issues raised in those cases and this, we decided to withhold delivery of our judgments in this case until after the decision of nine Justices in the cases of Mr Lumba and Mr Mighty had been given. Following the delivery of the judgment of their cases in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2011] 2 WLR 671 on 11 March 2011 the parties were invited to make written submissions in light of that judgment. Having received and considered their submissions, we are now in a position to give our judgment in this case.

3. The appellant is a national of Zimbabwe. He entered the United Kingdom with leave as a visitor and was then given leave to remain for one year as a student. But he overstayed his leave and, following his conviction for several criminal offences, he was sentenced to a period of imprisonment. The Secretary of State decided that he should be deported. On 8 March 2006 he was detained pending the making of a deportation order. He remained in detention for 27 months until 13 June 2008 when he was released on bail by the Asylum and Immigration Tribunal. On 12 November 2007 while still detained he sought judicial review by means of a mandatory order for his immediate release, a declaration that he was unlawfully detained and damages.

4. On 25 January 2008 Munby J granted a declaration that the appellant had been detained unlawfully for various distinct periods amounting to about 19 months and he gave directions for the assessment of damages: [2008] EWHC 98 (Admin). But he declined to make an order for his release. The Secretary of State appealed against the declaration. The appellant appealed against the refusal of an order for his release, but he was later granted bail and that appeal was not proceeded with. On 6 November 2008 the Court of Appeal (Laws, Keene and Longmore LJJ) allowed the Secretary of State's appeal, holding that the appellant's detention had been lawful throughout. It remitted a new point which had been raised about the legality of the appellant's detention during periods when Munby J held that he was lawfully detained for determination by the High Court: [2008] EWCA Civ 1204, [2009] 1 WLR 1527. The appellant now appeals to this court against the decision by the Court of Appeal that he is not entitled to damages for false imprisonment.

Anonymity

5. The appellant has been referred to hitherto in these proceedings as SK (Zimbabwe). Mr Tam QC for the respondent invited the court to maintain the order for the appellant's anonymity in accordance with the practice for asylum cases recognised by the Court of Appeal. He suggested that references in the appellant's application for asylum might expose him to risk if he were to be returned to Zimbabwe. Mr Husain for the appellant on the other hand did not ask for the order to be maintained. He did not suggest that there were any reasons for concern in his case. He said that he adopted a position of neutrality on this issue.

6. There is no doubt that the court has power to make an anonymity order to restrain publication of a person named in its proceedings. In an extreme case, where he or his family are in peril of their lives or safety, this may help to secure his rights under articles 2 and 3 of the European Convention on Human Rights: *In re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 WLR 325, para 26. Those are the rights that are most likely to be relevant if he is seeking asylum. It may also be made to secure that other persons, such as the press, show respect for his private and family life under article 8 of the Convention. But in such cases the person's article 8 rights must be balanced against the article 10 rights of the press and the general public interest in his being identified: *In re Guardian News and Media Ltd*, para 76. As the decision in that case shows, however, much will depend on the circumstances of each case. It is no longer the case that all asylum seekers as a class are entitled to anonymity in this Court. The making of such an order has to be justified.

7. I am not persuaded that an order for the appellant's anonymity is justified in this case. It must be recognised, of course, that lifting the order for his anonymity

is not entirely without risk. It is rarely possible to predict with complete confidence what risks a failed asylum seeker will face when he is returned to his home country. But the position that the asylum seeker himself adopts will always be an important factor. He is likely to be in the best position to assess the risks and to say whether or not he needs anonymity for his protection. His counsel, Mr Husain, is very experienced in these matters and well able to form a sound judgment as to whether this is necessary or desirable. I would have expected him to inform the court if there were any grounds at all for wishing to preserve the appellant's anonymity. Had he done so I would, of course, have given a good deal of weight to his submissions. As it is, in view of the position that he has adopted on the appellant's behalf, I am not persuaded that there is anything to prevent his being identified in this case. I would set aside the anonymity order, and name the appellant as Shepherd Masimba Kambadzi.

The appellant's case

8. The context for the appellant's claim of damages for false imprisonment is provided by the provisions for the regulation of entry and stay in the United Kingdom which are set out in Part 1 of the Immigration Act 1971, as amended. His case, put very simply, is that the discretionary power to detain that is vested in the Secretary of State by paragraphs 2(2) and (3) of Schedule 3 to the 1971 Act was not exercised throughout his period of detention in the way it should have been according to the published policy, that for periods when his detention was not reviewed in accordance with the policy it was not authorised and that he is entitled to damages for false imprisonment because his continued detention was unlawful during those periods. A description of the statutory background and the system which, according to his own policy, the Secretary of State had undertaken to operate provides the starting point for an examination of this argument. The facts of this case are best understood in the light of that background.

The statutory background

9. Section 4 of the 1971 Act provides that the power to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers and that the power to give leave to remain in the United Kingdom, or to vary any leave, shall be exercised by the Secretary of State. Section 3(5) renders a person who is not a British citizen liable to deportation if the Secretary of State deems his deportation to be conducive to the public good. Section 4 gives effect to Schedule 2, paragraph 1(3) of which provides:

> "In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (not

inconsistent with the immigration rules) as may be given them by the Secretary of State."

10. Section 5(3) of the 1971 Act gives effect to Schedule 3 with respect to the removal from the United Kingdom of persons against whom deportation orders are in force and the detention and control of persons in connection with deportation. Paragraph 2 of Schedule 3 appears under the heading "Detention or control pending deportation". It provides in subparagraphs (2) and (3):

> "(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 a detained person 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." [emphasis added]

11. At first sight, the effect of paragraph 2(3) of the Schedule is that, once notice has been given of a decision to make a deportation order against him, the person may lawfully be detained until he is removed or departs. But, as Munby J observed in para 9 of his judgment, the powers conferred by those paragraphs are not unfettered. In *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704, 706 Woolf J said:

> "Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained … pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly 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 provided 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 the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

12. This statement was referred to with approval in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97. Lord Browne-Wilkinson said of the power to detain pending removal in the Hong Kong Ordinance at p 111A-D:

> "Their Lordships have no doubt that in conferring such a power to interfere with individual liberty, the legislature intended that such power could only be exercised reasonably and that accordingly it was implicitly so limited. The principles enunciated by Woolf J in the *Hardial Singh* case [1984] 1 WLR 704 are statements of the limitations on a statutory power of detention pending removal. In the absence of contrary indications in the statute which confers the power to detain 'pending removal' their Lordships agree with the principles stated by Woolf J."

In *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, para 8 Lord Bingham of Cornhill said that Woolf J's guidance in *Hardial Singh* had never been questioned. In *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [2003] INLR 196, para 46, Dyson LJ said that counsel had correctly submitted that the following four principles (the *Hardial Singh* principles) emerge from it:

> "(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."

It was common ground in *R (Lumba) v Secretary of State for the Home Department* [2011] 2 WLR 671 that in this passage the effect of Woolf J's judgment was correctly summarised and it was approved as an accurate statement of the relevant principles: see, eg, paras 171-174. As Lady Hale said at para 199, the detention must be for the statutory purposes of making or implementing a deportation order and for no other purpose.

13. The cases were reviewed by Lord Brown of Eaton-under-Heywood in *R (Khadir) v Secretary of State for the Home Department* [2005] UKHL 39, [2006] 1 AC 207, where the power to detain was exercised under Schedule 2 in the context of removing those refused leave to enter. Lord Brown said that, while it went without saying that the longer the delay in effecting someone's removal the more difficult it becomes to justify the continued detention meanwhile, that was by no means to say that he does not remain "liable to detention": para 31. In para 33 he said:

> "To my mind the *Hardial Singh* line of cases says everything about the *exercise* of the power to detain (when it properly can be exercised and when it cannot); nothing about its *existence*."

This case is about the way in which the power to detain can properly be exercised, but it raises issues about the existence of the power too. Does the Secretary of State's failure to comply with his published policy for regular reviews to monitor changing circumstances deprive him of his executive power to continue to detain the detainee? Or does his power continue until a review shows that continued detention is no longer appropriate? I think that an examination of the *Hardial Singh* principles may help to resolve these questions, as they give rise to the need for these reviews. But it is clear that the appellant cannot succeed in his claim by relying solely on those principles.

14. Mr Husain for the appellant submits that, while the Secretary of State's decision to detain was lawful at its inception, it could become unlawful with the passage of time. There was no challenge to the judge's findings that throughout the period that the appellant was detained the *Hardial Singh* principles were complied with. In the Court of Appeal Laws LJ said that the judge was entitled to be so satisfied: [2009] 1 WLR 1527, para 36. But Mr Husain's case is that the matter does not rest there. He says that the Secretary of State's published policy also regulates the existence of the power to continue detention, and that it must be followed in the absence of good reason not to do so.

The published policy

15. Before I come to the published policy I should mention that the Secretary of State was given power by the Immigration and Asylum Act 1999 to make rules for the regulation and management of detention centres. Rule 9 of the Detention Centre Rules 2001 (SI 2001/238) provides:

> "(1) Every detained person will be provided, by the Secretary of State, with written reasons for his detention at the time of his initial decision, and thereafter monthly.
>
> (2) The Secretary of State shall, within a reasonable time following any request to do so by a detained person, provide that person with an update on the progress of any relevant matter relating to him."

Rule 9(3) sets out a list of relevant matters for the purposes of that paragraph.

16. In the Court of Appeal, para 45, Keene LJ said that it was clearly implicit in the rule that the Secretary of State has to reconsider the justification for detention, month by month, in the light of changing circumstances. At para 46 he said:

> "The need for such regular reviews stems from the necessity for the Secretary of State to monitor changing circumstances in a given case lest his power to detain, on the principles set out in *Ex p Hardial Singh* [1984] 1 WLR 704, no longer exists. Even if the power still exists, he has a discretion to exercise which he must also keep under review. The importance of the detainee receiving regular statements of the reason why he is still detained is self-evident: he needs to be in a position to know whether he can properly challenge the Secretary of State's decision in the courts by way of an application for habeas corpus or judicial review or whether he can apply for bail on a meaningful basis. So the requirements imposed by rule 9 cannot be treated lightly, especially when one is dealing with administrative detention which deprives a person of his liberty without a court order."

I agree with these observations, but I would prefer to apply them to the system of review that is set out in the policy rather than to the system required by rule 9(1). This is because it seems to me that the 2001 Rules are concerned with the regulation and management of detention centres, not with the way the discretion to detain is exercised. This is what the explanatory note says, and I think that Keene

LJ was right to conclude in para 47 that rule 9(1) is not concerned with limiting the Secretary of State's power to detain. In any event the appellant was detained in prison conditions to which the Rules do not apply for the first 14 months of the period of his detention. It was not until April 2007 that he was moved to a detention centre and the Rules applied to his case.

17. I come then to the Secretary of State's policy. It is to be found in a document issued by the Home Office called the Operations Enforcement Manual. Various versions of this manual have been existence since at least 2001. Mr Tam informed the Court that it was safe to proceed on the basis that the version used in these proceedings, which was downloaded in 2007, was the one that was in circulation while the appellant was being held in detention. Chapter 38 of the manual is entitled "Detention and Temporary Release". It is here that the published policies regulating the exercise of the Secretary of State's discretion, in accordance with the *Hardial Singh* principles, are set out.

