



23 March 2011

PRESS SUMMARY

Walumba Lumba (Congo) 1 and 2 (Appellant) v Secretary of State for the Home Department (Respondent)

Kadian Delroy Mighty (Jamaica) (Appellant) v Secretary of State for the Home Department (Respondent)

[2011] UKSC 12

JUSTICES: Lord Phillips (President), Lord Hope (Deputy President), Lord Rodger, Lord Walker, Lady Hale, Lord Brown, Lord Collins, Lord Kerr, Lord Dyson.

BACKGROUND TO THE APPEAL

The main issue in this appeal is whether, and if so which and in what circumstances, breaches of public law are capable of rendering unlawful the detention of foreign national prisoners (FNPs) pending their deportation. Section 3(5)(a) of the Immigration Act 1971 (the 1971 Act) confers on the Secretary of State for the Home Department a power to deport foreign nationals. Schedule 3 of the 1971 Act empowers the Secretary of State, in certain specified circumstances, to detain foreign nationals pending deportation. From at least 1991, the Secretary of State had maintained a published policy on the application of the power to detain. This policy presumed in favour of release whilst justifying detention in some circumstances. However, following adverse publicity in April 2006, the Secretary of State adopted a new policy which was not published. Between April 2006 and September 2008, the Secretary of State applied this unpublished policy which imposed a near blanket ban on release of FNPs. On 9 September 2008, the Secretary of State amended the published policy to replace all references to a presumption of release with a presumption of detention. However, on 22 January 2009, following the decision of Davis J in the current proceedings, the published policy was amended again to omit references to a presumption of detention.

Walumba Lumba is a citizen of the Democratic Republic of Congo. He entered the UK unlawfully in April 1994. He was later convicted of a number of offences and was sentenced to 4 years' imprisonment for wounding with intent on 12 January 2004. On 3 April 2006, the Secretary of State informed Mr Lumba of the intention to deport him. He was due to be released from prison in June 2006, but was informed that he was to be detained pending deportation. He left the United Kingdom voluntarily on 13 February 2011. Kadian Mighty is a citizen of Jamaica. He was granted indefinite leave to remain in the UK in February 2003. On 27 June 2003 he was sentenced to 42 months' imprisonment for possession of a Class A drug with intent to supply. On 10 May 2006, the Secretary of State informed Mr Mighty of the intention to deport him. On 19 May 2006, he was detained pending deportation. However, he was released on bail on 28 July 2008. Mr Lumba issued proceedings on 18 October 2007 claiming a declaration that his detention was unlawful and damages. His case was joined with that of Mr Mighty who had issued proceedings on 29 May 2008. In addition, Mr Lumba, who remained in detention until his departure from the United Kingdom, challenged the reasonableness of the duration of his detention and sought a mandatory order that he be released. At first instance ([2008] EWHC 3166 (Admin)), Davis J granted declarations to the effect that it was unlawful for the Secretary of State to operate an unpublished policy which presumed in favour of detention. He dismissed the other claims, including the claims for damages for unlawful detention. The appellants appealed and the Secretary of State cross-appealed on the issue of the presumption of detention. The Court of Appeal (Lord Neuberger MR, Carnwath and Stanley Burnton LJ) allowed the cross appeal but otherwise dismissed the appeals ([2010] 1 WLR 2168).

JUDGMENT

The Supreme Court, by a majority, allows the appeals. Lord Dyson gives the lead judgment. The majority hold that the Secretary of State is liable to both appellants in the tort of false imprisonment as the statutory power to detain them was exercised in breach of public law duties (Lords Phillips, Brown and Rodger dissenting). The appellants are, however, only entitled to nominal damages assessed at £1 (Lords Hope, Walker and Lady Hale).

dissenting). They are not entitled to exemplary damages. The court remits to the High Court the question whether Mr Lumba was detained for longer than a reasonable period in breach of the principles in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704 (the *Hardial Singh* principles).

REASONS FOR THE JUDGMENT

The court considers five issues: (1) whether the unpublished policy maintained by the Secretary of State between April 2006 and September 2008 is unlawful on grounds of public law error; (2) if so, whether detention on the basis of such a policy is unlawful in circumstances where the appellants would have been lawfully detained in any event; (3) if so, whether the appellants are entitled to recover more than nominal damages; (4) whether the appellants are entitled to an award of exemplary damages; and (5) in the case of Walumba Lumba, whether there has been a breach of the *Hardial Singh* principles.

The requirements of public law

The court holds unanimously that it is lawful for the Secretary of State to operate a policy which sets out the practice that she will normally follow in deciding whether or not to detain FNPs pending their deportation, provided that the requirements of public law, *Hardial Singh* and Article 5(1)(f) of the ECHR are respected: [40]-[55]. However, as regards the application of the statutory power to detain, it is unlawful in public law for the Secretary of State to maintain an unpublished policy which is inconsistent with her published policy and which applies a near blanket ban on the release of FNPs: [26]-[38]. Such a policy was applied to the appellants between April 2006 and September 2008: [21].

Liability in false imprisonment

Breach of a public law duty on the part of the person authorising detention is capable of rendering that detention unlawful and did render it unlawful in this case: [62]-[88], [198]-[207], [221]. Trespassory torts (such as false imprisonment) are actionable *per se* regardless of whether the victim suffers any harm. Accordingly, by a majority, the court holds that the fact that the appellants would have lawfully been detained in any event does not affect the Secretary of State's liability in false imprisonment: [62], [64]-[88], [197], [208]-[211], [221], [239]-[247]. Lords Phillips and Brown (with whom Lord Rodger agrees) dissent and hold that because the appellants would have been lawfully detained the Secretary of State is not liable to them in false imprisonment: [319]-[334], [343]-[360].

Damages

By a majority, the court holds that the fact that the appellants would have been lawfully detained is relevant to damages rather than to liability. Since the appellants have suffered no loss they should recover no more than nominal damages of £1: [90]-[96]. They are not additionally entitled to damages to vindicate the importance of the right and the seriousness of the infringement: [97]-[101], [222]-[237], [253]-[256] (Lords Hope, Walker and Lady Hale dissenting: [176]-[180], [195], [212]-[217]). Further, the court holds unanimously that the appellants are not entitled to exemplary damages: [150]-[169].

Reasonableness of the length of detention under the *Hardial Singh* principles

As regards the assessment of whether a reasonable period of detention has elapsed, the court unanimously holds that the risk of reoffending and the legal challenges pursued by the detainee are relevant. The relevance of a refusal to voluntarily return is limited: [106]-[128]. It is for a court of first instance to decide whether Mr Lumba's detention for almost 56 months was in breach of the *Hardial Singh* principles. Accordingly, his claim is remitted to the High Court: [129]-[148].

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html