



R (WL and KM) v SSHD [2011] UKSC 12 and **Liability**

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Introductory

1. From April 2006 until September 2008, unknown to the courts, detainees or their lawyers, the Home Office operated a secret near blanket policy of detaining foreign national former prisoners ('FNP's) beyond the completion of their criminal custodial sentences. The secret policy made no allowance for release on *Hardial Singh* grounds (ie that deportation could not be effected at all, or that detention had gone on, or was likely to continue, for an unreasonably long period). The Home Office meanwhile maintained a published policy which contained a presumption in favour of release in all detained cases.
2. This landmark Supreme Court judgment holds that two FNPs who had been detained in reliance on that hidden policy were thereby, and without more, wrongfully detained. Overturning the findings of the Administrative Court (in '*Abdi I*' - [2008] EWHC 3166 (Admin)) and the Court of Appeal ([2010] EWCA Civ 111, [2010] 1 WLR 2168), a six-three majority of the Supreme Court held that it was no answer to the Appellants' claims for false imprisonment that they would inevitably have been detained even under the lawful, published detention policy. But, since the Appellants had suffered no loss, they were entitled only to nominal damages. The Court's reasoning and conclusions on the lack of a causation defence in false imprisonment, and, conversely, on the role of causation in damages and on the appropriate award in this case, are likely to resonate far beyond the immigration field. Above all, this part of the judgment is a vindication of the rule of law. It is no defence to the tort of false imprisonment that a lawful decision could have been taken had the detainer put his mind to it. The contrary finding would have enabled the Home Office to ignore its own policies and engage in unlawful decision-making in administrative detention cases (or no decision-making at all - detention by default), in the hope that it could show, if ever required to justify the detention in court, that detention *could* have lawfully been decided upon. The judgment also, however, drives a troubling divide between the establishment of the tort of false imprisonment and the entitlement to an award of substantial damages.
3. A distinct point in the judgment is likely to be of particular importance in immigration detention cases. One of the appellants, WL, had been in detention for 56 months by the time his case was heard in the Supreme Court, albeit he had voluntarily returned to the DRC by the time of judgment. The Administrative Court (*R (Lumba) v SSHD* [2008] EWHC 2090 (Admin), Collins J) and the Court of Appeal (in *WL and KM*) found it

significant that, for much of his detention, WL had been pursuing appeals against deportation and had resisted voluntary repatriation. The Supreme Court found that the Courts below had wrongly interpreted and applied the *Hardial Singh* principles. Lord Dyson's powerful critique of their approach, with the support of seven other members of the Court, overturns a line of authority which has given minimal or no weight to periods of administrative detention deemed to be self-induced.

4. This note addresses the parts of the judgment that go to liability. It is divided, much as the case itself was, into points relating to the hidden policy and points relating to the common law limitations on the executive's exercise of the power to detain under paragraph 2, Schedule 3 Immigration Act 1971.
5. Parts of the judgment concerning damages are dealt with in Heather Williams' QC's separate paper.

Part I: Points relating to the hidden policy

No distinct categories of legal error

6. As *Anisminic* established, there are no distinct categories of legal error: wrongful exercise of jurisdiction, like excess of jurisdiction, renders a decision a nullity. See in particular Lord Dyson §66, Lord Kerr §247. The Secretary of State's authority to detain a foreign national under Immigration Act powers can be vitiated not just by breach of a condition precedent, or breach of the *Hardial Singh* principles but by other types of public law error.

Duty to apply published policy

7. One such public law error is a failure to apply published policy. The Supreme Court were unanimous in confirming that there is a public law duty to follow published policy, absent good reason for deviating from it. See Lord Dyson §30, Lady Hale §201, Lord Collins §221, Lord Phillips §313, Lord Brown and Lord Rodger §347 (4), §351. Policy also forms part of the 'law' with which the Secretary of State must comply for the justification of detention under Article 5(1) ECHR (Lord Dyson §32).