18. Paragraph 38.1, headed "Policy" refers to the 1998 White Paper "Fairer, Faster and Firmer: a Modern Approach to Immigration and Asylum (1998) (Cm 4018)" in which it was said there was a presumption in favour of temporary admission or release and that detention would most usually be appropriate to effect removal, initially to establish a person's identity or basis of claim or where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release. It refers also to the 2002 White Paper "Secure Borders, Safe Haven: Integration with Diversity in Modern Britain (2002) (Cm 5687)" in which the principles stated in the 1998 White Paper were reiterated. These criteria are said to represent the Government's stated policy on the use of detention. There then follows this important acknowledgement of the significance of the policy in public law:

> "To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law *but must also accord with this stated policy*." [emphasis added]

Under the sub-heading "Use of Detention" these words appear:

> "In all cases detention must be used sparingly, and for the shortest period necessary."

19. Paragraph 38.3 is headed "Factors influencing a decision to detain (excluding pre-decision fast track cases). It contains the following instructions:

> "1. There is a presumption in favour of temporary admission or temporary release.
>
> 2. There must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.
>
> 3. All reasonable alternatives to detention must be considered before detention is authorised.
>
> 4. Once detention has been authorised it must be kept under close review to ensure that it continues to be justified.
>
> 5. Each case must be considered on its individual merits."

Various factors which must be taken into account when considering the need for initial or continued detention are then set out. They include, among other things, the likelihood of the person being removed and, if so, after what timescale; whether there is any history of previous absconding or of failure to comply with conditions of temporary release or bail; and whether there is a previous history of complying with the requirements of immigration control.

20. Paragraph 38.5 is headed "Levels of authority for detention". It states:

> "Although the power in law to detain an illegal entrant rests with the [immigration officer], or the relevant non-warranted immigration caseworker under the authority of the Secretary of State, in practice, an officer of at least [Chief Immigration Officer] rank, or a senior caseworker, must give authority. Detention must then be reviewed at regular intervals (see 38.8).

Paragraph 38.5.2 states that the decision as to whether a person subject to deportation action should be detained under Immigration Act powers is taken by a senior caseworker in the Criminal Casework Directorate. Paragraph 38.6 is headed "Detention Forms". The opening sentence states:

> "The Government stated in the 1998 White Paper that *written reasons for detention* should be given in all cases at the time of

> detention and thereafter at monthly intervals." [emphasis in the original]

The authority to detain is known as Form IS91. Paragraph 38.6.1, which is headed "Form IS91RA Risk Assessment", states:

> "Once it has been identified that the person is one who should be detained, consideration should be given as to what, if any, level of risk that person may present whilst in detention. [Immigration officers] should undertake the checks detailed on form IS91RA part A 'Risk Factors' (in advance, as far as possible, in a planned operation/visit when it is anticipated detention will be required."

Paragraph 38.6.2, which is headed "Form IS9I Authority to Detain", states that once the Detainee Escorting and Population Management Unit has decided on the location for detention they will forward a form to the detaining office detailing the detention location and the assessment of risk, which is attached to form IS91 and served on the detaining agent. If there is an alteration in risk factors a new form IS91 is issued.

21. Paragraph 38.8 is headed "Detention Reviews". It is on its provisions that the appellant's argument that from time to time during the period of his detention he was detained unlawfully depends. It identifies the grade of officer by whom initial detention must be authorised. It then states:

> "… Continued detention in all cases of persons in sole detention under Immigration Act powers must be subject to administrative review at regular intervals. At each review robust and formally documented consideration should be given to the removability of the detainee….
>
> A formal and documented review of detention should be made after 24 hours by an Inspector and thereafter, as directed, at the 7, 14, 21 and 28 day points.
>
> *At the 14 day stage, or if circumstances change between weekly reviews an Inspector must conduct the review.*
>
> …

> In [the Criminal Casework Directorate] an [higher executive officer] reviews detention up to 2 months. [A senior executive officer/Her Majesty's inspector] reviews detention up to 4 months, the Assistant Director/Grade 7 up to 8 months, the Deputy Director up to 11 months and the Director up to 12 months and over." [emphasis in the original]

The facts

22. The appellant arrived in this country on 30 October 2002 as a visitor with six months leave to enter. On 9 May 2003 he applied for leave to remain for two years as a student. He was granted leave for one year until 30 April 2004. After that date he remained here without leave. On 9 December 2005 he was convicted on two counts of common assault and one count of sexual assault on a female. He was sentenced to 12 months' imprisonment and ordered to be registered as a sex offender for five years. The judge did not recommend deportation. But on 7 March 2006, the day before he was due to be released from prison after serving six months of his sentence including time spent on remand, the Secretary of State decided to make a deportation order against him. He was detained under paragraph 2(2) of Schedule 3 to the 1971 Act and remained in custody at HMP Woodhill.

23. On 24 March 2006 the appellant claimed asylum. On 11 April 2006 he asked the Secretary of State to move him from the prison to a detention centre, but his request was ignored. On 18 April 2006 the Citizens Advice Bureau wrote two letters to the Secretary of State on his behalf. In one it requested his urgent transfer to a detention centre. In the other it appealed against the notice of decision to make a deportation order. On 20 April 2006 and again on 3 May 2006 the Citizens Advice Bureau wrote to the Secretary of State on the appellant's behalf contending that his continued detention was unlawful. Munby J said in para 19(xvi) that these letters were clearly relying upon the *Hardial Singh* principles, but they went unanswered. On 17 May 2006 the appellant, who had now been moved to HMP Lincoln, applied for bail. His application was refused on 19 May 2006. He applied for bail again on 15 September 2006. On 19 September 2006 the Secretary of State refused his application for asylum. Two days later, on 21 September 2006, the Asylum and Immigration Appeals Tribunal heard his appeals against the decision to deport, the refusal of asylum and a refusal to grant him relief on human rights grounds. The tribunal refused bail, having noted that he had previously committed an offence under the Bail Act 1976.

24. On 4 October 2006 the Tribunal issued its decision dismissing all three appeals. It stated that the appellant, believing that he had a poor case in resisting deportation, had sought to bolster his prospects of success by inventing a false claim and that the Secretary of State was right to conclude that his deportation was

necessary as the offences which he had committed were serious and he had been assessed as presenting a medium risk of sexual or violent offending upon his release. On 4 May 2007 he was moved from HMP Lincoln to Campsfield Immigration Removal Centre. On 6 July 2007, following a hearing for the reconsideration of his appeals that had been ordered in January 2007, the tribunal refused his appeals following reconsideration. On 24 August 2007 a deportation order was made and served on the appellant. As the appellant is a national of Zimbabwe, it is to Zimbabwe that the Secretary of State proposes to deport him. But two years previously on 4 August 2005 Collins J ordered by consent that removal of 30 Zimbabweans be suspended pending resolution of the issue in a test case, and the enforced return of failed Zimbabwean asylum seekers was suspended by the Secretary of State. The position as at the date of the hearing of this appeal was that no enforced returns of Zimbabwean failed asylum seekers had taken place since that date.

25. By a letter dated 8 March 2006 the appellant was informed that he was to be detained and that his detention would be reviewed on a regular basis. If the reviews had been carried out in accordance with the policy set out in paragraph 38.8 of the manual they would have occurred on 10 March 2006 (after 24 hours), 16 March 2006 (7 days), 23 March 2006 (14 days), 30 March 2006 (21 days) and 6 April 2006 (28 days). They would have been carried out thereafter at monthly intervals. As to the monthly reviews, the paragraph 38.8 provides that the first two monthly reviews must be carried out by a Higher Executive Officer, the next two by a Senior Executive Officer or one of Her Majesty's Inspectors, the next four by an Assistant Director or Grade 7 civil servant, the next three by a Deputy Director and, in the case of the monthly reviews in the second year of detention, by a Director.

26. By the date of the hearing before Munby J the appellant had been entitled to 22 monthly reviews of the lawfulness of his detention in addition to the initial five reviews in the first month. In the event he had had only 10 reviews up to the date of the hearing. Of these, only six were conducted by officials of the required seniority. Of these, two were disavowed by the Secretary of State as flawed by material errors of fact. The details of the Secretary of State's failure to carry out reviews at the required frequency and by the appropriate persons are set in the judgment of Munby J at paras 43 – 51 and 124 -127 and in paras 11 – 13 of the judgment of the Court of Appeal. The judge described the picture that emerged from his analysis of the Secretary of State's file as deeply disturbing and profoundly shocking. The Secretary of State has acknowledged that reviews should have been carried out. He has not sought to justify or excuse in any way their absence in the appellant's case. He also accepts that these failures cannot be extenuated by the appellant's own bad character or his previous conduct.

27. It is now known, following disclosures that were made prior to the hearing of *R (WL) Congo v Secretary of State for the Home Department* [2010] EWCA Civ 111, [2010] 1 WLR 2168 by the Court of Appeal, that from April 2006 to September 2008 the Home Office applied an unpublished detention policy to all foreign national prisoners following the completion of their prison sentences pending their deportation. This followed the revelation on 25 April 2006 that during the past seven years over 1,000 such prisoners had been released from prison on completion of their sentences without being considered for deportation or deported. "Illegal migrants and paedophiles, a toxic mix. The tabloids will go bananas". The words of a contemporary diarist, *Chris Mullin, Decline and Fall* (2010), p 94, capture the atmosphere of disaster that was engendered among ministers by this announcement. A few days later Charles Clarke was removed from his post and was replaced on 4 May 2006 as Home Secretary by Dr John Reid. A practice of blanket detention was then instituted with a ruthless determination that precluded consideration of the merits of any individual case and was wholly at odds with the presumption in the published policy in favour of temporary admission or temporary release. It remained in place until November 2007 when it was replaced by another unpublished policy which permitted release only in exceptional circumstances. It was not until 9 September 2008 that a revised detention policy was published. This course of events may explain the Secretary of State's failure to carry out reviews at the required frequency and by the appropriate persons in the appellant's case. But his case has been conducted throughout so far on the basis that the policy that was being applied to him was the published policy. The new issues that he has raised in light of these disclosures are presently stayed for determination by the High Court: see Laws LJ [2009] 1 WLR 1527, paras 42-44.

The issues

28. Munby J held that the appellant was unlawfully detained for the periods which he specified by reason of the Secretary of State's failures to carry out the reviews required by rule 9(1) and the manual. The basis for that finding is to be found in the following passage in his judgment [2008] EWHC 98 (Admin), para 68:

> "Integral to the scheme endorsed by Parliament in its approval of rule 9(1) of the Detention Centre Rules 2001, and integral to the policy laid down by the Secretary of State in paragraph 38.8 of the Operations Enforcement Manual, is the principle that someone is not to be detained beyond a certain period without there being a review undertaken at regular intervals and moreover, as required by the Secretary of State's policy, a review undertaken at increasing high levels of seniority within the Home Office as the period of detention grows. Those reviews are fundamental to the propriety of the

> continuing detention, they are required in order to ensure that the continuing detention can still be justified in the light of current, and perhaps, changed circumstances, and they are, in my judgment, a necessary prerequisite to the continuing legality of the detention."

In para 122 he said that, to the extent that the appellant's detention had been unlawful as a matter of domestic law it had also, by parity of reasoning, been unlawful by virtue of section 6 of the Human Rights Act 1998, and that there was nothing in the circumstances of his case to give him a remedy under section 6 where there would not be a remedy under domestic law. So in practical terms the claim under article 5 of the Convention added nothing.

29. In the Court of Appeal Laws LJ said that the issue was one of statutory construction: [2009] 1 WLR 1527, para 21. *Ex p Hardial Singh* showed that paragraph 2(2) of Schedule 3 to the 1971 Act was subject to implied limitations. The question, as he saw it, was whether a further limitation was to be found such that on a proper construction of paragraph 2(2) the power was subject to compliance with the rule and the manual: para 23. Summarising his conclusions, with which the other members of the court agreed, he said that compliance with the rules and the manual as such was not a condition precedent to a lawful decision pursuant to paragraph 2(2): para 25. The statute did not make it so, nor did the common law or the Convention. The *Hardial Singh* principles had to be complied with, but this was subject to control by the courts, principally by way of judicial review. In that event the particular context would be the vindication of those principles, but in this case it was plain that the appellant was held in compliance with them throughout the period of his detention.

