



Neutral Citation Number: [2019] EWCA Civ 1168

Case No: C9/2018/1370 & C9/2018/1372

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**  
**MICHAEL FORDHAM QC (Sitting as a Deputy High Court Judge)**  
**[2018] EWHC 1045 (Admin)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 09/07/2019

**Before:**

**THE RIGHT HONOURABLE LORD JUSTICE LONGMORE**  
**THE RIGHT HONOURABLE LORD JUSTICE HICKINBOTTOM**  
and  
**THE RIGHT HONOURABLE LADY JUSTICE NICOLA DAVIES**

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**Between:**

<b>R (JONAS LAUZIKAS)</b>	<b><u>Appellant</u></b>
<b>- and -</b>	
<b>SECRETARY OF STATE FOR THE HOME DEPARTMENT</b>	<b><u>Respondent</u></b>

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**Ms Laura Dubinsky & Ms Alison Pickup** (instructed by **Duncan Lewis Solicitors**) for the  
**Appellant**

**Mr Jack Anderson** (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 22<sup>nd</sup> & 23<sup>rd</sup> May 2019  
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**Approved Judgment**

**Lord Justice Longmore:**

1. This appeal is another case of immigration detention said to have been unlawful. It arises in the somewhat unusual circumstance of a foreign national prisoner remanded in custody and being given a sentence which results in his immediate release from prison. The claimant, Mr Jonas Lauzikas, was at all material times a Lithuanian national entitled to live and work in the United Kingdom since Lithuania is a member country of the European Economic Area; he was therefore not an ordinary foreign national offender to whom deportation would ordinarily apply but an EEA national within the terms of the Immigration (European Economic Area) Regulations 2006 (“the 2006 Regulations”) enacted pursuant to Council Directive 2004/38/EC (“the Citizens Directive”), which imposes more stringent safeguards on deprivation of liberty than are available to ordinary foreign national offenders.
2. On 14<sup>th</sup> June 2014 he was arrested, while in possession of an imitation firearm, following an altercation with the partner of his ex-wife and remanded in custody. On 4<sup>th</sup> December 2014 he was convicted, after a guilty plea, of the offence of possession of an imitation firearm with intent to cause fear of violence and, on 27<sup>th</sup> January 2015, sentenced to 14 months’ imprisonment, credit being given for his guilty plea. Since he had been in custody for over seven months, he was eligible for immediate conditional release under licence but an immigration officer decided that he should be detained in administrative detention with a view to consideration being given to his deportation pursuant to regulation 24(1) of the 2006 Regulations. He was held in administrative detention until 29<sup>th</sup> April 2015 when a judge from the First Tier Tribunal granted him bail.
3. It is necessary to have 5 separate stages of his detention in mind (timings are from noon to noon on each day):-

**1) 27<sup>th</sup> – 28<sup>th</sup> January 2015**

It is common ground that his detention for this one day was unlawful because the Secretary of State (“the defendant”) failed to give Mr Lauzikas reasons for his detention at the time of detaining him. The deputy judge, however, held that the defendant was entitled to detain Mr Lauzikas and, therefore, could and would have detained him in any event; so, Mr Lauzikas was only entitled to nominal damages.

Mr Lauzikas appeals both the decision that he could have been lawfully detained and the decision to award him only nominal damages.

**2) 28<sup>th</sup> January – 25<sup>th</sup> February 2015**

On 24<sup>th</sup> February the defendant decided to deport Mr Lauzikas and certified, pursuant to regulation 24AA of the 2006 Regulations, that he could be removed pending appeal. Notice of the decision was served on 26<sup>th</sup> February. The deputy judge held that detention up to 25<sup>th</sup> February was unlawful because the defendant had not acted with what he called the “imperative urgency” required by the Article 27(2) of the Citizens Directive.

The defendant appeals this decision and says that, in any event, only nominal damages are recoverable.

**3) 25<sup>th</sup> February – 12<sup>th</sup> March 2015**

On 5<sup>th</sup> March the defendant made removal directions for 12<sup>th</sup> March. On 10<sup>th</sup> March Mr Lauzikas filed an appeal to the First Tier Tribunal and on 11<sup>th</sup> March issued judicial review proceedings in the High Court in respect of both his detention and the defendant's certification of removal before appeal. On 12<sup>th</sup> March removal directions were cancelled.