No causation defence to liability for false imprisonment

8. It follows, as the majority held (Lord Phillips, Lord Brown, Lord Rodger dissenting) that the authority to detain is vitiated by reliance on an unlawful policy or failure to apply the published policy. In the absence of authority to detain, the tort of false imprisonment is made out. It is no answer for the detaining authority to show that detention could have

been properly authorised on another basis. The majority were forceful in rejecting ‘*the hypothesis of lawful self-direction*’ (Lord Dyson §66) as inimical to the rule of law. ‘*The court must insist that powers of detention are exercised according to law. If they are not, those who have abused their powers must accept the consequences. It is no answer to say that they could, had they put their mind to it, have achieved the same result lawfully by other means.*’ (Lord Hope §175). ‘*It seems to me to be self evident that the justification must relate to the basis on which the detainer has purported to act, and not depend on some abstract grounds wholly different from the actual reasons for detaining*’ (Lord Kerr §242). See also Lord Collins §221 ‘*any other result would negate the rule of law*’ and Lord Hope §175 ‘*if the rule of law is to be sustained, the detention must be found to have been unlawful*’. However, as is seen in Heather Williams’ QC’s separate paper, causation comes into play in the assessment of damages.

The test for a vitiating public law error

9. It is more opaque what *WL and KM* decides to be the threshold test for a vitiating public law error. For Lord Dyson it sufficed that there be a material public law error: ‘*the breach of public law must bear on and be relevant to the decision to detain*’ §68. Lady Hale §207, Lord Collins, §219 and Lord Kerr §249 agreed. Lord Walker, on the other hand, would find false imprisonment established by the wrongful exercise of the power to detain only where the misuse amounted to an abuse of *power* ‘*including but not limited to cases of misfeasance or other conscious misuse of power*’ §193. But Lord Walker indicated his comments were *obiter* ‘*it is in my opinion unnecessary to decide the point in these appeals because the conduct of officials, including some senior officials...amounted to a serious abuse of power*’ §194. More equivocally, Lord Hope did not have a difficulty with the abuse of power nomenclature (§170) but appeared at §175 to endorse Lord Dyson’s test of material public law error. On a proper reading of Lord Hope and Lord Walker’s opinions, neither of whom went so far as to disagree with Lord Dyson, Lord Dyson’s test of material public law error ought to prevail.
10. If Lord Walker meant by ‘abuse of power’ intentional misconduct, that would of course be inconsistent with the *Hardial Singh* principles themselves (where a public law error arising out of pure administrative oversight can nullify the authority for detention). As discussed further below, the *Hardial Singh* principles were unanimously endorsed, albeit with different views as to their scope from Lord Phillips, in this case.

Prohibition of a blanket policy; Requirement to publish policy

11. The secret policy had two vices. First, it was a blanket or near blanket policy which fettered the Secretary of State’s discretion and precluded the required individuated consideration and application of the *Hardial Singh* principles in particular. Second, it was

unpublished. Davis J had declared that it was unlawful for the Secretary of State to operate a secret policy. The Secretary of State did not challenge that declaration and the point was not argued in the Court of Appeal. Nonetheless, the Court of Appeal found that there was no requirement to publish policy, even detention policy. Expressing surprise at the Court of Appeal's approach (Lord Dyson §27) the Supreme Court reaffirmed the duty to publish detention policy (Lady Hale §205, Lord Phillips §302) The requirement to publish policy is not limited to detention policy (Lord Dyson §§34-35 with whom there was no disagreement on this point) . However, it is not necessary to publish 'details which are irrelevant to the substance of the decisions made pursuant to the policy' –Lord Dyson §38.

Failure to give reasons for detention is a vitiating public law error

12. Both the majority and the minority in *Lumba* endorsed the conclusion in *Christie v Leachinsky* [1947] AC 573 that a failure to comply with the common law requirement to communicate reasons for detention vitiates the legality of an arrest (Lord Dyson §76; Lord Walker §185; Lady Hale §§201, 211; Lord Collins §221; Lord Phillips §327; Lord Brown and Lord Rodger §345). It is strongly arguable that *Saadi v SSHD*, [2002] UKHL 41, [2002] 1 WLR 3131 (§48) in which a failure to give accurate reasons to immigration detainees did not affect the legality of their detention, is wrongly decided on this point, although Lord Walker in *Lumba* (§185) distinguished *Saadi* on the basis that the statutory context there (Schedule 2 Immigration Act 1971) required no giving of reasons. The reasons point in *Saadi* is in any event *obiter*, see *Lumba*, Lord Dyson, § 84.