30. Mr Husain accepted that the *Hardial Singh* principles had throughout been complied with. On the other hand there had been repeated failures to comply with the system of review set out in the manual. Paragraph 38.8 of the manual states that continued detention in all cases under Immigration Act powers must be subject to administrative review at regular intervals. These reviews were essential to the continued legality of the exercise by the Secretary of State of his discretion to detain. He accepted that not all public law errors or policy defaults will render detention unlawful. The question will always be whether the error is sufficiently linked to the decision to detain or to continue detention. In this case the reviews required by the policy must be seen as the authority on which continued legality of the detention rests. He accepted that if his case were to succeed at common law his case under article 5 would not add anything. But in case it were necessary to address this argument he submitted that the appellant was entitled to the implied protections prescribed by article 5(1)(f). There had been a clear breach of national procedural rules because the Secretary of State had failed to comply with the rules and with the published policy, which he was required to follow unless there were good reasons not to do so. This was irrespective of whether the requirements that

had been breached were conditions precedent to the exercise of the power to detain.

31. As to the effect of the decision in *Lumba*, Mr Husain submitted that it was now clear that it was not a defence for the Secretary of State to show that the detention complied with the *Hardial Singh* principles and the requirements of the statute. Nor was it a defence for him to show that had the public law error not been committed the detainee would have been detained in any event. The serial failure to conduct the proper detention reviews was a material public law error, as it was essential to the legality of a temporarily unlimited and otherwise unchecked power to continue detention. The initial detention authority by the Secretary of State's executive order was to be contrasted with orders to detain by a court. The reviews were an important safeguard. The failure to conduct them amounted, on the facts of this case, to an abuse of the power to detain.

32. For the Secretary of State Mr Tam accepted that the *Hardial Singh* principles imposed implied limits on the exercise of the powers of detention that were set out in the statute. But he submitted that there was no provision or rule that limited the Secretary of State's authority to detain in any other way. Things had not been done, probably in violation of his duty in public law, for which legal remedies might have been available. But the claim in this case was a very specific one. The question was not whether there had been a breach of the law. The appellant was seeking damages for false imprisonment. There was no basis for such a claim, as the detention was at all times within the original authority to detain under the powers that were to be found in the statute. That would have been plain from the documents that were available in his case had his continued detention had been challenged by judicial review.

33. In the light of the judgments in *Lumba*, the central question for the court was whether each relevant breach of the procedural requirement to review detention was material in public law terms, that is to say whether it bore on and was relevant to the decision to detain. There was a difference between a requirement that was procedural only and a failure to apply a substantive rule which was capable of affecting the decision to detain or not to detain. A pure omission to review detention at the times specified by the policy was not material, at least in a case such as this where, had the review been carried out, the application of the substantive rules would have resulted in a decision to continue detention. But he accepted that if that submission was rejected, an omission to make a new decision by way of a detention review which was material in the *Lumba* sense must inevitably have the effect that the next period of detention was not authorised and the tort of false imprisonment was made out.

The common law remedy

34. The issue as to whether the appellant is entitled to damages, as focussed by these arguments, is a narrow one. It is common ground that the appellant was lawfully detained at the outset, as his detention was with a view to the making of a deportation order. There was a serious breakdown thereafter in the system of reviews mandated by the manual. But it is also common ground, as the judge found, that the *Hardial Singh* principles were complied with throughout the entire period. As Mr Tam points out, the continued detention could at all times have been justified by the Secretary of State had he been faced with an application for judicial review. 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 accepts that the breakdown in the system was a breach of a 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? I have not found this an easy question to answer.

36. I do not accept the Court of Appeal's view that the question is one of statutory construction. We are dealing in this case with what the Secretary of State agrees are public law duties which are not set out in the statute. Of course it is for the courts, not the Secretary of State, to say what the effect of the statements in the manual actually is. But there is a substantial body of authority to the effect that under domestic public law the Secretary of State is generally obliged to follow his published detention policy. In *R (Saadi) v Secretary of State for the Home Department* [2001] EWCA Civ 1512, [2002] 1 WLR 356, para 7, Lord Phillips of Worth Matravers MR, delivering the judgment of the court, said that lawful exercise of statutory powers can be restricted, according to established principles of public law, by government policy and the legitimate expectation to which such policy gives rise. In *Nadarajah v Secretary of State for the Home Department* [2003] EWCA Civ 1768, [2004] INLR 139, para 54 the Master of the Rolls, again delivering the judgment of the court, said:

> "Our domestic law comprehends both the provisions of Schedule 2 to the Immigration Act 1971 and the Secretary of State's published

policy, which, under principles of public law, he is obliged to follow."

In *D v Home Office (Bail for Immigration Detainees intervening)* [2005] EWCA Civ 38, [2006] 1 WLR 1003, para 132 Brooke LJ said that what the law requires is that the policies for administrative detention are published and that immigration officers do not stray outside the four corners of those policies when taking decisions in individual cases. *Wade and Forsyth, Administrative Law* 10th ed, (2009), pp 315-316 states that the principle that policy must be consistently applied is not in doubt and that the courts now expect government departments to honour their statements of policy. Policy is not law, so it may be departed from if a good reason can be shown. But it has not been suggested that there was a good reason for the failure of officials of the required seniority to review the detention in this case and to do so in accordance with the prescribed timetable.

37. Mr Husain submitted that the effect of the statements in the manual was not just to create a legitimate expectation that the reviews would be carried out. He said that, as the discretion to detain under the statute had to be exercised reasonably according to the *Hardial Singh* principles, the authority for continued detention was dependent on decisions taken each time it was reviewed. Moreover an unlawful detention was not rendered lawful because there were circumstances that might have made it lawful. He sought support for that proposition in Clarke LJ's observation in *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662, 666, that the detention in that case was unlawful because it was not reviewed until some event occurred to make it lawful. But that was a case where the plaintiff was detained under the Police and Criminal Evidence Act 1984, section 34(1) of which provided that a person arrested for an offence shall not be kept in detention except in accordance with the provisions of Part IV of the Act. Section 40, which was in Part IV, required reviews of the detention of person police custody at stated intervals. It was clear, as Clarke LJ said in the passage at p 666 that Mr Husain referred to, that the plaintiff was not being detained in accordance with the relevant provisions of the Act.

38. As Mr Husain pointed out, the Secretary of State accepts that where the authorising statute provides that a particular procedural step is a precondition to the legality of the detention a failure to carry out the required step means that the detention is unlawful and entitles the detainee to damages for false imprisonment. That is what was decided in *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662. But that case, as Mr Tam put it, was all about the statute. The situation in this case is quite different, as there is no mention of the need for reviews in relevant paragraphs in the authorising statute. I agree with both Laws LJ in the Court of Appeal, para 25, and Lord Brown (see para 100, below), that *Roberts* provides little, if any, assistance on the effect of the Secretary of State's failure to comply with his published policy.

39. On the other hand the appellant's argument that where the published policy is departed from the detention is unlawful finds some support in *Nadarajah v Secretary of State for the Home Department* [2004] INLR 139. Two appeals were before the court in that case. The appellants had both been detained on the ground that their removal from the United Kingdom was imminent. The Secretary of State's published policy was not to treat removal as imminent once proceedings which challenged the right to remove had been initiated. It was also the policy of the immigration service when considering the imminence of removal to disregard information from those acting for asylum seekers that proceedings were about to be initiated. But this policy had not been made public and it was held that the Secretary of State could not rely on it. In para 54 the Master of the Rolls, Lord Phillips of Worth Matravers, said that he was obliged to follow his published policy. Asking itself the question whether the appellants' detention had been lawful, the court held that it was not. In para 68, referring to *Nadarajah*'s case, Lord Phillips said:

> "The only basis upon which the Immigration Service could treat his removal as imminent was by applying that aspect of the Secretary of State's policy which had not been made public, namely that no regard would be paid to an intimation that judicial review proceedings would be instituted. The Secretary of State cannot rely upon this aspect of his policy as rendering lawful that which was, on the face of it, at odds with his policy, as made public".

In other words, it was unlawful for him to depart from his published policy unless there were good reasons for doing so. In para 72, referring to the case of the other appellant, he said that his detention was unlawful for the same reason as Nadarajah's detention was unlawful. In consequence of that decision he was entitled to damages: see para 15.

40. In *Mohammed-Holgate v Duke* [1984] AC 437, 443, Lord Diplock said that the *Wednesbury* principles are applicable not only in proceedings for judicial review but also for the purpose of founding a cause of action at common law for trespass by false imprisonment. It may be that not every public law error will justify resort to the common law remedy in every case. But I do not think that it is necessary to show that there was bad faith or that the discretion was exercised for an improper purpose in the present context. 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 discretion has not been lawfully exercised. In *R v Deputy Governor of Parkhurst Prison, Ex p Hague* [1992] 1 AC 58 Lord Bridge of Harwich said that the tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it. The requirements of the 1971 Act and *Hardial Singh* principles are not the only applicable law with which the Secretary of State must comply. *Nadarajah*'s case shows that lawful

authority for an executive power of detention may also be absent when there is a departure from the executive's published policy.

41. As Lord Brown points out, the published policy in *Nadarajah*'s case entitled the detainee to release because it narrowed the grounds on which the power of detention was exercisable: para 107, below. In this case the policy was different because it was concerned not with the grounds for detention but with procedure. All it did was to provide that the detention would be reviewed by designated officers at regular intervals. Of course I agree with him that the policies are different. But I do not think that this difference means that *Nadarajah* 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. The importance of the principle that the executive must act within the law was emphasised by Lord Bingham in his seminal Sir David Williams lecture, *The Rule of Law* [2007] CLJ 67, 72, when he said:

> "The broader and more loosely-textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law. This sub-rule requires that a discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification."

42. That is a proposition which can be applied to this case. 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 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: [2011] 2 WLR 671, para 68.

The authorities relied on by the Secretary of State

43. Mr Tam referred to a series of cases where detention was held not to be unlawful despite errors of public law. In *R v Deputy Governor of Parkhurst Prison, Ex p Hague* [1992] 1 AC 58 the appellant Hague had been segregated under a procedure which was not lawful which it was claimed amounted to false

imprisonment, and another prisoner named Weldon claimed that he had been falsely imprisoned and battered by certain prison officers. Those claims were rejected, in short because the sentence of imprisonment provided lawful authority for the prisoner's detention, that this could not be read as subject to any implied term with respect to the prison rules and that an otherwise lawful detention was not rendered unlawful by the conditions of detention. Mr Tam said that it was authority for the view that a public law error made in relation to a person's detention may entitle the person to seek judicial review but does not necessarily give rise to a remedy in damages. I would not quarrel with that proposition, but it begs the question whether the present case is one where a remedy in damages is available.

44. *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2003] 1 WLR 1763 was a case about the right of access to a solicitor. The appellant was arrested under section 14(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1982. He asked to see a solicitor but his right to do so was deferred while he was in police custody. In contravention of the relevant statute the deferral was made before the appellant requested access and he was not given the reasons for delaying access. He claimed damages for false imprisonment. Lord Hutton said in para 48 that he saw no substance in this submission as he had been lawfully arrested and after his arrest was lawfully detained under the provisions of the statute. The premature authorisation and the breach of the requirement for reasons to be given did not render the detention unlawful. Lord Millett said in para 61 that compliance was not a condition of lawful detention. This decision indicates that the critical question is likely to be whether breaches of this kind undermine the lawful authority for the detention. On the view that was taken of the statute that applied in that case, they did not. The facts of this case, which concerns the Secretary of State's discretion to maintain detention in accordance with his published policy, are quite different.