The deputy judge held this period of detention was lawful and there is no appeal in relation to this stage 3.

**4) 12<sup>th</sup> March – 9<sup>th</sup> April 2015**

Once removal directions had been cancelled, the defendant continued to detain Mr Lauzikas pursuant to detention reviews of 23<sup>rd</sup> March and 9<sup>th</sup> April. The deputy judge held that there was a reasonable prospect of Mr Lauzikas being deported within a reasonable time during this period.

Mr Lauzikas appeals this decision on the grounds that there was no such prospect either as at 12<sup>th</sup> March or, at least, as at 30<sup>th</sup> March 2015 when the defendant filed her acknowledgement of service without making any request for expedition of the judicial review hearing.

**5) 9<sup>th</sup> April – 29<sup>th</sup> April 2015**

The deputy judge held that detention was unlawful for this period because there was no longer a reasonable prospect of deportation within a reasonable time.

There is no appeal against this decision.

4. It is, therefore, stages 1,2 and 4 which are the focus of the appeal.

**Stage 1**

5. As I have said there is no dispute that detention for this one day was unlawful because Mr Lauzikas was not given the reason for detention. But the deputy judge held that he could and would have been detained in any event if the reason had been given, because he was a serious offender whom the Secretary of State was entitled to detain while considering whether to deport him.

6. Ms Laura Dubinsky for Mr Lauzikas submits that this is wrong because at this stage the Secretary of State knew no more than that Mr Lauzikas had been convicted of possessing an imitation firearm and had been given a sentence that led to his immediate release from custody. She said that detention on the basis of this information alone would have contravened the Citizens Directive, Article 27 of which provides:-

“1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union

citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

2. Measures taken on grounds of public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.”

The argument has some relevance to stage 2 to which I shall come in due course, because the deputy judge accepted that detention during stage 2 was indeed unlawful for breach of Article 27.2 standards. But he did not accept that that conclusion applied to stage 1.

7. In relation to stage 1 the judge said this (para 61):-

“The Home Office had been alerted to a case arising out of crown court proceedings, where the sentence of the Court and period on remand combined to make the question of immigration detention urgent. The requirement of individualised proportionality and necessity can in my judgment cater for situations where very little is known about the individual but there are real grounds for concern, provided always that the recognition of that situation is accompanied by a recognition of the need to obtain such fuller information as is available about the individual’s conduct, circumstances and risk profile, with imperative urgency. It would, on the face of it, be best if proactive liaison arrangements between the Home Office and criminal justice authorities put an executive detaining decision-maker in a more informed position from the outset. In this case, the claimant had pleaded guilty, his case had been adjourned for a pre-sentence report, and the extent and implications of his lengthy period on remand were discernable. I cannot describe as satisfactory the situation in which the Home Office found itself at stage 1. Nevertheless, I have concluded that the Secretary of State discharges the onus of demonstrating that her undoubtedly protective and precautionary approach based on what was known about the claimant satisfied the Article 27.2 standards on that first day. The protective approach is perhaps encapsulated in IO Zabardast’s phrase in the form ICD3079, that in the known circumstances it was *“not considered reasonable to leave the public vulnerable to the potential for him to re-offend”*.

Executive detention is a serious step and urgent initial intrusive action will in my judgment continue to satisfy Article 27.2 standards on the proviso that further information about the claimant's conduct and circumstances is obtained and considered as a matter of imperative urgency. I see that proviso as a vital one, reconciling the policy imperatives and securing that Article 27.2 standards provide a robust and disciplined protection for the individual against executive detention.”

8. Ms Dubinsky attacks this conclusion on the basis that at stage 1 there was not in fact an approach that satisfied Article 27.2 because the detaining officer only had regard to Mr Lauzikas's previous convictions and on the basis that the requirements (that detention be based exclusively on the personal conduct of Mr Lauzikas and that it be proportional) as laid down by the Article were not met.

## Stage 2

9. Here the arguments are a development of the arguments at Stage 1. The deputy judge held that the necessary inquiries to justify the detention from 28<sup>th</sup> January 2015 had not been made with imperative urgency. The defendant appeals that conclusion by saying:-
- 1) there is no legal test of imperative urgency required by either EU law or UK law; the only requirement is one that relevant information be gathered reasonably speedily;
  - 2) the inquiries were completed with reasonable speed; and
  - 3) even if there was a breach of duty by the Secretary of State, Mr Lauzikas would have been detained anyway and such detention would have been lawful as it was, in fact, found to be after 25<sup>th</sup> February when the information was forthcoming.

