



Neutral Citation Number: [2019] EWHC 49 (QB)

Case Nos: QB/2017/0319
QB/2018/0207

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
On appeal from Central London County Court

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2019

Before :

THE HONOURABLE MRS JUSTICE FARBEY DBE

Between :

THE HOME OFFICE	<u>Appellant</u>
- and -	
(1) TR	
(2) JA (by his mother and litigation friend, the First Respondent)	<u>Respondents</u>

David Mitchell (instructed by **The Government Legal Department**) for the Appellant
Amanda Weston QC (instructed by **Irwin Mitchell Solicitors**) for the **Respondents**

Hearing date: 31st October 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MRS JUSTICE FARBEY

Mrs Justice Farbey :

1. The Home Office appeals (with the permission of Julian Knowles J) against the order of HHJ Lamb QC sitting at the Central London County Court awarding damages to the first and second respondents for false imprisonment arising from their immigration detention. The first respondent (TR) is a Nigerian national. The second respondent (JA) is her son. He is a British citizen through his father and he was about eight months old when he was detained. He is now nine years old. A reporting restriction is in place to protect his private life.
2. The respondents were detained from 9 May 2010 to 21 May 2010. Following a trial, the Judge allowed their claims for false imprisonment. He awarded £20,000 damages to TR on the grounds that part of the period of unlawful detention - from 15 to 21 May 2010 - contravened the principles in the well-known case of *R v Governor of Durham Prison, Ex parte Hardial Singh* [1984] 1 WLR 704. He awarded £5,000 to JA for the whole period of detention on the basis that, as a British citizen, there had been no power to detain him.
3. The Home Office appeals on three grounds. First, it is submitted that the Judge made an error of law by concluding that JA could not lawfully be detained because he is a British citizen. Secondly, the Judge misapplied *Hardial Singh*. Thirdly, the Judge failed to give adequate reasons for the sum of damages awarded to TR which was in any event excessive.
4. Both before the Judge and before me, Mr David Mitchell appeared for the appellant and Ms Amanda Weston QC appeared for the respondents.

Immigration history

5. TR arrived in the United Kingdom on 6 October 2007 and was granted leave to enter until 9 January 2008. She overstayed her leave and remained in the United Kingdom. In September 2009, JA was born. Initially, his birth certificate showed TR as his mother but the father's details were not registered.
6. On 23 October 2009, TR applied for asylum. On 12 January 2010, the Home Office rejected the asylum claim and refused to grant humanitarian protection. A decision was taken to remove TR from the UK and to remove JA as TR's family member.
7. Removal directions were set for 19 April 2010 but cancelled. On 22 April 2010, the Immigration Advisory Service (IAS) made written representations to the Home Office claiming (among other things) that JA was a British citizen through his father. The IAS attached a copy of a letter dated 17 February 2010 from a person whom I shall call DAA who claimed to be the father. The IAS also enclosed an application for the re-registration of JA's birth certificate to show DAA as the father. It was submitted that, as a British citizen, JA could not be removed and that TR should be permitted to remain in the UK to care for him.
8. By letter dated 7 May 2010, the Home Office rejected the representations and set directions for the removal of TR and JA to Nigeria. A Home Office file note of the same date records that TR told an immigration official that her son was British and that she was to be interviewed by a Registrar at Lambeth Registry Office on 10 June

in order to prove this. Nevertheless, on 9 May 2010, TR and JA were detained pending removal on 17 May.

9. Both TR and JA applied to this Court for judicial review of the decision not to accept the representations of 22 April as a fresh human rights claim. On 14 May 2010, HHJ SP Grenfell (sitting as a Judge of the High Court) granted a stay of removal. On 21 May 2010, an Immigration Judge refused bail. However, for reasons which were not made clear to the Judge and which remain unclear, the Home Office had a change of mind and released TR and JA later that day. Subsequently, on 22 June 2010, DAA's name was added to JA's birth certificate.