45. In *R (Saadi) v Secretary of State for the Home Department* [2002] UKHL 41, [2002] 1 WLR 3131, which was concerned with the lawfulness of detention under paragraphs 2(1) and 16(1) of Schedule 2 to the 1971 Act, Lord Slynn of Hadley said at para 48 that the Secretary of State's giving of no or wrong reasons did not affect the legality of the detention. Mr Tam said that no hint was given in that case that this failure gave rise to a problem as to its legality. But Collins J said that it was not argued in that case that the muddle about reasons rendered the decision to detain unlawful: [2001] EWCA Civ 1512, [2002] 1 WLR 356, para 16. Nor was the effect of a failure to review in issue.

46. In *R (Munjaz) v Mersey Care NHS Trust* [2003] EWCA Civ 1036, [2004] QB 395 two psychiatric patients challenged the lawfulness of the policy on seclusion that was applied in their respective hospitals. Referring to what was decided in *R v Deputy Governor of Parkhurst Prison, Ex p Hague* [1992] 1 AC 58,

Hale LJ said that a person who had been deprived of his liberty in pursuance of a lawful power to detain cannot through the medium of a tort of false imprisonment complain about the conditions in which he is detained, at least by those who are lawfully detaining him: para 49. There had been a breach of the statutory code of practice, but this did not amount to false imprisonment: para 82. Mr Tam said that these observations supported his argument. But he accepts that *Hague, Cullen* and *Munjaz* were not concerned with the question whether the person concerned should be detained at all, but only with the conditions of detention (*Hague* and *Munjaz*) or the ancillary matter of legal advice while in detention (*Cullen*). It should also be noted that in *Munjaz*, para 77, Hale LJ said that if an individual decision has been taken unlawfully in public law terms and results in actions which are tortious if taken without lawful excuse, then tortious remedies will be available. The context is different, of course. And the claim for a remedy under the tort of false imprisonment was rejected. But her observation is entirely consistent with what was said in *Nadarajah v Secretary of State for the Home Department*: see para 39, above.

47. The question as to the lawfulness of continued detention was directly in issue in *R (Walker) v Secretary of State for Justice (Parole Board intervening)* [2009] UKHL 22, [2010] 1 AC 553. That case arose out of the Secretary of State's failure to provide the systems and resources that prisoners serving indeterminate sentences for public protection needed to demonstrate to the Parole Board by the time of the expiry of their tariff periods that it was not longer necessary for the protection of the public for them to remain in detention. There was a breach of the Secretary of State's public law duty to provide these facilities. But, as I noted in para 5, counsel for the prisoners accepted that they were unable to challenge the legality of the warrant which authorised their continued detention. That provides the context for the passage in the speech of Lord Brown of Eaton-under-Heywood in paras 36 and 37 on which Mr Tam relies, where he said:

> "36. It is one thing to say – as indeed is now undisputed – that the Secretary of State was in breach (even systemic breach) of his public law duty to provide such courses as would enable IPP prisoners to demonstrate their safety for release and, to some extent at least, course enabling them to reduce the risk they pose, duties inherent in the legislation (the legislation's 'underlying premise' as Laws LJ described it [2008] 1 All ER 138, paras 24, 50); quite another to say that such breach of duty results in detention being unlawful. I respectfully agree with the Court of Appeal that it does not."
>
> 37. The remedy for such breach of public law duty – indeed the only remedy, inadequate in certain respects it may be – is declaratory relief condemning the Secretary of State's failures and indicating

> that he is obliged to do more… Past failures do not sound in damages"

48. In my own speech in *Walker*, para 6, I said that in terms of the statute the detention was lawful until the Parole board gave a direction for the prisoner's release. The default position was that until the direction was given the protection of the public required that the prisoner should be confined. I do not think that Lord Brown's observations can be applied to the different statutory regime that we are concerned with it this case. I agree with him that *Walker* is no more helpful to the respondent's case than *Roberts* is to the appellant: para 104, below. For the same reason I do not think that the decision in *Dunn v Parole Board* [2008] EWCA Civ 374, [2009] 1 WLR 728, where the Court of Appeal applied the same approach where the Parole Board had failed to conduct a timely review and the appellant remained in detention as authorised by the statute, is of any assistance in this case.

Discussion

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: *R v Governor of Brockhill Prison, Ex p Evans (No 2)* [2001] 2 AC 19, 35; see also *Tam Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97, per Lord Browne-Wilkinson at p 111B. In *Ex p Evans (No 2)*, p 42, Lord Hobhouse of Woodborough said:

> "Imprisonment involves the infringement of a legally protected right and therefore must be justified. If it cannot be lawfully justified, it is no defence for the defendant to say that he believed that he could justify it."

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 paragraph 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. Unlike the 2001 Rules, chapter 38 of the manual is concerned with the lawfulness of the detention. That is made clear in the opening paragraphs: see para 18, above. It has been designed to give practical effect to the *Hardial Singh* principles to meet the requirement that, to be lawful, the measures taken must be transparent and not arbitrary. It contains a set of instructions with which officials are expected to comply: see Schedule 2 to the 1971 Act, para 1(3). As I see it, the principles and the instructions in the manual go hand in hand. As Munby J said in para 68, the reviews are fundamental to the propriety of continued detention. The instructions are the means by which, in accordance with his published policy, the Secretary of State gives effect to the principles. They are not only commendable; they are necessary.

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. References to the authority to detain in the forms that were issued in the appellant's case illustrate this point. Form IS 151F, which is headed "Monthly Progress Report to Detainees", concludes at the top of page 3 of 3 with the words "Authority to maintain detention given", on which the officer's comments are invited and beneath which his decision is recorded. The discretion to continue detention must, of course, be exercised in accordance with the principles. But it must also be exercised in accordance with the policy stated in the manual. The timetable which paragraph 38.8 sets out is an essential part of the process. These are limitations on the way the discretion may be exercised. Following the guidance that *Nadarajah v Secretary of State for the Home Department* [2004] INLR 139 provides (see paras 39 and 40, above), I would hold that if they are breached without good reason continued detention is unlawful. In principle it must follow that tortious remedies will be available, including the remedy of damages.

53. There remains however the question of causation: what if the Secretary of State is able to show that, despite the failure to give effect to the policy, continued

detention was nevertheless compatible with the *Hardial Singh* principles? Is it an answer for the Secretary of State to say that, as he could have authorised continued detention had lawful procedures been followed, no tort was committed? Is there room in such a situation for an award of damages?

54. These questions are brought into sharp focus in this case. Mr Husain accepts that the Secretary of State would have been able to justify the need for the appellant's detention under the *Hardial Singh* principles at all times had he been required to do so. But in *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662, 667, Clarke LJ said that it was nothing to the point to say that the detention would have been lawful if a review had been carried out or that there were grounds which would have justified detention. The statutory requirement with which he was dealing in that case existed in order to ensure that members of the public were not detained except in certain defined circumstances. In all other circumstances, he said, every member of the public is entitled to his liberty. I would apply that reasoning to this case. It is true that the reviews were not required by the statute. But there was a public law duty to give effect to the provisions about reviews in the manual. If the reviews were not carried out – unless for good reason, which is not suggested in this case – continued detention was not authorised by the initial decision to detain. It is no defence for the Secretary of State to say that there were good grounds for detaining the appellant anyway. Unless the authority to detain was renewed under the powers conferred by the statute he was entitled to his liberty. The decision in *Lumba* leads inevitably to this conclusion.

55. As for the question of damages, the decision on this point in *Lumba* was that the appellants were entitled to no more than nominal damages as their detention was at all times justifiable. But this cannot be assumed to be so in every case, and in this case the facts have still to be established. So I would not foreclose entirely the possibility that the appellant in this case is entitled to more than a purely nominal award. The public law duty exists for the protection of everyone, from the most undeserving to the most vulnerable. The detention of children, those suffering from physical or mental illness and those who have been traumatised by torture are perhaps the most obvious examples. Paragraph 38.8 states that children are reviewed on a regular basis to ensure that the decision to detain is based on the current circumstances of the case and that detention remains appropriate. This sentence makes explicit in the case of children what must be taken to be the purpose of the reviews in all cases. The difference is that the system provides for more frequent reviews in the case of children. In any event, false imprisonment is a trespass against the person which is actionable without proof of special damage: *Murray v Ministry of Defence* [1988] 1 WLR 692, 701-702, per Lord Griffiths; *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662, 666-669, per Lord Clarke.

56. There may well be issues as to quantum in cases of that kind. As Smith LJ said in *Iqbal v Prison Officers Association* [2009] EWCA Civ 1312, [2010] QB 732, para 83, an award of damages for false imprisonment is based on normal compensatory principles: see also *Langley v Liverpool City Council* [2005] EWCA Civ 1173, [2006] 1 WLR 375, para 70. It may be that the conclusion in this case will be that an award of nominal damages is all that is needed to recognise that the appellant's fundamental rights have been breached. But that does not affect the issue of principle.

57. I would hold therefore that the appellant is entitled to the remedy he seeks at common law. There will, of course, have to be an inquiry as to the quantum of damages if the amount is not agreed.

Article 5

58. The appellant's alternative claim is that he has an enforceable right to compensation under article 5(5) of the Convention. He maintains that his detention did not satisfy the requirements of article 5(1)(f). It was not "lawful", and it was not "in accordance with a procedure prescribed by law". He relies on what the Grand Chamber said in *Saadi v United Kingdom* (2008) 47 EHRR 17, para 74, and in *A v United Kingdom* (2009) 49 EHRR 29; Application No 3455/05, 19 February 2009, para 164 as to what was needed to avoid the detention being branded as arbitrary. The protections referred to in these passages are, as Mr Husain points out, redolent of the *Hardial Singh* principles.

59. It is agreed on both sides that the article 5 claim adds nothing to the claim at common law if that claim succeeds: see *R (I) v Secretary of State for the Home Department* [2003] INLR 196, per Simon Brown LJ at para 8; *R (Munjaz) v Mersey Care NHS Trust* [2004] 2 QB 395, per Hale LJ at para 70. Indeed there are reasons for thinking that the *Hardial Singh* principles are in some respects more favourable to detainees than Strasbourg requires, as Lord Brown indicates: see para 94, below; *Chahal v United Kingdom* (1996) 23 EHRR 413, para 112; *Saadi v United Kingdom*, para 72. So, as I would hold that the appellant succeeds on his common law claim, I propose to say no more about this alternative, except to note that article 5(5) gives a right to compensation where there has been a contravention of any of the provisions of the article. This would have provided the appellant with a remedy if, although there was a breach of the public law duty to conduct reviews, he was not entitled to claim damages at common law for false imprisonment. As it is, for the reasons I have given, I consider that he is entitled to that remedy and at least to nominal damages.

Conclusion

60. For these reasons, and for those given by Lady Hale and Lord Kerr with which I am in full agreement, I would allow the appeal. I would restore the declaration that was made by Munby J that the appellant's detention by the Secretary of State was unlawful for the periods stated by him, except for a period of one month beginning on 6 December 2007 when the only defect in the decision to continue detention was that the review was carried out by an official of the wrong grade: see *R (Lumba v Secretary of State for the Home Department* [2011] 2 WLR 671, para 68 per Lord Dyson. I would also restore his orders as to the assessment, if the parties are not agreed, of the quantum of damages.