The consequences of other 'procedural' defects

13. Aside from the duty to give reasons, it remains to be seen whether a failure to comply with a procedural safeguard imposed by published policy can, without more, render detention unlawful. In *SK (Zimbabwe)*, the appeal from [2008] EWCA Civ 1204, [2009] 1 WLR 1527, the Supreme Court will determine whether a failure to comply with detention review requirements, contained in published policy and in delegated legislation, vitiates the legality of detention; and will inevitably also address the question of the correct test for a vitiating public law error. *SK (Zimbabwe)* was heard by the Supreme Court in February 2010 but judgment was then stayed behind *Lumba*.
14. In *Lumba*, Lord Dyson and to a lesser extent Lady Hale considered that there was a fundamental distinction between breach of a substantive policy requirement (such as the criteria for detention) and breach of a procedural policy requirement (such as regular detention reviews): Lord Dyson §§ 31, 61, 68; Lady Hale §198. But the distinction between substance and procedure is difficult to sustain in this context since the detention review *is* the decision to detain or to maintain detention: the review is the means by which the substantive criteria for detention in the policy and the *Hardial Singh* principles

are applied. And, as Lord Kerr pointed out in *Lumba* (§250) the review is the means by which the Secretary of State ensures that the statutory purpose of detention under Schedule 3, Immigration Act 1971 – deportation – remains achievable. In any event, as is demonstrated by the acceptance in *Lumba* that the legality of detention may be vitiated by a failure to give reasons (see § 12 above) , breach of a procedural safeguard can be a vitiating error . It is difficult to see how the failure to give reasons for detention could be a vitiating error but not the review which is necessary for the having of reasons for detention.

Burden of proof on the detainer

15. *Lumba* holds (Lord Dyson §§42, 44, 65, with which point there was no disagreement) that the burden of proof is on the detainer to justify the detention. There being no principled distinction between an error of excess of jurisdiction and an error as to exercise of jurisdiction (see §6 above), ***the burden is on the detainer not only to point to the statutory basis for the detention but to establish the lawful exercise of the power to detain.*** Note that this appears to overrule *Al-Fayed v Commissioner of Police for the Metropolis* [2004] EWCA Civ 1579 (§83(4)) in which the Court of Appeal had imposed on the claimant the burden of establishing the unlawful exercise of a discretion to detain.

Permissibility of a policy presuming in favour of detention, in so far as this describes ‘normal practice’

16. The issue of presumption of detention arose in two ways in this case. First, the Secretary of State throughout the proceedings in the lower courts maintained that she had not operated a blanket detention policy but rather one that presumed in favour of detention. The Secretary of State finally accepted in oral submissions through her counsel in the Supreme Court that the hidden policy had not in fact been a presumptive policy. Second, the issue remained live even in the Supreme Court because for a brief period from 9 September 2008, when the published policy was amended, until 22 January 2009 when the presumption was removed, the Secretary of State had operated a published policy which referred to a presumption in favour of detention for FNP’s.

17. At first instance, Davis J had found a presumption of detention to be contrary to the common law. He referred to the case of *Sedrati, Buitrago-Lopez and Arangatu v SSHD* [2001] EWHC Admin 418 in which Moses J, as he then was, declared there to be no presumption of detention in paragraph 2, Schedule 3 Immigration Act 1971. The Court of Appeal reversed Davis J and found *Sedrati* to be wrongly decided. The Court of Appeal also suggested (*obiter* since neither WL nor KM were court recommendation cases) that there was a fundamental distinction between the power to detain in a court recommendation case under paragraph 2(1), Schedule 3 Immigration Act 1971, and the other statutory detention powers in paragraph 2 Schedule 3 Immigration Act 1971. The

Court of Appeal reasoned that paragraph 2(1) Schedule 3 Immigration Act 1971 did create a presumption of detention and that the statutory provision was in itself legislative authority for detention such that detention could even be effected absent any decision to detain (Court of Appeal judgment §88).