The Proceedings

10. In April 2014, TR and JA commenced proceedings in the County Court seeking damages for false imprisonment. The Particulars of Claim (which were not settled by Ms Weston) ran to thirty-two pages and cited numerous provisions of law and policy which were said to render their detention unlawful.
11. The case came before the Judge for trial over three days in October 2017. In a reserved judgment handed down on 21 November 2017, the Judge accepted Ms Weston's submission that there was no power in law to remove JA from the UK as he was a British citizen. As the objective of his detention had been to effect his removal, the whole period of his detention - from 9 May to 21 May 2010 - had been unlawful.
12. The Judge regarded the Home Office as carrying the burden of proving that TA was not British. He held that there was no evidence of any honest and reasonable belief by the relevant official in the Home Office that JA was not a British citizen. In this way, he rejected the Home Office's pleaded case that JA was under a burden to prove that he was a British citizen under s.3(8) of the Immigration Act 1971 and that, absent the amended birth certificate to prove JA's paternity, there had been reasonable grounds for detaining him under paragraph 16(2) of schedule 2 to the 1971 Act. As I have mentioned, the Judge awarded JA £5,000 in damages.
13. As to TR, the Judge found that there were conflicts between her oral evidence and the record of what she had previously told the Home Office. He did not regard her as a reliable witness. He did accept that TR found the conditions of detention to be distressing. He found that those who detained her showed indifference or careless disregard for the welfare of a nursing mother and her child.
14. The Judge made a rough and ready calculation that it should have taken eight days to remove TR from the UK. He held that the commencement of judicial review proceedings had led to the prospect of an 'indefinite' or 'unquantified' extension of TR's detention. He took the view that, as the judicial review proceedings would be open-ended, it would have been apparent to the Home Office after the stay of removal imposed on 14 May that TR would not be removed within a reasonable period. The Judge considered that a period of 24 hours would have been enough for the Home Office to give consideration to the respondents' situation after the stay was imposed. It is not clear how the eight-day period fits in with this 24-hour period; but at any rate the Judge concluded that the detention of TR from 15 May until her release on 21 May 2010 was unlawful. The award of £20,000 in damages included £2,500 in aggravated damages.

15. Against this background, I turn to the first ground of appeal which raises the question whether there was a power to detain JA at a time when his British citizenship had not been proved; or whether his status as a British citizen in itself rendered any detention unlawful.

Ground 1: Legislative framework

16. Section 1(1) of the British Nationality Act 1981 states, so far as relevant, that a person born in the United Kingdom ‘shall be a British citizen if at the time of the birth his father or mother is...a British citizen’. A child’s father includes a person ‘who satisfies prescribed requirements as to proof of paternity’ (British Nationality Act 1981 s.50(9A)(c)). At the time of JA’s birth, a person could be treated as a child’s father by satisfying the requirement that he be named as the father of the child in a birth certificate issued within one year of the date of the child’s birth (British Nationality (Proof of Paternity) Regulations 2006 reg. 2(a)). That has changed: the Regulations as amended from 10 September 2015 require that a person must in every case satisfy the Home Office that he is the natural father of the child.
17. It is common ground that JA is a British citizen by birth. At times, the Home Office has expressed the view that the addition of DAA’s name to the birth certificate conferred citizenship on JA. That position misinterprets s.1(1) and is contrary to authority that the acquisition of citizenship by birth is automatic and requires no conferral (*R v Secretary of State for the Home Department, Ex parte Naheed Ejaz* [1994] QB 496 at 501G). The Home Office’s muddled position has not been helpful.
18. Section 3(8) of the Immigration Act 1971 provides:
- ‘When any question arises under this Act whether or not a person is a British citizen, or is entitled to any exemption under this Act, it shall lie on the person asserting it to prove that he is’.
19. By virtue of s.10(1) of the Immigration and Asylum Act 1999, a person who is not a British citizen may be removed in accordance with directions given by an immigration officer if he or she has remained in the UK without leave. Directions may also be given for the removal of a family member.
20. Those who may be removed under s.10(1) are (under s.10(7) of the 1999 Act) subject to the provisions for detention under paragraph 16(2) of schedule 2 to the Immigration Act 1971 which provides:
- ‘If there are reasonable grounds for suspecting that a person is someone in respect of whom [removal] directions may be given..., that person may be detained under authority of an immigration officer pending –
- (a) a decision whether or not to give such directions;
- (b) his removal in pursuance of such directions’.
21. There are no express limitations on the length of immigration detention. It is, however, well-established that there are implied limitations. In the leading case of