LADY HALE

61. Mr Shepherd Kambadzi may not be a very nice person. He is certainly not a very good person. He has overstayed his welcome in this country for many years. He has abused our hospitality by committing assaults and sexual assault. It is not surprising that the Home Secretary wishes to deport him. But in *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, para 84, Lord Steyn quoted the well-known remark of Justice Frankfurter in *United States v Rabinowitz* (1950) 339 US 56, p 69, that "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people". Lord Steyn continued: "Even the most wicked of men are entitled to justice at the hands of the state". And I doubt whether Mr Kambadzi is the most wicked of men.

62. He had come to the end of the time he was due to serve as a result of his crimes. He may even have been expecting to be released from prison on 8 March 2006. If so, it must have come as a cruel shock when he was kept in prison (indeed for many months in the same prison where he had been serving his sentence), because the Home Secretary had decided to make a deportation order against him and at the same time to exercise the power to authorise his detention under paragraph 2(2) of Schedule 3 to the Immigration Act 1971. This gives the Secretary of State an apparently open-ended power to authorise the detention of a person who has been served with a notice of intention to deport "pending the making of the deportation order". The order was in fact made more than a year later, after which Mr Kambadzi was detained under paragraph 2(3) of the Schedule, which again gives an apparently open-ended power to authorise detention "pending his removal or departure from the United Kingdom".

63. No court had ordered or authorised or approved this detention. The trial judge who sentenced Mr Kambadzi for his crimes had not even recommended it. A Government official decided to lock him up, on the face of it until a Government official decided to take the next step. But no-one suggests that paragraph 2 of Schedule 3 gives the Government an unlimited power to authorise a person's indefinite detention without trial. Everyone knows that there are limits. Everyone also knows that if those limits are exceeded, the detention becomes unlawful. Everyone also knows that a person who is unlawfully detained is entitled, not only to be released, but to claim compensation for having been unlawfully detained. The person responsible for the unlawful detention is liable even if he acted in good faith and without any negligence: see *R v Governor of Brockhill Prison, Ex p Evans (No 2)* [2001] 2 AC 19 (compare the statutory protection given to those who detain mentally disordered or incapacitated people under the Mental Health Act 1983 or the Mental Capacity Act 2005: see s 139(1) and Schedule A1, para 3 respectively). All this is "Hornbook law".

64. The only question, therefore, is what the limits are to the Home Secretary's powers. In particular, are there procedural as well as substantive limits? The substantive limits were established as long ago as 1983, in the powerful extempore judgment of Woolf J in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704, and approved by the Privy Council in *Tan Te Lam v Superintendent of the Tai A Chau Detention Centre* [1997] AC 97. The detention has to be "pending" the deportation order or the removal, as the case may be, and cannot therefore be imposed for any other purpose. If it becomes clear that the purpose cannot be carried out, the detention becomes unlawful. In *Tan Te Lam*, above, the detention of these particular Vietnamese boat people became unlawful once it was clear that the Vietnamese Government did not regard them as Vietnamese nationals and would not have them back. It was also held in *Hardial Singh* that the Secretary of State cannot detain a person for longer than is reasonable in all the circumstances. This can depend upon the reasons for the delay. The Secretary of State has to "exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time": *Hardial Singh*, at p 706F. If the Secretary of State is dragging his feet, then the period may become unreasonable. But if the detainee is unjustifiably stringing things out, for example by launching an obviously bogus asylum claim, it will not.

65. In this case, Munby J held that the Home Secretary did indeed intend to deport Mr Kambadzi and that this was still a possibility. He had been detained for a very long time (22 months by the time that Munby J decided the case in January 2008). But for most of that time he had been pursuing a claim for asylum, which was clearly bogus, through all possible appellate routes. Thereafter he could not be deported because the Home Secretary had temporarily suspended removals to Zimbabwe. But there remained some prospect of achieving this. Hence the

detention was substantively justified in accordance with the *Hardial Singh* principles.

66. But Munby J held that the detention had, for much of those 22 months, been unlawful because of the failure of the Secretary of State's officials to conduct the regular reviews laid down in his own Operations Enforcement Manual. No-one doubts that the failure to conduct these reviews was unlawful, and that the Secretary of State could have been obliged by judicial review proceedings to comply with his stated policy, unless he had a good reason not to do so in the individual case: see the Court of Appeal's judgment in this case at [2009] EWCA Civ 1204, [2009] 1 WLR 1527, para 25. The issue is whether that unlawful failure has also rendered the detention unlawful.

67. The Manual seemed to think that it did. It stated that the purpose of the reviews was to ensure that the detention continued to be justified: see para 38.3.4. Further than that, it declared, at para 38.1:

> "To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with this stated policy."

68. The Court of Appeal took the same view in *Nadarajah v Secretary of State for the Home Department* [2003] EWCA Civ 1768, [2004] INLR 139. At para 54, Lord Phillips stated that:

> "Our domestic law comprehends both the provisions of Schedule 2 to the Immigration Act 1971 and the Secretary of State's published policy, which, under principles of public law, he is obliged to follow."

The failure to follow that published policy rendered the detentions unlawful in that case. The policy which was in question there related to the considerations that the Secretary of State would take into account in deciding to detain. It went further than the bare bones of the *Hardial Singh* principles.

69. *Nadarajah* was a case principally brought under article 5 of the European Convention on Human Rights. The question, therefore, was whether the detention was "lawful" in the sense that it complied with the Convention standards of legality. It is not surprising that the Court held that, to be "lawful", a decision to detain had to comply, not only with the statute, but also with the Secretary of

State's published policy. But it is also not surprising that the majority of this Court has now held, in *R (Lumba and Mighty)* v *Secretary of State for the Home Department* [2011] UKSC 12; [2011] 2 WLR 671, that a failure to comply with the Secretary of State's published policy may also render detention unlawful for the purpose of the tort of false imprisonment. While accepting that not every failure to comply with a published policy will render the detention unlawful, I remain of the view that "the breach of public law duty must be material to the decision to detain and not to some other aspect of the detention and it must be capable of affecting the result – which is not the same as saying that the result would have been different had there been no breach" (see the *Lumba* case, para 207). The question remains, however, whether a material breach of a public law duty to conduct regular reviews – that is, a procedural obligation – has the same consequence as a material breach of a public law duty to detain only if certain criteria are fulfilled. For the sake of the argument before this Court, we have to assume that the case falls into the former category – breach of a procedural obligation – even though the co-incidence of timing and the evidence of the secret policy which emerged in *Lumba* might suggest that the real reason why the reviews were not conducted as required by the policy was that they would be a waste of time – all these people were going to be detained under the new and secret criteria in any event. But might there be a distinction between the substantive limitations on the power to detain and the procedural requirements for exercising it?

70. Sometimes a statute puts the effect of a failure to follow procedural requirements beyond doubt. The Police and Criminal Evidence Act 1984, section 34(1), states that "A person . . . shall not be kept in police detention except in accordance with the provisions of this Part of this Act"; those provisions require regular reviews; failure to conduct those reviews on time renders detention beyond the time when they should have been conducted unlawful: see *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662, CA. Sometimes a statute does not say in so many words that failing to comply with one of its procedural requirements will render the resulting detention unlawful, but the courts will construe the statute to mean that it does. An example is the prohibition in the Mental Health Act 1983, section 11(4)(a), of making an application for compulsory admission to hospital if the patient's nearest relative objects: *Re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599, CA. In these cases, it is irrelevant that the person concerned could have been lawfully detained had the correct procedures been followed. Sometimes, however, the court will conclude that the lawfulness of detention does not depend upon the fulfilment of a particular statutory requirement. For example, in *R (D) v Secretary of State for the Home Department* [2006] EWHC 980 (Admin), it was common ground that failing to comply with the requirement in the (Immigration) Detention Centre Rules 2001 SI 2001/238 that immigration detainees be given a medical examination within 24 hours of arrival did not render the detention unlawful unless the detainees could show that it would have led to their earlier release.

71. In short, there are some procedural requirements, failure to comply with which renders the detention unlawful irrespective of whether or not the substantive grounds for detention exist, and some procedural requirements, failure to follow which does not have this effect. If the requirement is laid down in legislation, it will be a matter of statutory construction into which category it falls. A clear distinction can be drawn between a requirement which goes to whether or not a person is detained and a requirement which goes to the conditions under which a person is detained. If the grounds exist for detaining a person in a mental hospital, for example, and the procedures have been properly followed, it is not unlawful to detain him in conditions of greater security than are in fact required by the nature and degree of his mental disorder.

72. The same analysis applies to requirements which are imposed, not by statute, but by the common law. There are some procedural requirements which go to the legality of the detention itself and some which do not. The common law imposed a requirement that an arrested person be told, at the time, the real reason why he was being arrested. It did so for the very good reason that the arrested person had to know whether or not he was entitled to resist arrest. Mr Leachinsky was told that he was being arrested under the Liverpool Corporation Act 1921, but this Act gave the police officers no power to arrest him without a warrant. They did have power to arrest him on reasonable suspicion of having committed a felony. But, as they had not told him this, his detention was unlawful and he was entitled to damages for false imprisonment: see *Christie v Leachinsky* [1947] AC 573. As Lord Simonds put it, at p 592, "if a man is to be deprived of his freedom he is entitled to know the reason why".

73. It is not statute, but the common law, indeed the rule of law itself, which imposes upon the Secretary of State the duty to comply with his own stated policy, unless he has a good reason to depart from it in the particular case at the particular time. Some parts of the policy in question are not directly concerned with the justification and procedure for the detention and have more to do with its quality or conditions. But the whole point of the regular reviews is to ensure that the detention is lawful. That is not surprising. It was held in *Tan Te Lam*, above, that the substantive limits on the power to detain were jurisdictional facts, so the Secretary of State has to be in a position to prove these if need be. He will not be able to do so unless he has kept the case under review. He himself has decided how often this needs to be done. Unless and until he changes his mind, the detainees are entitled to hold him to that. Just as Mr Leachinsky's detention was unlawful even though there were in fact good grounds for arresting him, the detainees' detention is unlawful during the periods when it has not been reviewed in accordance with the policy, irrespective of whether or not the review would have led to their release. In my view, Munby J was right to hold that the reviews were "fundamental to the propriety of the continuing detention" and "a necessary

prerequisite to the continuing legality of the detention": see [2008] EWHC 98 (Admin), para 68.

74. It follows also, from the decision in *Lumba*, that the fact – if it be a fact – that had the requisite reviews been held, the decision would have been the same makes no difference. However, the result of any review, had it been held, cannot be irrelevant to the quantum of damages to which the detainee may be entitled. False imprisonment is a trespass to the person and therefore actionable *per se*, without proof of loss or damage. But that does not affect the principle that the defendant is only liable to pay substantial damages for the loss and damage which his wrongful act has caused. The amount of compensation to which a person is entitled must be affected by whether he would have suffered the loss and damage had things been done as they should have been done. A differently constituted majority in *Lumba* has now clearly rejected the view, taken by some members of the Court, that deliberate breaches of constitutional rights might attract a conventional sum in vindicatory damages even if the officials' conduct were not so egregious as to attract exemplary or punitive damages. That view has, of course, to be respected.