18. Lord Dyson, with whom the other members of the Supreme Court agreed, found that there is no bar on operation of a policy that presumes in favour of detention as a matter of ‘*normal practice*’ provided that (i) the policy requires the Government to justify the detention with reasons closely connected to the statutory purpose of the detention; (ii) the *Hardial Singh* principles are observed; and (iii) each case is considered individually— Lord Dyson §§42, 52-54. But ‘normal practice’ at the administrative stage of deciding to detain is distinct from the ‘legal presumption’ regulating the burden of proof in legal proceedings –Lord Dyson §§42-44. The burden of proof is on the SSHD to justify detention- see §13 above.
19. The Supreme Court has decided only the question of the permissibility of a policy describing a ‘normal practice’ of detaining a specified category (Lord Dyson §54) and left open the question of whether any part of paragraph 2, Schedule 3, Immigration Act 1971 itself contains a presumption in favour of detention (Lord Dyson §55). But the Supreme Court’s judgment does demonstrate §88 of the Court of Appeal’s judgment to be wrongly decided: individuated consideration with proper reasons is always required (Lord Dyson, §53).
20. The question of whether there is any presumption of detention in paragraphs 2(1) or 2(3) Schedule 3 Immigration Act 1971 is of particular importance because the UK Borders Act 2007 has, in almost identical language, given the Secretary of State power to detain a person who is the subject of an ‘automatic’ deportation: order: that power ‘shall’ be exercised ‘unless’ the Secretary of State thinks it inappropriate. Lord Dyson’s comments on this issue in *Lumba* at §55 are opaque: ‘*Whatever the position may be in relation to paragraph 2(1) and the parenthesis in paragraph 2(3), paragraph 2(2) and the remainder of paragraph 2(3) do not create any presumption. They simply give the Secretary of State a discretion to detain. In relation to paragraph 2(2) and (3) therefore, so far as it goes, the declaration granted by Moses J [in Sedrati] is correct*’. The passage is difficult because the *Sedrati* declaration concerned all of paragraph 2, Schedule 3 Immigration Act 1971 and the declaration was given specifically in the context of clarifying paragraph 2(1) Schedule 3 Immigration Act 1971.

Part II. Common law constraints on the exercise of the power to detain under the Immigration Act 1971 : the *Hardial Singh* principles

21. The *Hardial Singh* principles receive emphatic endorsement from the Supreme Court in *Lumba* from Lord Dyson §25, Lord Hope §171, Lord Walker §189, Lady Hale §198, Lord Kerr §250, implicitly Lord Collins §219 and Lord Brown and Lord Rodger §362 and, albeit with disagreement as to their scope, Lord Phillips §261.
22. Lord Dyson (§ 22) endorsed his own earlier distillation of the *Hardial Singh* principles in *R (I) v SSHD* [2002] EWCA Civ 888, [2003] INLR 196 §46:
 - ‘(i) *The SSHD 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 the period that is reasonable in all the circumstances;*
 - (iii) If, before the expiry of the reasonable period, it becomes apparent that the SSHD will not be able to effect deportation within that reasonable period, [s]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.’*
23. All save Lord Phillips agreed with Lord Dyson’s analysis of the *Hardial Singh* principles.
24. There are two, possibly three, important advances in *Lumba* as to the rights of those detained under Immigration Act powers. The first two do much to dispel the notion of self-induced detention which has heavily influenced the jurisprudence around immigration detention since *R (A) v SSHD (‘A (Somalia)’)* [2007] EWCA Civ 804 and the Court of Appeal’s judgment in this case.

No exclusionary rule as to time spent detained while pursuing appeals

25. First, the Supreme Court has decisively rejected the idea that there is any exclusionary rule whereby past or future periods of detention pending the exhaustion of appeals can be disregarded (Lord Dyson §§ 115-121). The question of the approach to be taken to time spent detained while pursuing appeals is case and fact specific and a question of weight rather than any hard-edged exclusionary rule. Much will depend on the merits of the appeal, with minimal weight being attached to periods spent detained while pursuing ‘a hopeless’ appeal (§121). Where a claim has been certified, this is a prima facie indication that it is unmeritorious while orders for reconsideration or a grant of permission to the Court of Appeal are indicative of merit (§120).