Hardial Singh [1984] 1 WLR 704, Woolf J laid down the following principles (at 706D-G):

1. Immigration detention may only be authorised if the individual is being detained pending removal. It cannot be used for any other purpose.
2. As the power to detain is given in order to enable a person's removal to be carried out, it is 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.
3. If there is a situation where it is apparent to the Secretary of State that he is not going to be able to remove an individual within a reasonable period, it would be wrong for the Secretary of State to seek to exercise the power of detention.
4. 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.

These principles – applied many times by the courts – require no gloss.

Ground 1: The Parties' submissions

22. In relation to ground 1, Mr Mitchell accepted that JA had been born a British citizen who could not lawfully be removed from the UK. He submitted, however, that the bar on the removal of a British citizen is not the same thing as a bar on detention. Paragraph 16(2) of schedule 2 to the 1971 Act means that detention will be lawful provided only that there are reasonable grounds for suspecting that a person may be removed. JA's citizenship was not proved until the father's name was added to the birth certificate. As the father was not added to the certificate until after JA had been released, the Judge had made an error of law in treating JA's citizenship as automatically precluding his lawful detention. The question was whether there were reasonable grounds for detention in light of all the available information at the time. The Judge had not properly addressed that question.
23. Ms Weston concentrated her submissions on the effect of s.10(1) of the 1999 Act. On its plain words, s.10(1) prohibits the removal of a British citizen. The exercise of the statutory power to detain is contingent on the power to remove. Absent any power to remove, there is no power to detain. The statutory purpose of the power to detain is to effect removal. The detention of a British citizen falls outside the statutory purpose and is therefore unlawful.
24. Ms Weston relied on the common law position that the burden lies on the detaining authority to justify the detention. She submitted that s.3(8) of the 1971 Act places a burden on an individual to prove his citizenship only if citizenship is in issue. In the present case, there could be no issue as to JA's citizenship which was plain as a matter of law. There was no need to invoke s.3(8) and so no question of any burden of proof shifting away from the Home Office.

25. Ms Weston emphasised that the tort of false imprisonment is a tort of strict liability. Even if the Home Office had been mistaken about JA's citizenship status, the error would not be relevant to liability. The courts have recognised that strict liability can sometimes lead to hard results (*R (AA (Sudan)) v Secretary of State for the Home Department* [2017] EWCA Civ 138; [2017] 1 WLR 2894 at [44]). The fundamental nature of the right to liberty means that hard results should be tolerated as a matter of judicial policy. It would not be unjust for the Home Office to pay damages.
26. Ms Weston drew my attention to the chronology which showed that the Home Office had decided to detain the respondents when immigration officials knew that JA's father was seeking to add his name to the birth certificate. The Judge had concluded that there was no evidence that the Home Office honestly and reasonably believed that JA was not a British citizen but someone who could be removed.

Ground 1: Analysis and conclusions

27. The English common law jealously guards and protects the individual's right to liberty. The fundamental importance accorded to the liberty of the individual led to the development of the writ of habeas corpus as a prerogative writ in order for 'the king...at all times to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted' (Blackstone, *Commentaries*, BK III, p.13, 112th ed. (Christian) 1794; cited in *Khawaja v Secretary of State for the Home Department* [1984] 1 AC 74 at 111A-B). As in Blackstone's time, so the modern law places the burden on the detaining authority, if challenged, to justify the detention to the court (*Khawaja* at 110F-G). The court will require executive detention to be justified by plain statutory language or clear implication (*Khawaja* at 122F and 123F).
28. The tort of false imprisonment – involving the restraint of an individual which is not authorised by law – enables an individual whose liberty is unlawfully removed to seek compensation. At common law, liability for false imprisonment is (in general terms) strict, involving no proof of fault on the part of the detaining authority (*R v Governor of Brockhill Prison, Ex parte Evans (No 2)* [2001] 2 AC 19 at 28B). Reasonable belief in a power to detain will not be a defence (*R (AA (Afghanistan)) v Secretary of State for the Home Department* [2013] UKSC 49; [2013] 1 WLR 2224 at [41]).
29. These principles were not in dispute before me. Nor did either party suggest that Article 5 of the European Convention on Human Rights, which guarantees the right to liberty, should be interpreted in any way differently to the common law.
30. In this, as in other areas of the law, the common law position may be modified by statute. In the sphere of immigration, Parliament has struck the balance between the right to liberty on the one hand and the interests of effective immigration control on the other hand. Successive pieces of legislation have permitted the immigration authorities to detain those who are unlawfully in the UK with a view to their expulsion. The European Court of Human Rights has likewise recognised that the fundamental values enshrined by Article 5 ECHR may nevertheless be balanced against the state's right to control its borders (as observed in *R (AA) v Secretary of State for the Home Department* [2012] EWCA 1383 at [27]).