75. I have reached these conclusions without reference to the Strasbourg case law under article 5 of the European Convention on Human Rights. I did initially think that article 5 might supply the answer to what, on any view, is not an easy question. Article 5 lays down an exhaustive list of the circumstances in which a person may be deprived of his liberty. These include, in article 5(1)(f), "the lawful arrest or detention of a person … against whom action is being taken with a view to deportation or extradition". The requirement of lawfulness is not limited to complying with the substantive and procedural provisions of the domestic law. The Convention itself imports extra requirements in order to ensure that the detention is not arbitrary. Some of these are procedural. Thus the detention of persons "of unsound mind" under article 5(1)(e), even if formally authorised, must be regularly reviewed in order to ensure that the criteria for detention still exist: see *X v United Kingdom* (1982) 4 EHRR 118. A principle of domestic law which allows people to be *de facto* detained without any formality at all contravenes article 5(1)(e) (as well as article 5(4)) even though the criteria for detention do exist: see *HL v United Kingdom* (2005) 40 EHRR 761.

76. The Strasbourg court has not yet (so far as we are aware) addressed the procedural protection which may be required in order to prevent detention by the executive under article 5(1)(f) becoming arbitrary. The notion of arbitrariness for the purpose of article 5(1)(f) is, however, different from the notion of arbitrariness for the purpose of article 5(1)(b), (d) and (e). It does not require that the detention be necessary in order to achieve the stated aim: see *Chahal v United Kingdom* (1997) 23 EHRR 413; *Saadi v United Kingdom* (2008) 47 EHRR 427. But in *Chahal*, the Court did endorse the *Hardial Singh* principles, which incorporate a

reasonable time limit on the detention. It is not impossible, therefore, that the Court would also impose a requirement for regular reviews. But it cannot be assumed that it would do so, or that it would expect these to be as rigorous as those which the Secretary of State has imposed upon himself. Thus, while the article 5 jurisprudence does not detract from the conclusions reached on domestic law, it does not add anything to them.

77. For those reasons, I would allow the appeal and make the order proposed by Lord Hope, although I would not hold out much hope that Mr Kambadzi will be entitled to more than a nominal sum in damages. My reasons for reaching this conclusion are, I believe, no different from those of Lord Hope and Lord Kerr. But because the Court is so narrowly divided, I thought it necessary to reason the matter through for myself. The decision in *Lumba* has confirmed and strengthened me in these conclusions, although I acknowledge that, as this case was presented to us, the departure from published departmental policy was of a different kind from the departure in that case. Nevertheless, it was so obvious and so persistent and so directly related to the decision to continue to detain that it was clearly "material" in the *Lumba* sense. Whether in reality it was a *Lumba* case is not for this Court to decide.

LORD KERR

78. I agree with Lord Hope that this appeal should be allowed for the reasons that he has given. I also agree that the anonymity order should be set aside. As Lord Hope has said, it may be safely assumed that an asylum seeker will be alive to the risks that disclosure of his identity will entail and his stance on the question of anonymity, especially if he expresses no desire that it be maintained, will be of importance in striking the balance between avoiding unnecessary risks to the asylum seeker's safety and the principle of open justice.

79. The critical question in this appeal is whether compliance with the duty to review underpins the legality of the detention. It is accepted that there is a duty to review. It is further accepted that this duty had not been complied with. Does that make the detention unlawful? The respondent says that it does not, arguing that the situation encountered here is not comparable to that which demands compliance with a statutory obligation on which the condition of lawfulness of the detention depends. It is suggested that a failure to observe a public law duty should not render unlawful a hitherto lawful detention because there can be no sufficient nexus between such a failure and the lawfulness of the detention.

80. One can acknowledge the initial appeal of the respondent's argument. If a statute prescribes certain conditions that must be met in order that a person may be lawfully held in detention, where one of those conditions remains unfulfilled, the detention may be regarded as automatically unlawful. By contrast, the failure to fulfil a duty owed at public law will not necessarily render invalid a detention made on foot of a valid authorisation. The essential question must be whether there is an adequate connection between compliance with the duty and the lawfulness of the detention. The respondent's argument proceeds on the premise that there can never be such a close link. The appellant's case is that it depends on the circumstances – some public law duties are so closely linked to the continued legality of the detention that a failure to comply with them transforms it from a condition of lawfulness to one which is unlawful.

81. The case can be approached in a relatively simplistic way. The appellant has a legal entitlement to have the justification for his detention reviewed. This is not disputed. Likewise it is not challenged that where there has been a violation of that right, the appellant must have a remedy. Is that remedy to be confined to a declaration and/or an injunction? And if he is entitled to these forms of relief, why should he not be entitled to maintain an action for damages for false imprisonment? Given that what is at stake is the appellant's liberty; that there is a presumption in favour of his release; that scrupulous adherence to the review standards is clearly contemplated in the language of the policy document; and that, plainly, these are considered to be vital safeguards of the detainee's interests, I can discern no reason in principle to restrict the availability of all remedies that the law will conventionally afford for unlawful detention. On the contrary, it appears to me that access to the full panoply of such remedies is required in order that those fundamental interests are afforded proper protection.

82. Another way of approaching the questions that arise on the appeal is to ask whether the initial authority to detain could be regarded as comprehensive of the issues which are germane to the continued lawfulness of detention. Quite clearly, detention which is lawful initially can be transformed to a condition of illegality – see *R v Governor of Durham Prison Ex p Hardial Singh* [1984] 1 WLR 704. In his argument to this court on behalf of the Secretary of State, Mr Tam QC has asserted that where the detention is initially lawful, it cannot become unlawful, absent an undermining of the initial authority to detain. But there was no undermining of the initial authority in that sense in *Hardial Singh* yet the initially lawful detention became unlawful. That transformation occurred by a means other than by operation of an express statutory pre-condition or by the extinction of the initial authority to detain.

83. In *Hardial Singh* it was held that there were implicit limitations on the statutory power to *continue to detain*. If, for instance, the original purpose of detention *viz* to deport became incapable of fulfilment, the detainee could no

longer be lawfully held. Why should implicit limitations in the form of an effective review of the continuing justification for detention not be recognised in the present case? Where someone is detained beyond the immediate post-detention period, there may be two aspects to the question whether his detention is lawful. First there must be an initial valid authorisation; secondly, there must be compliance with such public law duties as touch directly on the question of whether he should continue to be detained. That proposition can perhaps be best exemplified in the context of a review of the justification of the reasons for continued detention by considering the purpose of that review.

84. One starts with the unexceptionable proposition that it would be indisputably unlawful to hold someone in detention if there was no justification for it. Since, self evidently, an original justification for detention may prove, in light of events and circumstances that occur subsequently, to no longer obtain, periodic review of the justification for continued detention is required. The purpose of the review is to determine whether there are still good grounds to continue to hold the person in detention. If the review discloses that there are no such grounds, continued detention is unquestionably illegal. A person detained after it had been shown that there was no good reason for his continued detention would undoubtedly have the right to claim compensation for false imprisonment.

85. As Lord Hope has said, support for the proposition that a departure from published policy as to detention will render it unlawful is to be found in *R (Nadarajah) v Secretary of State for the Home Department* [2004] INLR 139. Lord Brown has sought to distinguish that case from the present appeal on the basis that in *Nadarajah* the grounds on which the power of executive detention could be exercised had been "narrowed" but that no such narrowing of powers occurred here. But if the published policy in *Nadarajah* narrowed the grounds on which someone could be lawfully detained, why should the same consequence not accrue in the present case? In *Nadarajah* the stated policy was to release those whose removal was not imminent. Here it is to the effect that persons will only be detained if there is continuing justification for it, as verified by a prescribed system of review. Lord Brown suggests that in *Nadarajah* the detainee was entitled to release and in the present case that the appellant was entitled 'merely' to be reviewed for release. I respectfully disagree that such a distinction can be drawn. The essence of the appellant's entitlement was that he *would be* released unless continued justification for his detention existed. The review was the means by which the existence of the justification was to be established. It is not comprehensive of the detainee's entitlement. As in *Nadarajah* the appellant in the present case is entitled to be released in accordance with the terms of the relevant policy, if justification for his continued detention no longer obtains.

86. What if no review takes place? If it is illegal to hold a person in detention where it has been established that there are no good grounds for doing so, can it be

lawful to hold someone without examining whether such grounds continue to exist? In my view it cannot. Since it has been recognised that, in cases such as the appellant's, periodic review is necessary in order to vouch the continued justification for detention, where that review does not take place, the detention can no longer be considered justified. The justification for continued detention cannot be said to exist and, absent such justification, the detention is unlawful. Likewise, in my opinion, where the review does take place but does not partake of the quality or character required to justify the continuance of detention, it becomes unlawful and gives rise to a right to claim false imprisonment.

87. I believe that Munby J was right in his characterisation of the system of review as being integral to the lawfulness of the detention (para 68 of his judgment). It was not only so stated in the policy document, this concept pervades the entire approach of government to this type of detention. I accept, of course, that the Executive cannot make law and that the policy document should not be construed as a statute but it is not irrelevant that the Home Secretary made an unequivocal statement that failure to comply with the policy would be a breach of the law. This surely provides the foundation for a finding that the requirement of review is intimately connected to the continuing lawfulness of the detention and that it therefore constitutes an implicit limitation on the statutory power to detain.

88. The majority in *R (Lumba and Mighty) v Secretary of State for the Home Department* [2011] UKSC 12; [2011] 2 WLR 671, has held that causation is not a necessary ingredient for liability. In that case the argument on behalf of the detained persons was put in this way: a public law error that bears directly on the decision to detain will mean that the authority for detention is ultra vires and unlawful, and will sound in false imprisonment. That argument was accepted by the majority of the court in *Lumba*. The public law error in the present case bore directly on the decision to detain in that it was made without the necessary review of the justification for detention.

89. As the majority in *Lumba* also held, however, causation is relevant to the question of the recoverability of damages. For the reasons that I gave in my judgment in that case, I consider that if it can be shown that the claimant would not have been released if a proper review had been carried out, this must have an impact on the quantum of compensation and that nominal damages only will be recoverable.

LORD BROWN (with whom Lord Rodger agrees)

90. Does a failure to comply with a published policy periodically to review the exercise of a statutory power of executive detention constitute not merely the breach of a public law duty but in addition the tort of false imprisonment? Does it, in other words, undermine the lawfulness of continuing detention? That essentially is the issue before the Court on this appeal.

91. Lord Hope's judgment contains a very full account of the facts, the arguments and the authorities relevant to this appeal so that my own judgment can be correspondingly short. The Immigration Act 1971, as amended, (the 1971 Act) provides (by paragraphs 2(2) and (3) of Schedule 3) that, in a case like this, once notice of intention to deport has been given, the Secretary of State may detain the person "pending the making of the deportation order" (paragraph 2(2)) and, once the deportation order has been made, the detainee "shall continue to be detained ["pending his removal or departure"] unless he is released on bail or the Secretary of State directs otherwise" (paragraph 2(3)).

92. One suspects that when these provisions were enacted nearly 40 years ago Parliament envisaged the deportation process taking place within a comparatively short timescale, perhaps months at most. As it is, however, the process regularly stretches to years and not infrequently the position arises where, for one reason or another, it proves impossible for a considerable time to deport anyone to a particular country because of conditions there. In the past this has been true at various times of Somalia, of Afghanistan, of Iraq, and of Kosovo. Since 2005 it has also been true of Zimbabwe which is why this appellant, although given notice of an intention to deport him on 8 March 2006, and made subject to a deportation order on 24 August 2007, remains in this country to this day. More particularly, this is the background to his detention under Schedule 3 to the 1971 Act (following completion of a prison sentence) from 8 March 2006 to 13 June 2008 when, after 27 months of Schedule 3 detention, he was finally released on bail.