Limited relevance of refusal to voluntarily repatriate

26. Second, the circumstances in which a refusal to voluntarily repatriate will be relevant to the assessment of the reasonable period of detention are heavily circumscribed. The refusal to voluntarily repatriate is of no relevance where the detainee is still pursuing proceedings challenging expulsion (Lord Dyson, §127). The refusal to voluntarily repatriate may be indicative of an absconding risk, which itself is relevant to the reasonable period of detention. But no automatic inference of absconding risk can be drawn from a refusal to voluntarily repatriate: it is necessary to look at the history and particular circumstances of each detainee (Lord Dyson §123). And it is for the Secretary of State to demonstrate that it is right to infer absconding risk from a refusal to voluntarily repatriate in a given case (Lord Dyson, §123, endorsing his own earlier dicta in *R (I) v SSHD*). Where no absconding risk is to be inferred, a refusal to voluntarily repatriate is of limited significance if any as a free-standing reason (Lord Dyson §§128, 144). It cannot be held against a detainee that he is refusing to voluntarily repatriate where return is impossible for extraneous reasons (Lord Dyson §127). In any event a refusal to voluntarily repatriate is not a ‘trump card’ enabling the Secretary of State ‘*to continue to detain until deportation can be effected, whenever that may be*’ (§128).

There must be a realistic prospect of deportation occurring within a reasonable period

27. Finally, this judgment confirms that detention will be unlawful unless there is a realistic prospect of deportation within a reasonable time and emphasises the need to assess when deportation is realistically expected to occur. ‘A *convenient starting point is to determine whether, and if so when, there is a realistic prospect that deportation will take place*’ (emphasis added, Lord Dyson §103). It is strongly arguable that administrative detention (as in *A(Somalia)*) in the absence of any anticipated end-point is unlawful.

**R (WL and KM) v SSHD [2011] UKSC 12: Implications of the Supreme Court's
Decision on Awards of Damages**

Heather Williams QC

1 May 2011

Introduction

1. The liability aspects of the Supreme Court's decision are addressed in Laura Dubinsky's separate paper. The Supreme Court's decision on damages will have significant implications, in particular as to:
 - When a successful claim in false imprisonment will give rise to nominal damages, rather than more significant compensatory damages, because the claimant would have been detained lawfully by the tortfeasor for the same period;
 - Whether an award of vindictory damages can be made in respect of a successful private law tort claim; and
 - Factors relevant to deciding if an award of exemplary damages under the "oppressive, arbitrary or unconstitutional action by servants of the government" limb of *Rookes v Barnard* [1964] AC 1129 is appropriate.

2. As Laura's paper explains, the Supreme Court decided by a 6 – 3 majority in favour of the claimants' claims for false imprisonment in respect of their detention pursuant to the Home Office's unlawful hidden policy of blanket detention. The Court went on to hold that conventional compensatory damages should not be awarded as the claimants would inevitably have been detained in any event if the Home Office had acted pursuant to its legitimate published policy (as opposed to the unlawful covert one) and that exemplary damages were not appropriate. Lord Dyson gave the leading speech in relation to those aspects of the case, with other members of the Supreme Court indicating their agreement. The Court was more split on the question of vindictory damages; three members of the Court

thought that a modest award of vindicatory damages was appropriate in this case (Lords Hope and Walker and Lady Hale). The rest of the Supreme Court Justices disagreed, but Lord Kerr left open the possibility of an award of vindicatory damages in an appropriate case.

3. The reasons given by the members of the Court for these conclusions and the implications arising from them are examined below.

Conventional Compensatory Damages / Nominal Damages

4. Lord Dyson's speech (paras 91-96) contains the detailed reasons why the Court rejected the claimants' submission that they were entitled to significant compensatory damages even if it was inevitable that they would have been detained if the statutory power of detention had been lawfully exercised in their cases.
5. The claimants' submitted that false imprisonment was a tort of strict liability, actionable without proof of special damage, that the focus should be on their right not to be unlawfully detained and that they had been so detained, pursuant to the unlawfully hidden policy (for approximately two years in each case). The claimants relied in particular upon the Court of Appeal's decision in *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662, upholding an award of £500 compensatory damages for false imprisonment in respect of a claimant wrongly detained for two hours and twenty minutes after a review of his detention required by Part IV of the Police and Criminal Evidence Act 1984 (as a pre-condition to the legality of his detention) had not taken place. In that case the trial judge had found that the claimant's detention would have been authorised for that period had the prescribed review occurred.