31. In determining how Parliament has struck the balance in the present case, I have reached the conclusion that the question whether JA was lawfully detained rests on the proper interpretation of the relevant statutory provisions. In my judgment, the starting point is s.3(8) of the Immigration Act 1971.
32. Section 3(8) applies when any question arises under the 1971 Act whether or not a person is a British citizen. The question whether JA is a British citizen is not in itself a question under the 1971 Act: entitlement to citizenship arises under the British Nationality Act 1981.
33. What question arises under the 1971 Act in this case? In my judgment, s.3(8) of the Act makes a distinction between (on the one hand) those who are subject to the permissions, regulation and controls laid down by the Act and (on the other hand) British citizens who may come and go without let or hindrance as enshrined in the right of abode under s.1(1) of the Act. If a person claims to be outside the scope of the Act's controls by virtue of his citizenship, s.3(8) requires that he prove it.
34. The provisions relating to detention in schedule 2 to the 1971 Act are part of the Act's controls. In my judgment, a question as to whether or not a person falls within the schedule 2 controls is a question under the Act within the meaning of s.3(8). It follows that, if a person claims to fall outside schedule 2 powers on the basis that he is a British citizen, the burden lies on him to prove it.
35. I would reach this conclusion on the plain and ordinary meaning of the words of s.3(8) but the matter is not free from authority. In *R v Secretary of State for the Home Department, Ex parte Obi* [1997] 1 WLR 1498, the applicant for judicial review had entered the UK using a temporary British passport. He was subsequently arrested and detained as an illegal entrant on the ground that the Secretary of State was not satisfied that he was the person described in the passport. Sedley J found on the facts that the applicant had established that he was a British citizen and quashed the Secretary of State's decision that he was an illegal entrant. In the course of his judgment (at p.1502F-H), he made the following observations about the effect of s.3(8):

‘The present class of case concerning what was originally partiality and is now citizenship is...governed by a specific statutory provision. It is one which the courts, so far as I know, have failed to remark is a suspension of habeas corpus—something which...did not happen “even in the days of the war, when the enemy were at the gate” [citing Lord Denning MR in *R v Governor of Pentonville Prison, Ex parte Azam* [1974] AC 18, 31]. For the principle upon which many of our liberties are historically founded, section 3(8) of the Act of 1971 substitutes a rule that anyone whose citizenship, and hence whose right to be at liberty in this country, is questioned must prove it. Although, as Mr. Kovats rightly concedes, the question, if it reaches the court, must be one of precedent fact, the fundamental requirement that it is then for the state to prove its entitlement to take away a person's liberty is reversed by section 3(8) in this class of case’.

In my judgment, Sedley J's reasoning is applicable to the present case. If a person's citizenship is in question, the burden lies on him to prove that he is British in order to avoid the risk of loss of liberty under the 1971 Act.