93. That the Secretary of State's power to detain people under paragraph 2 of Schedule 3 (the paragraph 2 power as for convenience I shall call it) is not unlimited is plain and undisputed. This was first established by Woolf J in *R v Governor of Durham Prison Ex p Hardial Singh* [1984] 1 WLR 704, approved by the Privy Council in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 and subsequently distilled by Dyson LJ in *R (I) v Secretary of State for the Home Department)* [2003] INLR 196, para 46 into four propositions (which, again for convenience, I shall call the *Hardial Singh* principles), as follows:

> "(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."

94. Although suggested by the appellant to be broadly similar to the protections implied by the ECtHR into article 5(1)(f) of the Convention to ensure proportionality and guard against arbitrariness, to my mind the *Hardial Singh* principles, certainly as applied in a succession of later cases, are in fact more favourable to detainees than Strasbourg requires. In particular Strasbourg has consistently stated that there is "no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing" (para 72 of the Grand Chamber's judgment in *Saadi v UK* (2008) 47 EHRR 427, following *Chahal v UK* (1996) 23 EHRR 413, para 112). Domestic case law, by contrast, holds that with regard to the second *Hardial Singh* principle – "the deportee may only be detained for a period that is reasonable in all circumstances" – "[t]he likelihood or otherwise of the detainee absconding and/or re-offending [is] an obviously relevant circumstance" (my judgment in *I* at para 29, echoed by Dyson LJ at paras 48 and 49).

95. I may note at this point that, notwithstanding that the full width of the *Hardial Singh* principles was clearly recognised by Munby J in the present case (paras 79-120), his conclusion was that none of them had been breached at any time, a conclusion unchallenged in the Court of Appeal. It follows that not merely was the appellant in a formal sense a person liable to be detained under the third Schedule (in the same way that the unsuccessful appellant in *R (Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207 was held "liable to detention" and thus eligible for temporary admission under the second Schedule – even though it might well have been unreasonable and in breach of the *Hardial Singh* principles actually to have detained him); here the appellant was liable to be detained in the fuller sense that throughout the period of his detention it would have been a lawful and reasonable exercise of the paragraph 2 power actually to detain him.

96. On what basis, then, is it said that the appellant's detention was *un*lawful so as to give rise to a claim for damages for false imprisonment? The argument revolves around the Secretary of State's published policy: chapter 38 of the Department's Operations Enforcement Manual (the OEM) under the heading "Detention and Temporary Release".

97. The policy (at 38.3) includes "a presumption in favour of temporary admission or temporary release", provides that "[t]here must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified" and that "[a]ll reasonable alternatives to detention must be considered before detention is authorised", and dictates that "[o]nce detention has been authorised, it must be kept under close review to ensure that it continues to be justified". Paragraph 38.8 then specifies how both the initial detention and any continued detention thereafter are to be authorised and kept under review, expressly providing both for the frequency and for the level of seniority of the reviews required. In the event, as Munby J recorded (para 48), although entitled (by the date of the first instance hearing) to no fewer than 22 monthly reviews of the lawfulness of his detention, the appellant had had the benefit of only ten reviews, of which only six were conducted by officials of the requisite seniority, and of those six, two had had to be disavowed as fatally flawed.

98. Paragraph 38.1 of the policy, headed "General", states:

> "To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with this stated policy."

In a sense the question now before us is quite simply: is that statement accurate? Munby J in effect held that it was, not only as to the substantive requirements to justify continuing detention but as to the review requirements also. At para 68 of his judgment, having referred to rule 9(1) of the Detention Centre Rules (which, like Lord Hope, I think to be of only peripheral relevance) he continued:

> "[I]ntegral to the policy laid down by the Secretary of State in paragraph 38.8 of the Operations Enforcement Manual, is the principle that someone is not to be detained beyond a certain period without there being a review undertaken at regular intervals and moreover, as required by the Secretary of State's policy, a review undertaken at increasingly high levels of seniority within the Home Office as the period of detention grows longer. Those reviews are

> fundamental to the propriety of the continuing detention, they are required in order to ensure that the continuing detention can still be justified in the light of current, and perhaps changed, circumstances, and they are, in my judgment, a necessary prerequisite to the continuing legality of the detention."

99. That paragraph identifies the critical question: is the holding of the reviews required by the OEM "a necessary prerequisite to the continuing legality of the detention"? In addressing this question it is convenient first to distinguish the present case from certain other authorities strongly relied upon by the respective parties. The appellant (supported by the Intervener) seeks to pray in aid the Court of Appeal's decision in *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662. The case turned on the proper construction of Part IV of the Police and Criminal Evidence Act 1984 (the Part containing each of the sections to which I now refer). The detainee, following arrest, was initially kept in police detention pursuant to section 37. Section 40(1) provided that: "Reviews of the detention of each person in police detention in connection with the investigation of an offence shall be carried out periodically in accordance with the following provisions of this section." Section 40(3)(a) provided that "the first review shall be not later than six hours after the detention was first authorised". Central to the decision that, no such review within six hours having taken place, the detainee's continued detention (until the point two hours, twenty minutes later when his detention *was* reviewed) had been unlawful (notwithstanding that had he been reviewed at the six-hour point he clearly would still have been detained), was section 34(1) which provided that: "A person arrested for an offence shall not be kept in police detention except in accordance with the provisions of this Part of this Act."

100. Munby J appears to have thought *Roberts* strongly supportive of the appellant's case. Laws LJ, giving the leading judgment in the Court of Appeal, thought otherwise. As he pointed out ([2009] 1 WLR 1527, para 25):

> "[T]he requirement of periodic review, on the proper construction of the statute, had to be satisfied as a condition precedent to the legality of the suspect's detention. It was made so by the express terms of section 34(1). But there is no analogue to section 34(1) of PACE to be found in paragraph 2(2) of Schedule 3 to the Immigration Act 1971. There is no reference in the sub-paragraph, express or implied, to the Rules or the manual or to any Rules that might be made under powers in the Immigration Act or to any manual, or instructions, that might be issued by the Secretary of State. I cannot see how compliance with the letter of the Rules or manual could be said to be a sine qua non of a lawful exercise of the power to detain unless

> paragraph 2(2) (or other main legislation) made it so. But it does not".

I agree with Laws LJ that *Roberts* provides little if any assistance to the appellant here.

101. The respondent for his part seeks to rely on *R (Walker) v Secretary of State for Justice (Parole Board intervening)* [2010] 1 AC 553 in support of his argument that a failure in the review process does not undermine the legality of (the unreviewed) continuing detention. *Walker* was concerned with a number of appeals by IPP prisoners justifiably complaining of the Secretary of State's systemic failures to provide the necessary resources and systems to enable such prisoners to demonstrate to the Parole Board that they could safely be released. The Divisional Court held in one of the cases, *R (Wells) Parole Board* [2008] 1 All ER 138, para 47: "To the extent that the prisoner remains incarcerated after tariff expiry without any current and effective assessment of the danger he does or does not pose, his detention cannot in reason be justified. It is therefore unlawful."

102. The Court of Appeal and the House of Lords disagreed. As I put it (at paras 36-37):

> "It is one thing to say – as, indeed, is now undisputed – that the Secretary of State was in breach (even systemic breach) of his public law duty to provide such courses as would enable IPP prisoners to demonstrate their safety for release and, to some extent at least, courses enabling them to reduce the risk they pose, duties inherent in the legislation (the legislation's 'underlying premise' [as it was described in the court below]); quite another to say that such breach of duty results in detention being unlawful. I respectfully agree with the Court of Appeal that it does not.
>
> The remedy for such breach of public law duty – indeed the only remedy, inadequate though in certain respects it may be – is declaratory relief condemning the Secretary of State's failures and indicating that he is obliged to do more."

103. By the same token, submits Mr Tam QC, the undisputed (and here too systemic) breaches of the Secretary of State's public law duty to review, consistently with his published policy, the justifiability of the appellant's (and doubtless very many other detainees') continuing detention, although (as in

Walker) deeply to be regretted and strongly to be condemned, does not result in the unreviewed detention being unlawful.

104. To my mind, however, *Walker* is no more helpful to the respondent's case than *Roberts* is to the appellant's. Again, as in *Walker*, the primary legislation made the position clear: IPP prisoners were expressly made subject to the statutory requirement (under section 28 of the Crime (Sentences) Act 1997) that they were not to be released until the Parole Board was satisfied that their continuing confinement was no longer necessary for the protection of the public. In the same way that Schedule 3 to the 1971 Act contains no analogue to section 34(1) of PACE, so too it contains no analogue to section 28 of the 1997 Act.

105. Laws LJ below identified (at para 21) the essential question here to be: "What is the reach [of the paragraph 2 power]" and characterised it as "a question of statutory construction". At paragraph 35 he summarised his conclusions upon the question as follows:

> "(i) Compliance with the Rules and manual as such is not a condition precedent to a lawful detention pursuant to paragraph 2(2). Statute does not make it so (contrast section 34(1) of PACE, and the *Roberts* case [1999] 1 WLR 662). Nor does the common law, or the law of the Convention. (ii) Avoidance of the vice of arbitrary detention by use of the power conferred by paragraph 2(2) requires that in every case the *Hardial Singh* principles should be complied with. (iii) It is elementary that the power exercised, being an act of the executive, is subject to the control of the courts, principally by way of judicial review. So much is also required by Convention article 5(4). The focus of judicial supervision in the particular context is upon the vindication of the *Hardial Singh* principles. (iv) In the event of a legal challenge to any particular case the Secretary of State must be in a position to demonstrate by evidence that those principles have been and are being fulfilled. However the law does not prescribe the form of such evidence. Compliance with the Rules and the manual would be an effective and practical means of doing so. It is anyway the Secretary of State's duty so to comply. It is firmly to be expected that hereafter that will be conscientiously done."

106. Mr Raza Husain's attack upon that paragraph centres upon the proposition that, following the initial exercise of the paragraph 2 power, the Secretary of State has a continuing discretion whether to maintain the detention and is under a duty to exercise that discretion regularly in accordance with the published policy. So much Mr Tam accepts and, indeed, he further accepts that every failure to review a detention by the specified time or by the specified level of decision-maker

constitutes a breach of the Secretary of State's public law duty. Of course, as Mr Husain recognises, not all breaches of public law duties arising in the context of detention would render its continuation unlawful – see, for example, *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763. The key question, he submits, is whether the breach is sufficiently closely linked to the detention decision. Here, he contends, it plainly was. The authority (*Roberts* aside) upon which Mr Husain principally relies is the decision of the Court of Appeal in *R (Nadarajah) v Secretary of State for the Home Department* [2004] INLR 139 (a report dealing also with Amirthanathan's appeal – I shall call them respectively N and A). That case too concerned the Secretary of State's detention policy under chapter 38 of the OEM but not, as here, the review provisions - rather the statement that one of the reasons for detaining an asylum-seeker is that his removal from the UK is imminent. What was not part of the published policy and so was not publicly known was the Department's further policy, when considering the imminence of removal, to disregard information from those acting for asylum-seekers that proceedings were about to be instituted, however credible that information might be. N's solicitors had given notice of his intention to seek judicial review of the Secretary of State's decision to certify his case as manifestly unfounded. A's solicitors similarly had notified his intention to exercise his right of appeal against the Secretary of State's rejection of his Human Rights Act claim to remain. The detentions of both – on the ground that their removal was imminent – were held unlawful. It was, said the Court of Appeal (at para 68), "at odds with [the Secretary of State's] policy, as made public". Additionally, in A's case, it was clear that he had in fact been kept detained so as to facilitate the obtaining of the documentation needed for his removal. This too was "at odds with the Secretary of State's policy, as made public" (para 72).