## Stage 4

10. At this stage the Hardial Singh principles come into play as derived from R v Governor of Durham Prison, ex p. Hardial Singh [1984] 1 WLR 704 and reiterated by Lord Dyson JSC in R (Lumba) (Congo) v SSHD [2012] 1 A.C. 245 para 22:-

“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 a reasonable period, he should not seek to exercise the power of detention; and

iv) the Secretary of State should act with reasonable diligence and expedition to effect removal.”

11. Mr Lauzikas contends

- 1) that once removal directions had been cancelled as a result of the institution of judicial review proceedings, it was apparent that deportation would not be effected within a reasonable period unless the defendant sought and obtained an order for expedition of the proceedings; and
- 2) alternatively, that it was so apparent once the defendant had had the opportunity to seek expedition but had not availed herself of that opportunity, namely at latest when filing her acknowledgement of service on 30<sup>th</sup> March 2015.

**Stage 1**

12. Administrative detention of EEA nationals and family members of EEA nationals is not uncharted territory. In Nouazli v Secretary of State for the Home Department [2016] 1 WLR 1565; [2016] UKSC 16, an EEA family member had committed numerous criminal offences; in January 2012 he had been convicted of a further offence of theft and sentenced to a term of imprisonment. While he was serving that sentence, the defendant decided to authorise his detention after his sentence came to an end. Mr Nouazli completed his sentence on 3<sup>rd</sup> April 2012 but was administratively detained on that day. He was served with notice of detention and with a letter giving him the opportunity to make representations. The defendant sought to justify the claimant's detention pursuant to regulation 24(1) of the 2006 Regulations which provides:-

“If there are reasonable grounds for suspecting that a person under regulation 19(3)(b) is someone who may be removed from the United Kingdom [providing for removal on grounds of public policy, public security or public health], that person may be detained under the authority of the Secretary of State pending a decision whether or not to remove the person under that regulation ...”

13. The claimant claimed his detention was unlawful because (among other reasons) regulations 21 and 24 failed accurately to transpose the safeguards of article 27 (and 28) of the Citizens Directive, since they provided no time limit to his detention. The regulations were therefore said to be contrary to European Union law and had to be “disapplied in every case and in all circumstances” (para 18). Regulation 21(3), reflecting Article 27 of the Directive quoted above, provides that a relevant EEA decision “taken on the grounds of public policy [or] public security” may not be taken in respect of a person with a permanent right of residence “except on grounds of public policy or public security”. Regulations 21(5) and (6) provide:-

“(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles-

- (a) the decision must comply with the principle of proportionality;

- (b) the decision must be based exclusively on the personal conduct of the person concerned;
- (c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
- (d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
- (e) a person's previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin."

14. The Supreme Court held in a judgment delivered by Lord Clarke of Stone-cum-Ebony JSC (with whom the other members of the court agreed)
  - 1) that the power to detain pending a decision to deport contained in regulation 24(1) was not disproportionate (and did not, therefore, offend European Union law) subject to the question whether an absence of a time limit in the regulation rendered the detention unlawful under EU law (para 62);
  - 2) that the absence of such time limit did not render the detention unlawful because the Hardial Singh requirements (which did not impose any specific time limit) were, at the least, consonant, if not more stringent than, the requirements of EU law (paras 63-78);
  - 3) that regulations 21 and 24 did not fail accurately to transpose the safeguards of Article 27 of the Citizens Directive (para 80-84); and
  - 4) that there was no separate test of necessity to be imported into regulation 24(1) beyond the requirement that the power to detain had to be exercised proportionately (paras 88-96).
15. Although there was no express consideration in Nouazli of the question whether the claimant's detention on 3<sup>rd</sup> April 2012 was based "exclusively on the personal conduct of the individual concerned" within Article 27 of the Citizens Directive (no doubt because it was so based), the decision of the Supreme Court is the background against which Mr Lauzikas's claim must be considered.
16. Ms Dubinsky had what she called a maximalist and a minimalist argument. Her extreme contention was that there was no power under the regulations or the directive to detain Mr Lauzikas on the basis of his conviction without any individualised

information, such as the pre-sentence report and the judge's sentencing remarks would provide. The detaining officer did not have such information but merely relied on the seriousness of the offence for which Mr Lauzikas had been convicted. That was tantamount to using his previous conviction as in itself justifying detention and the detention was therefore unlawful.