36. Ms Weston sought to minimise the effect of this passage of *Obi*, contending that the interpretation of s.3(8) would have received more detailed treatment if Sedley J had intended that it should be part of the ratio of the case, which turned on its facts. She submitted that the reversal of the burden of proof in s.3(8) should not be interpreted as reversing any burden in detention cases as the law of habeas corpus should not be suspended on such slight authority as *Obi*.
37. In my judgment, Ms Weston understates the effect of *Obi*. I accept that the courts should be astute to hold the executive to account in matters of liberty. I also accept that the right to come and go without let or hindrance is a hallmark of citizenship, intrinsic to individual relations with the state. A restraint on the right must receive the court's intense scrutiny. I have nevertheless reached the conclusion that Sedley J's view of s.3(8) is correct and that there is no reason why I should not follow it. Sedley J's reasoning is not out of tune with other cases. For example, Parker LJ in *In re Bamgbose* [1990] Imm AR 135, 138 described s.3(8) as a 'specific statutory direction' placing a burden of proof on the individual even within the context of habeas corpus proceedings. The conclusion of the court in *Bamgbose* was considered in *Minta v Secretary of State for the Home Department* [1992] Imm AR 380 without any indication that it represented anything other than good law. In my judgment, following this line of case law, the burden lay on JA (or more realistically his parents) to prove that he was British.
38. Ms Weston relied on the express prohibition on the removal of a British citizen in s.10(1) of the 1999 Act. In so far as the purpose of JA's detention was at all times to facilitate his removal, she submitted that there was no power in law to detain him as his detention fell outside the statutory purpose of the detention provisions. For this part of her argument, she relied on two principal authorities.
39. The first of those authorities is *R (A) v Cardiff County Council and others* [2011] EWHC 1216 (Admin); on appeal *R (AA) v Secretary of State for the Home Department* [2012] EWCA Civ 1383 (which I have cited above) and then *R (AA (Afghanistan) v Secretary of State for the Home Department* [2013] UKSC 49; [2013] 1 WLR 2224. The claim concerned the lawfulness of the claimant's detention pending his removal under immigration powers. Home Office policy was not to detain children save in exceptional circumstances. The claimant was under 18 years old at the time of his detention but the Home Office had not appreciated that this was the case and had treated him as an adult.
40. The claim came before Blake J on a renewed application for permission to apply for judicial review. The claimant submitted that when detention is challenged on grounds of age, the question of age is not a matter of the decision-maker's discretion or judgment but a question of precedent fact to be determined by the court. In an ex tempore judgment, Blake J held (at [13]) that the claimant was 'intermingling matters of policy with the requirements of the statutory regime for detention'. Paragraph 16 of schedule 2 permitted the detention of children if the statutory conditions were met, although there were strong policy reasons against such detention unless it was necessary in all the circumstances. The judgment continues:
- 'Insofar as the applicant relies upon policy, then in my judgment the application of policy depends upon the assessment of facts made by the decision maker at the material time. At the time this applicant was detained the Secretary of State knew

that Hampshire had assessed him to be over 18 in an assessment which they claimed was Merton compliant. Secondly he knew that the immigration judge, acting on all material available to him in February 2010, had reached a similar conclusion not entirely dependant upon the approach of Hampshire. Thirdly, no discrete submissions had been made to the Secretary of State as to why the immigration judge and/or Hampshire assessment was wrong in fact.’