6. Lord Dyson concluded that *Roberts* was wrongly decided on the issue of damages (paras 93 - 95). He reasoned that there was a fundamental difference, in terms of loss, between a detainee who would have remained in detention if the review had been properly carried out and a detainee who would *not* have remained in detention if the review had been carried out when it should have been; the first has suffered no loss because he would have remained in detention whether or not the tort was committed, whereas the second has suffered a real loss as, if the tort had not been committed, he would have been released. The purpose of damages (other than exemplary damages) is to compensate the claimant for the loss and damage suffered as a result of the tort. As it was inevitable that the claimants would have been detained in any event, had the Home Office acted lawfully, they had suffered no loss or damage and thus no award of compensatory damages was appropriate.
7. To similar effect, see the briefer discussion of this issue by Lord Hope (para 176) and Lord Kerr (para 253). Other members of the Court, including those in the minority on liability, simply expressed agreement with this aspect of Lord Dyson's reasoning.
8. Accordingly, it is apparent that the Court of Appeal's decision in *Roberts* so far as damages are concerned, has been overruled by the Supreme Court.
9. This outcome in turn gives rise to the questions of what has to be shown and by whom for a comparable "detained in any event" contention to succeed.
10. As Laura explains in her paper, the Supreme Court decided, that in terms of liability, the burden of proof is on the detainer to justify the detention, both in terms of showing the existence of a lawful power to detain and in showing that the power to detain was exercised lawfully (her para 15). Accordingly, it ought to

follow that if the defendant contends that only nominal damages should be awarded, because detention would in any event have occurred pursuant to an alternative lawful basis, it should be for that party to establish the proposition, rather than for the claimant to prove that s/he would not have been detained in such circumstances.

11. In *WL and KM* the Supreme Court considered it clear that the claimants would have been detained in any event and thus did not examine the above discussed point in the speeches, nor what the party bearing the burden of proof had to show.

12. However, in light of the way that the members of the Court expressed their conclusions, it is strongly arguable that the defendant must show that the claimant *would* have been detained on the alternative lawful basis (not *could* have been so detained or *might well* have been so detained) and that it must be clear on the evidence that this outcome would have resulted.

13. Lords Dyson and Kerr referred to it being shown that the claimants *would* have been detained if the correct procedures had been followed (paras 93 – 95 and 253 respectively). Lord Hope stressed that it was: “*plain* that the appellants would not have had *any prospect* of being released from detention if the Secretary of State had acted lawfully” (para 176) (emphasis added).

14. Furthermore, (albeit when dealing with the liability issue) Lady Hale stressed that “it will rarely be possible to be confident that had the correct procedure been followed the outcome would have been the same” (para 211). She referred to *Roberts* and to the present case as examples of where this was possible, but, significantly, made her general observation in the context of referring to cases such as *Christie v Leachinsky* [1947] AC 573 (concerning the common law

obligation to provide a detainee with grounds of arrest). Hitherto, false imprisonment arising from a failure to comply with the statutory requirement to provide grounds of arrest (pursuant to section 28 of the Police and Criminal Evidence Act 1984) had led to modest compensatory damages, as endorsed by the Court of Appeal in *Goswell v Commissioner of Police of the Metropolis* (1998) 7 April, unreported. Lady Hale's observation in this paragraph may assist in resisting defendants' attempts to now argue that nominal damages only should be awarded in this kind of situation as provision of the requisite information would still have led to the claimant's detention.

15. A further point to note before leaving the topic of nominal damages, is the explicit acknowledgement by some members of the Court as to the important role played by a finding of liability in itself in a false imprisonment claim in vindicating the claimant's rights: see, for example, Lord Kerr at para 252 and Lord Collins at para 236 (a point that may be relevant to, for example, Legal Services Commission funding issues).

Vindictory Damages

16. As explained above, Lord Hope (paras 176-180), Lord Walker (para 195) and Lady Hale (paras 212 – 217) were in favour of an award of vindictory damages to the claimants in this case.

17. Lord Hope considered that an award should be made to mark the breach of fundamental rights that had occurred. Although no loss had been suffered by the claimants an award was appropriate in recognition of the importance of the right to the individual and the gravity of the breach. An analogy was drawn with awards for infringement of constitutional rights endorsed by the Privy Council in *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 QB 328 (and subsequent authorities), made to vindicate or uphold the constitutional right in

question. Although such an award covered some of the same ground as an award of exemplary damages, where appropriate, its nature was compensatory rather than punitive. The primary considerations in terms of whether such an award should be made and, if so, the level of the same were the factors identified by Lord Nicholls in *Ramanoop*: the importance of the right, the gravity of the breach and the deterrent effect of such an award. Lord Hope considered that the award should be a modest one and was prepared to agree with Lord Walker's figure of £1,000 for each claimant, though he would, for his own part, have arrived at a lower figure.