17. Her secondary position was that, if there was such power, it was conditional on the necessary individual information being obtained as a matter of urgency which was never done.
18. She naturally emphasised the primacy with which both domestic law and EU law, incorporating as it does the Charter of Fundamental Rights, give to freedom of movement and freedom from detention. She reminded us that the concept of proportionality required by both the directive and the regulations imparted the concept that any measure depriving a citizen of his liberty had to be necessary for realising the aim of public policy and public security, see e.g. K v Staatssecretaris [2018] 1 CMLR 47 paras 37, 40 and 48. Although this was a case of detention of an asylum seeker in order to ascertain his identity and nationality, it emphasised that limitations on the right to liberty must be appropriate and necessary.
19. The factual position as at 27<sup>th</sup> January 2015 appears to be that the Home Office was notified (it is not clear by whom) that Mr Lauzikas had received a 14 month sentence for possession of an imitation firearm, was being held at court and was due for release. A Home Office caseworker contacted HMP Norwich and asked if Mr Lauzikas had received 14 months in one hit which was confirmed. She then contacted HEO Suzi Jell to whom she sent the Police National Computer ("PNC") record of the conviction. The relevant authority to detain was then faxed to the prison for service and passed to a Mr Benson for allocation and he signed the document IS91 authorising the detention of Mr Lauzikas. On the same day the caseworker completed a notice of liability to deportation which gave Mr Lauzikas the opportunity to say why he should not be deported.
20. On the next day 28<sup>th</sup> January the papers were sent to a Ms Sue Yildiz for approval. A Ms Zabardast submitted a "proposal" for continuation of detention because "it is not considered reasonable to leave the public vulnerable to the potential for him to re-offend" and "he has provided no evidence that he has successfully completed" any programme such as an Enhanced Thinking Skills and a victim awareness course". Ms Yildiz responded to that proposal by saying:-

"I have considered the facts and am satisfied that detention is both reasonable and proportionate to reduce the risk of harm, re-offending and absconding in this case."

A letter explaining the reasons for his detention was then completed and signed by Ms Zabardast on the same day; that letter said that Mr Lauzikas' representations would be considered without any unavoidable delay and explained that he could apply for bail.

21. On 29<sup>th</sup> January Ms Zabardast requested a number of documents relating to Mr Lauzikas including the Judge's Sentencing Remarks and an OASys Assessment and, perhaps, the pre-sentence report. Nothing emerged before 9<sup>th</sup> February 2015 when Ms Zabardast sent a chaser. The judge's sentencing remarks were received on 18<sup>th</sup>



February but it is not clear when the other documents were received; there is no question, however, that the deportation order of 24<sup>th</sup> February 2015 was a properly individualised decision.