107. I confess that for a time I was persuaded by the appellant's argument and thought it supported by the authority of *Nadarajah*. In the end, however, I have reached the contrary view. *Nadarajah* now seems to me clearly distinguishable. Not because, as the Court of Appeal noted in that case at para 69, had N's solicitor been aware of the Secretary of State's unpublished policy she would have instituted judicial review proceedings earlier, so that the departure from the published policy was in fact causative of N's continued detention. Rather *Nadarajah* is distinguishable because it is one thing, as there, to adopt a published policy which in substance narrows the grounds on which an executive power of detention is exercisable (the stated policy there being to release those whose removal was not imminent); quite another, as here, to have a policy and programme for review which dictates only the procedure whereby detention will regularly be reviewed. In the former case, under the published policy the detainee was entitled to release; in the latter case, he was not – he was entitled merely to be reviewed for release. Naturally, upon the intended reviews, the detainee would be released if, as a matter of substance, his continuing detention were found no longer justifiable according to the published policy. The difference, however, seems to me

crucial. In the one case a breach of policy renders continuing detention unlawful. In the other it does not.

108. Lady Hale, at para 72 of her judgment, suggests an analogy between the present case and *Christie v Leachinsky* [1947] AC 573 which established the common law requirement that an arrested person be told, at the time, the reason for his arrest. For my part I find the suggestion unpersuasive. As Lady Hale herself observes, the requirement was imposed "for the very good reason that the arrested person had to know whether or not he was entitled to resist arrest". Lord Simonds put it thus (p591): "it is the corollary of the right of every citizen to be thus free from arrest [unless, that is, someone has the right to arrest him] that he should be entitled to resist arrest unless that arrest is lawful. How can these rights be reconciled with the proposition that he may be arrested without knowing why he is arrested? " – and a little later (p.592): ". . . the subject is entitled to know why he is deprived of his freedom, if only in order that he may, without a moment's delay, take such steps as will enable him to regain it." No such consideration arises or could arise in the present content. Their Lordships in *Christie v Leachinsky* would, I think, be astonished at the suggestion that any failure to give effect to a self-imposed requirement for periodic review of the continuing detention of those awaiting deportation similarly renders that detention unlawful. I fear that they would be scarcely less surprised by the further suggestion (at para 77 of Lady Hale's judgment) that, assuming such detention to be unlawful, it is to be compensated by no more than a nominal sum in damages. Indeed it seems to me that that very suggestion illustrates the ineptness of the proposed analogy between the two cases in the first place. The majority's proposed solution to this case would quite simply devalue the whole concept of false imprisonment.

109. Nothing that I have said should be taken to depreciate the desirability and importance of reviews under chapter 38 nor to excuse the Department's lamentable failures to conduct them, certainly in the appellant's case and very probably in a host of others. As the courts below rightly observed, these matters go to the liberty of the subject and "the picture which emerges is deeply disturbing, indeed profoundly shocking" (Munby J, para 137). One obvious consequence of such serial failures is that it creates a substantially greater risk of detainees bringing successful proceedings for breach of the *Hardial Singh* principles (or, indeed, assuming they are still more favourable to detainees, the Secretary of State's published policy statements going to the substantive criteria for release, as in *Nadarajah* itself) – principles and statements to which the reviews are intended and likely to give effect. And, of course, as the *Hardial Singh* line of authority (and, indeed, *Nadarajah)* clearly establishes, a successful claim on these grounds carries with it a right to damages for false imprisonment, a right to damages, moreover, which, unlike that arising upon a failure to review such as envisaged by the majority (and, indeed, such as arose in *Roberts* – see p669H), would naturally be untroubled by any question of causation.

110. I recognise, of course, that, on this approach, it is only in cases where the detainee can show that he should have been released that the respondent will be required to pay, financially, for failures in the review process. Where, as here, all that can be shown is a series of public law breaches – failures to comply with his own published policy as to reviews – the only remedy, as in *Walker*, is by way of declaratory relief. Unsatisfactory though in one way this is, to treat a failure in the review process (perhaps merely a review held a day late or by someone of insufficient seniority and perhaps in respect of an obviously dangerous detainee) as of itself giving rise (as in *Roberts*) to a claim for false imprisonment would to my mind be unsatisfactory too.

111. There may well be altogether too many people (above all children and other likewise vulnerable people) locked up awaiting deportation. Plainly a wise Secretary of State would instigate and operate a practicable and robust system for minimising the use made of the paragraph 2 power. As it is, like any other public body failing to comply with their published policy, he commits a breach of his public law duty, always a regrettable state of affairs. That said, however, a detainee, once properly detained, in my opinion remains lawfully imprisoned unless and until released on bail or by the Secretary of State's direction or he establishes an entitlement to release pursuant to the *Hardial Singh* principles or other substantive policy statements governing how the Secretary of State will exercise his paragraph 2 power. This appellant could establish no such entitlement. In my judgment he remained lawfully imprisoned until he was bailed.

112. It will be noted that I have not hitherto referred to article 5(1)(f) of the Convention save only to observe (at para 94) that domestic law is in fact more favourable to detainees awaiting deportation than Strasbourg requires. Since it now appears that this is to be a minority judgment, I need say no more than that there is nothing in the existing Strasbourg jurisprudence which would warrant a conclusion that a failure to give effect to the Secretary of State's self-imposed requirement for detention reviews would result in unlawful detention under the Convention irrespective of whether it constitutes false imprisonment under the common law. (I do not think I am in disagreement with the majority as to this – see, for example, para 76 of Lady Hale's judgment.) Nor, of course, is there any question here of a breach of article 5(4) of the Convention: the requirements of that provision are amply satisfied by the detainee's right to seek bail or, indeed, judicial review.

113. I would dismiss this appeal.

114. The above (paras 90-113) is the judgment I wrote before an enlarged court of nine of us in November 2010 heard, and subsequently, on 23 March 2011, gave judgment in, *R (Lumba and Mighty) v Secretary of State for the Home Department* [2011] UKSC 12; [2011] 2 WLR 671 ("*Lumba*"). Given that a majority of the

court (6:3) held that the particular public law breaches committed by the Secretary of State there resulted in the appellants being falsely imprisoned – albeit a differently constituted majority (also 6:3) held that they can recover no more than nominal damages – should I (must I) now change my judgment and agree with the majority that Mr Kambadzi too was falsely imprisoned?

115. I have concluded not: it by no means follows from the majority view on liability in *Lumba* that there is liability here too and to my mind it would be still more undesirable to find liability established here than the minority of us thought it to be in *Lumba* itself.

116. That the two cases are different is plain enough. As Lord Dyson observed in para 61 of his lead judgment:

> "A somewhat similar problem arose in *R (SK Zimbabwe) v Secretary of State for the Home Department*… In that case the unlawfulness lay in the failure of the Secretary of State to comply with her policy which prescribed the *procedural* requirements for reviews of FNPs who are already in detention. The present case concerns the *substantive* requirements for the initial detention of FNPs as well as their continued detention."

Lady Hale too (para 198) recognised that on the issue of liability *Lumba* "is a stronger case than is still before the court in *SK (Zimbabwe)* because the illegality alleged (and now admitted) went to the criteria for detention rather than to the procedure for authorising it."

117. Although, obviously, the court in *Lumba* was not required to consider the consequences in terms of liability of a public law failure to comply with the Secretary of State's self-imposed requirements for the review of continuing detention, there appear to me a number of passages in the judgments of those holding liability to be established there, strongly suggesting that they might well have taken a very different view in the present case. This is perhaps plainest at paras 193 and 194 of Lord Walker's judgment:

> "It is a big step to extend the [*Anisminic*] principle to a claim for damages for false imprisonment, where a defendant may have his professional reputation at stake and may not enjoy the procedural protections which attend judicial review (strict time limits, and the discretionary nature of the remedy granted). I would prefer a more demanding test, that in a case where an extant statutory power to

> detain has been wrongly used there would be a private law claim only if the misuse amounted to an abuse of power (including but not limited to cases of misfeasance or other conscious misuse of power).
>
> 194 However, it is in my opinion unnecessary to decide the point in these appeals because the conduct of officials, including some senior officials, of the Home Office between April 2006 and September 2008 amounted to a serious abuse of power. Lord Dyson SCJ has . . . described in restrained language how senior officials were well aware of the risk (indeed the likelihood) of challenge and decided to run the risk, (including the proposal to 'let immigration judges take any hit'), and how further damaging facts were disclosed by stages, some before Davis J, some before the Court of Appeal and some only in this court. Wherever the line is to be drawn (if, as I think, a line does need to be drawn between public law errors in detention policies which do or do not give rise to an action for false imprisonment) these appeals must in my view fall on the wrong side of the line from the Secretary of State's point of view."

Given that a line is to be drawn between public law errors amounting to the sort of serious misconduct which Lord Walker was clearly intending to denote by *his* use of the expression "abuse of power" and other public law errors which do not give rise to actions for false imprisonment, it is very far from obvious that Lord Walker would regard the failures in the review process here as an abuse of power. Lord Collins too, having referred (at para 220) to the Home Office's "deliberate decision . . . to continue an unlawful policy" and to the cynical nature of its approach generally in these cases, expressed himself (at para 221) "satisfied that the *serious* breach of public law in this case has the result that the detention of the appellants was unlawful" (emphasis added).

118. Even Lord Dyson (para 68) expressly accepted that:

> "It is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment. In the present context, the breach of public law must bear on and be relevant to the decision to detain. Thus, for example, the decision to detain made by an official of a different grade from that specified in a detention policy would not found a claim in false imprisonment."

It seems clear, therefore, that Lord Dyson would have rejected Mr Kambadzi's case at least in respect of the four monthly reviews carried out by officials of the

wrong grade – although, I acknowledge, it is unclear what conclusion he would have reached with regard to the twelve omitted reviews.

119. Of course, the three of us who dissented on liability in *Lumba* would by definition conclude that Mr Kambadzi must fail on liability in the present case.

120. As for why, liability in *Lumba* notwithstanding, it would be wrong to find false imprisonment established here too, let me illustrate what seems to me the absurdity of such conclusion by the example I gave (at para 357) in *Lumba*: it would result in "a detainee whose detention is reviewed every second month instead of monthly as the published policy dictates, alternat[ing] yo-yo like between lawful detention and false imprisonment." To hold that false imprisonment is the consequence of a failure to comply with "the *substantive* requirements for the initial detention of FNPs as well as their continued detention" (Lord Dyson at para 61, quoted above) is one thing; to hold that the same consequence follows a failure to comply with "the *procedural* requirements for reviews of FNPs who are already in detention" (ibid) is quite another – and to my mind a step altogether too far.

121. I therefore remain of the view, the authority of *Lumba* notwithstanding, that this appeal should be dismissed.

122. On the issue of anonymity I agree with Lord Hope. As was recently established by the Court's comprehensive and authoritative judgment given by Lord Rodger in *In re Guardian News and Media Ltd* [2010] 2 AC 697, the general rule is that parties to proceedings are named and that an anonymity order has to be justified. In my opinion there is no justification for such an order here and, indeed, Mr Husain on behalf of the appellant suggests none and seeks no such order. There may, of course, be good reason in certain asylum cases for maintaining the asylum-seeker's anonymity notwithstanding that his claim fails: the very fact of his having made a claim, albeit unsuccessful, could on occasion tip the balance and give rise to a genuine fear of persecution or article 3 ill-treatment where previously none existed. Doubtless in any such case counsel, certainly counsel as expert and experienced as Mr Husain, would duly seek the necessary anonymity order. Given, however, that this appellant's asylum claim was clearly bogus, it is unsurprising that no such application was made here and it is to my mind inconceivable that the appellant's known involvement in these proceedings could give rise to any bona fide further asylum claim.