18. Lord Walker drew a parallel with the common law's willingness to award more than nominal damages in respect of an assault, even if no injury to the person or other form of damage was shown.

19. Lady Hale saw the concept of vindicatory damages as a "middle course" between compensatory damages and exemplary damages. She recognised that such a concept was a relatively novel one (save for the Privy Council context referred to above), but noted that the common law was capable of growing and adapting to meet new situations. The right to be free from arbitrary imprisonment was of fundamental constitutional importance in this country and was a right which the law should be able to vindicate in some way irrespective of whether compensatable harm has been suffered or whether the conduct was sufficiently egregious to merit exemplary damages. She would award £500 per claimant, rather than £1,000.

20. Lord Dyson (paras 100-101) disagreed with the three views I have just summarised; he considered that it was a "big leap" to apply a form of discretionary damages awarded for breach of a written constitution, as in *Ramanoop*, to any private law claim against the executive. Further, that

awarding such damages would lead to undesirable uncertainty; would they apply to any case involving a battery or a false imprisonment by an arm of the State? In his view there was no justification for letting “such an unruly horse loose on our law”. The purpose of vindicating a claimant’s common law rights was sufficiently met by a finding of liability and by existing remedies.

21. Lord Collins, agreeing with Lord Dyson, (paras 222-237) gave detailed reasons as to why he considered that there was no legitimate basis to introduce a concept of vindicatory damages into the law of tort, including an interesting review of the position in other jurisdictions. He emphasised that the *Ramanoop* Privy Council line of authority arose in the context of countries with written constitutions that expressly provided for redress for violations of the rights contained therein. Further, he considered that such damages were in essence akin to punitive or exemplary damages and, as such, unnecessary. He felt that to make an award of vindicatory damages was to confuse the purpose of damages awards with the nature of the award; a declaration or an award of compensatory damages, where appropriate, could have a vindicatory purpose or effect. In his view there was no basis in law or in policy for the creation of such a new head of damages.

22. Those in the minority on liability, agreed with Lord Dyson and Lord Collins on the question of vindicatory damages: Lord Phillips (para 335) and Lords Brown and Rodger (para 361).

23. Lord Kerr did not consider an award of vindicatory damages appropriate in these cases, but did not rule out the concept altogether (therefore giving a slim majority of 5 – 4 against such a concept in principle). However, he felt that scope for such awards in cases where exemplary damages were not appropriate was “very limited indeed” and could only arise where a declaration that the claimant’s rights

had been infringed provided insufficiently emphatic recognition of the defendant's default, a situation that he felt did not arise on the present facts (para 256).

24. In so far as there is any potential, from the four Justices minority view, for the development of a concept of vindictory damages in this jurisdiction, it remains to be seen what would amount to a sufficiently serious infringement of a sufficiently fundamental right for these purposes.

Exemplary Damages

25. The Supreme Court was unanimous in concluding that this was not an appropriate case for an award of exemplary damages. Lord Dyson gave the leading speech on this point (paras 150-168). The other members of the Court simply expressed their agreement with his reasoning: Lord Hope (para 176), Lord Walker (para 195), Lady Hale (para 213), Lord Collins (para 233), Lord Kerr (para 256), Lord Phillips (para 335) and Lords Brown and Rodger (para 362). It was not suggested that the sheer fact that nominal, rather than compensatory, damages were appropriate, precluded an award of exemplary damages.

26. The claimants argued that they were entitled to exemplary damages as the Secretary of State had made a deliberate decision not to publish the hidden detention policy, had actively discouraged disclosure of it by officials making the determinations and she and her officials must have known they were acting unlawfully or were reckless as to the same. It was also submitted that in relation to the litigation, the Secretary of State had fallen short of the duties of candour owed to the Courts, as much relevant material had only been disclosed belatedly during the appeals to the Court of Appeal or to the Supreme Court.

27. Lord Dyson accepted that the evidence supported the claimants' criticisms of the defendant's conduct. However, he noted that there was no suggestion of malice or ulterior motives, which he regarded as significant.