41. Ms Weston submitted that Blake J’s judgment is authority for the proposition that questions as to the Secretary of State’s power to detain under statute are questions of precedent fact for the court, in contradistinction to questions arising under policy which are discretionary in their nature and a matter of judgment for the decision-maker (subject only to public law constraints). The lawfulness of JA’s detention turned (under s.10(1) of the 1999 Act) on whether he was a British citizen. That was a question of precedent fact, in the same way as the claimant’s age in the case before Blake J. By virtue of s.3(8), the burden lay on JA to prove his citizenship for the purposes of that question. But at the time of the proceedings before the Judge, the question had been answered in JA’s favour. Section 3(8) had no further role. As a British citizen, JA could not lawfully be detained. False imprisonment being a tort of strict liability, JA’s detention was unlawful.
42. As attractively as Ms Weston put the argument, I am not persuaded on the authorities cited to me that the modern law of detention draws such a sharp distinction between exceeding the statutory power to detain and exceeding a discretion under a power. Both are unlawful and capable of giving rise to the award of compensation. A breach of public law (such as the unlawful exercise of a discretion) must ‘bear on and be relevant to the decision to detain’ but may found a cause of action in false imprisonment (*R (WL (Congo) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 at [66] and [68]). Blake J’s judgment does nothing to gloss that principle and to a large extent turned on the nature of the submissions before him. He did not interpret s.3(8) of the 1971 Act which does not appear to have been cited to him.
43. The passage of Blake J’s judgment on which Ms Weston relied was cited on appeal by Arden LJ with whom the other members of the court agreed ([2012] EWCA Civ 1383 at [15]). Arden LJ did not discuss the passage in any detail and did not consider the distinction for which Ms Weston contends. The court determined the power to detain by reference to the words of paragraph 16 of schedule 2. On appeal to the Supreme Court, the same part of Blake J’s judgment was cited, again without further comment. The appeal by that time focused on the proper interpretation of s.55 of the Borders, Citizenship and Immigration Act 2009 and in my view does not advance the consideration of the specific issues that arise in this appeal.
44. The second authority on which Ms Weston relied was *R (AA (Sudan)) v Secretary of State for the Home Department (Equality and Human Rights Commission intervening)* [2017] EWCA Civ 138; [2017] 1 WLR 2894. The case concerned the lawfulness of the detention of an unaccompanied child. The issue was whether a person was to be treated as a child according to the reasonable belief of the immigration officer or whether it was a matter of objective precedent fact. The court held that the latter was the case. It did not however reach that conclusion by resort to the distinction between the exercise of a statutory power and the exercise of an administrative discretion. The court held (at [20]) that the outcome of the case was governed by the meaning and

effect of the relevant statutory provisions. By that time, there were in force specific legislative provisions limiting the detention of unaccompanied children (paragraphs 16(2A) and 18B of schedule 2 to the 1971 Act which I need not set out).

45. Davis LJ (with whom Underhill and Lindblom LJ agreed) observed that, as a result of the new statutory provisions, the legal landscape had changed since the Supreme Court's decision in *AA (Afghanistan)*. He held (at paras 29-35) that the plain language of the amended provisions compelled the conclusion that if, as a matter of fact, the detainee was a child, then detention beyond the legislative limitations was unlawful.
46. He reached that conclusion because the amended statutory provisions disapplied the 'reasonable grounds' threshold of paragraph 16(2). As a consequence, in relation to children, the statutory question is whether a person is under the age of 18, which cannot be answered by reference to the reasonable belief of the decision-maker. On the basis of the court's reasoning, I am not persuaded that *AA (Sudan)* does anything other than support the proposition that the question whether a person who is a British citizen may lawfully be detained is a matter of interpreting the relevant statutory provisions. Unlike in *AA (Sudan)*, the reasonable grounds threshold of paragraph 16(2) applies to this case.
47. Paragraph 16(2) permits detention only 'pending removal'. In so far as JA could not lawfully have been removed, it might be said that his removal was never 'pending' such that his detention was beyond the scope of the statutory power. However, in my judgment, the words 'pending removal' denote the purpose for which a person must be detained. I accept Mr Mitchell's submission that they do not denote that removal will, or must, be effected. They limit the purpose of detention but do not merge the lawfulness of detention with the lawfulness of removal.
48. In my judgment, a person's detention will be lawful provided that there are reasonable grounds for suspecting that he may be removed. As Arden LJ held in the *AA* case ([2012] EWCA Civ 1383 at [40]):

'the crucial words in the statutory detention power are the opening words, namely "If there are reasonable grounds for suspecting". In my judgment, this is correct and these words are unequivocal. They mean that the statutory detention power is exercisable when the Secretary of State forms the view that there are reasonable grounds for suspicion. It is not necessary for her also to show that the matters which she suspects are in fact as she reasonably suspects them to be'.
49. The Judge failed to ask whether there were reasonable grounds for suspecting that JA could be removed. He ought to have done so. The question fell to be answered by reference to the evidence available to the Home Office at the material time, which did not include the requisite proof of paternity. There is no proper analysis of the law or of the evidence in the judgment. This ground of appeal succeeds.