28. Whilst past case law has not treated deliberate bad faith of this kind as a pre-requisite for such an award, provided the conduct met the basic test of being "oppressive, arbitrary or unconstitutional" - see for example *Holden v Chief Constable of Lancashire* [1987] QB 380 and the Court of Appeal's recent decision in *Muuse v SSHD* [2010] EWCA Civ 453 – I do not read this part of Lord Dyson's speech as suggesting the contrary, namely that bad faith is a pre-requisite; rather I consider he was simply noting that the absence of such bad faith was a relevant factor to weigh in the balance in his consideration in this case. He said he was also influenced by the fact that the Secretary of State could have detained the claimants lawfully. Furthermore, he was not inclined to interfere with the decision of the judge below, Davis J, who had evaluated the evidence and applied the correct test on this point. Although further documentation bearing on the seriousness of the defendant's conduct had since come to light, the Court of Appeal had also not considered this an appropriate case for exemplary damages and, overall, Lord Dyson did not consider that the conduct was sufficiently outrageous to merit such an award.

29. Lord Dyson highlighted three additional specific points that he regarded as significant (paras 165, 167 & 168).

30. Firstly, he did not accept that a lack of candour during the litigation could be reflected in an award of exemplary damages. He said the role of exemplary damages was to punish the commission of the underlying tort and not the subsequent conduct of the litigation. Any disapproval of the conduct of the litigation can be marked by an appropriate order for costs and / or aggravated

damages. Although Lord Dyson referred to the Court of Appeal's guidance in *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498 in support of the latter proposition, his approach appears to be inconsistent with that guidance, in so far as the Court of Appeal in that case stated that where the defendant persisted in a false defence this could, in appropriate cases, be reflected in an award of exemplary damages. It is now unclear whether that approach survives *WL and KM*, given that the Justices were unanimous in agreeing with Lord Dyson in relation to exemplary damages and given that this aspect of his speech is apparently part of the ratio of the case, in reflecting why an award of exemplary damages was not made. Perhaps a distinction can be drawn for these purposes between conduct of the litigation in the procedural sense (late disclosure etc) and conduct of the litigation in the substantive sense (maintaining an untrue defence).

31. Secondly, Lord Dyson agreed with the Court of Appeal that there was a real difficulty in making an award of exemplary damages where there was potentially a large number of claimants, who were not all before the Court – here all those foreign national prisoners who had been detained pursuant to the secret policy - as *Riches v News Group Newspapers Ltd* [1986] QB 256 established that where there was more than one victim of a tortfeasor's conduct, one award of damages should be made which should be shared between the victims. This was because the purpose of the award was to punish the conduct in question rather than to compensate the claimants. If all the claimants were not before the Court it could not realistically fix and apportion the punitive element of the damages.

32. Two consequences arise from this aspect of Lord Dyson's reasoning. Firstly, it appears to follow that in general where there is more than one claimant litigating in respect of the same wrongful conduct, the Court should make only one award of exemplary damages to be shared between the claimants. In the civil actions against the police context, when this point has been raised in the past by

defendants, in settlement negotiations at least, claimants have sometimes successfully contended that *Riches*, a libel case, is distinguishable as it concerned a sole publication of defamatory material that affected a number of claimants. However, Lord Dyson's reasoning appears to preclude that line of argument, indicating that the commission of separate torts against separate individuals – here the false imprisonment of each foreign national prisoner – is to be treated as a common wrong, attracting one award for the purposes of exemplary damages if it stems from the same misconduct. It is unclear whether the same approach would be taken to, for example, sequential assaults of two claimants on the same occasion by the same police officer or indeed by two different police officers, if apparently acting in concert. Lord Dyson when addressing this point, simply described it as arising where there was “more than one victim of a tortfeasor's conduct” (para 167). Similarly, the passage in the Court of Appeal's judgment below, with which he indicated agreement, simply referred to where “the conduct complained of” was common to a large number of detainees (para 163).

33. Secondly, in a situation where not all potential claimants have brought claims and are before the Court, this will be reason in itself not to make an award of exemplary damages, at least where, in the words of Lord Dyson “there is potentially a large number of claimants”.

34. Lord Dyson's third additional factor tending against an award of exemplary damages, was that it was unsatisfactory and unfair to make such an award where, because the claim was (understandably) brought as a judicial review, no evidence had been heard and tested from those responsible for the misconduct. Again, this appears to be a factor of broader application, though not perhaps such a controversial one.

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1 May 2011