Ground 2

50. Ground 2 relates to TR. Mr Mitchell submitted that the Judge's reasoning about *Hardial Singh* was opaque and inadequate. The Judge had been influenced by the stay on removal but the stay was not an order for release. It was difficult to

understand why *Hardial Singh* principles required TR's release 24 hours after the stay came into effect. The Judge had approached the ongoing judicial review proceedings as giving rise to the inference that JA's detention was indefinite detention which was unreasonable.

51. In relation to ground 2, Ms Weston submitted that the Judge's reasoning was adequate when the judgment was read as a whole. It was open to him to find that the judicial review proceedings might have continued for an indefinite period. In the context of the policy considerations relating to the detention of a nursing mother and her very young child, the Judge was reasonable to regard indefinite detention as unlawful albeit that other judges may have taken a different view of the situation.
52. In my view, the Judge fell into error. Detention does not become unlawful because a person commences legal proceedings. It is unclear on what basis the Judge determined that the commencement of judicial review proceedings and the stay of removal granted by the High Court gave rise to indefinite detention. Not least, the order granting the stay made provision for the judicial review application to be placed before a judge on receipt of the acknowledgement of service, the timescale for which is governed by civil procedure rules. In short, it is not clear how the Judge formed the view that the judicial review proceedings in themselves meant that TR's removal could not have taken place within a reasonable period. In relation to this as other aspects of the judgment, the legal background is recited at length but there is a paucity of reasoning and findings of fact. This ground of appeal also succeeds.

Ground 3

53. Mr Mitchell submitted that it was not possible to understand how the Judge had concluded that £20,000 was an appropriate award for TR. The Judge's findings of fact and his reasoning were inadequate to support such a high award in circumstances where he had disbelieved TR's evidence. The award was out of tune with awards in authorities which Mr Mitchell had cited to the Judge.
54. Ms Weston submitted that the award of £20,000 was within the rational range when viewed in the context of other cases. The nub of the judge's reasoning could withstand scrutiny on appeal.
55. In my view, it is not clear how the Judge selected £20,000 as the appropriate quantum of damages. The judgment does not set out the Judge's reasoning and does not set out how the Judge sought to weigh all relevant factors. There is no mention of any of Mr Mitchell's submissions on quantum. The Judge awarded aggravated damages on the basis that TR was treated with indifference or careless disregard but the judgment gives no indication of what happened to her. The section of the judgment on TR's award of quantum cannot stand.

Cross-appeal

56. In addition to the grounds of appeal, I heard brief submissions on TR's cross-appeal. Ms Weston submitted that if there was no power in law to remove JA as a British citizen and if TR was at all material times breastfeeding him, then there was at no point any reasonable prospect of removing TR. It followed that the whole of her detention was unlawful and not simply the period determined by the Judge. The

respondent's notice setting out this submission had not featured in any case management relating to the appeal and so Mr Mitchell's skeleton argument did not deal with it.

57. It transpired however that both counsel were in broad agreement on this issue – albeit for different reasons. The Judge dealt with this aspect of TR's case in two sentences of his judgment. Ms Weston submitted that his reasoning was inadequate such that his conclusion could not stand. Mr Mitchell submitted that the inadequate reasoning formed part of the wider flaws in the judgment and formed grist to the mill for allowing the appeal. I agree with counsel that this part of the judgment is not clearly or adequately reasoned. On this narrow basis, I propose to allow the cross-appeal.
58. For these reasons, the appeal and cross-appeal are allowed. Ms Weston pointed out that the case before the judge had succeeded on other grounds but ultimately did not press the submission that the Judge's errors were immaterial to the outcome of the case. Both parties submitted that the case would need to be remitted rather than re-decided by me. I agree. The paucity of relevant findings of fact means that the case will be remitted to the County Court for rehearing by another judge. The parties should endeavour to agree the terms of a draft order in writing.

Postscript

59. Given the range of issue and the costs of proceedings to date, I express the hope that the case will be subject to active case management and that the parties will assist the new judge in focusing on what needs to be decided. A case raising liberty is a serious one but the overriding objective contained in the CPR includes dealing with cases expeditiously and allotting an appropriate share of the court's resources. This case is not an exception.