22. Having regard to these facts as at stage 1 the deputy judge decided (para 59(6)) that it was important to pay close regard to context, circumstances and practical reality and that the law should not impose an impossible burden or place the Secretary of State in an invidious position where circumstances of urgency necessarily meant that only limited information about an individual was available. He also said (para 59(5)) that both the stage 1 and the stage 2 decisions were focusing on what was known about the claimant's individual case and circumstances and that detention was not treated as automatically following from the fact of Mr Lauzikas being a convicted criminal.
23. Mr Jack Anderson for the Secretary of State supported the deputy judge's approach in para 59(6) and submitted that the findings in para 59(5) were findings of fact which were open to the judge and should not be reversed by this court. Ms Dubinsky responded by submitting that the Secretary of State ought to have a system of monitoring all cases in which a court was likely to sentence any EEA offender to a sentence which might result in the offender's immediate release and that, even if this meant that all EEA offenders who were remanded in custody had to be monitored, that was by no means too difficult for the Secretary of State to do.
24. Mr Anderson applied to adduce evidence (not before the court below) of a PNC record of 15<sup>th</sup> February 2015 in support of an attempt to show that the offence recorded was possession of an imitation firearm "with intent". We do not consider it appropriate to allow that application particularly since the document produced could not have been the document available to Ms Jell. But there is no doubt that a PNC record in some form was available and is part of the picture justifying the deputy judge's conclusion that the decision to detain Mr Lauzikas was an individualised rather than an automatic decision.
25. I therefore agree with the deputy judge's decision in paragraph 61, quoted above, that the Secretary of State has discharged the onus of showing that the detention of Mr Lauzikas satisfied Article 27.2 standards on the first day (27<sup>th</sup> January). The fact that the deputy judge supports that conclusion by referring to what Ms Zabardast said the following day on form ICD3079 does not detract from his conclusion as to the first day because it will obviously have been uppermost in the detaining officer's mind that the public would be vulnerable if Mr Lauzikas were to be released and were to re-offend. I also agree with the deputy judge that what he calls urgent intrusive action satisfies Article 27.2 standards provided that further information about the offender's conduct and circumstances is obtained. I do not, however, consider it appropriate to use the phrase "with imperative urgency" as the deputy judge does (twice) in paragraph 61. This seems to be an invention of the deputy judge and might (or might not) be derived from the use of the word "imperative" in Article 28(3) of the Citizens Directive. However derived, it is an inappropriate phrase.
26. The normal approach is that such further information should be gathered within a reasonable time while recognising that in cases where the liberty of an EEA national is concerned that time may be very short. But that brings me to stage 2.

## **Stage 2 – Liability**

27. Apart from the use of the phrase imperative urgency, I agree with the deputy judge's assessment of the position at stage 2 as set out in paragraph 62 of his judgment:-

“As to stage 2, the Secretary of State has not in my judgment discharged the onus of justifying the detention applying Article 27.2 standards. In short, the proviso was not satisfied. There was nothing impossible or invidious in the urgent circumstances which prevented the decision to detain at stage 1 from being accompanied by a recognition that the position was unsatisfactory and the action intrusive, insisting that further relevant materials about the claimant's conduct and circumstances be provided as a matter of imperative urgency, if the detention were to be continued beyond the first 24 hours. No reason has been provided as to why the PSR should not have been urgently obtained. It existed, it will have been known to and available to those from whom the notification had originated. Importantly, no witness statement evidence has been filed in this case, explaining that some impediment or undue burden arose. No information gathering started until 29 January 2015, after the stage 2 decision, and in readiness for the first monthly detention review on 25 February 2015. Applying the same contextual approach urged by the Secretary of State, the absence of information about the individual conduct and circumstances left her in my judgment with material and reasons which were not legally adequate to justify the continuing detention. The stage 2 decision was based on what was known about the claimant, but it has not in my judgment been shown to be sufficient to meet the standard of individualised proportionality and necessity in all the circumstances. The price for urgent protective action was an urgent review which would need fuller individualised information in order for justification for detention to continue.”

28. The judge focuses, naturally enough, on the pre-sentence report but the same considerations apply to the OASys assessment which, like the pre-sentence report was dated 31<sup>st</sup> December 2014 and was presumably available to the sentencing judge on 27<sup>th</sup> January 2015. The judge's own sentencing remarks would also be relevant. But, quite apart from the fact that these documents were available to the state (qua state) which is the entity which detained Mr Lauzikas and continued to detain him between 28<sup>th</sup> January and 25<sup>th</sup> February, there is no reason why those documents (or at least the pre-sentence report which the judge regarded as potentially the most significant) could not have been obtained by the Home Office within 24 hours of the initial decision to detain. Urgency was undoubtedly required and, even if the correct approach is to say that these documents should be obtained within a reasonable time that reasonable time, in a case where an EEA national is detained because he is given a sentence that will permit his release but has to be detained for the purposes of protection of the public, is very short indeed.
29. I agree with the judge, therefore, that detention between 28<sup>th</sup> January and 25<sup>th</sup> February was unlawful.

## Stage 2 – Damages

30. The more difficult question is whether damages for this period should be compensatory or nominal. Since, if the Secretary of State had had the information she should have had on 28<sup>th</sup> January, that information would have justified continuing detention, as indeed it did on 24<sup>th</sup> February when the deportation order was made, it might be thought that damages should be nominal.
31. That was the conclusion of the Supreme Court in R (Lumba) (Congo) v SSHD cited above. In that case the Secretary of State made her decision to detain in accordance with a secret unpublished policy but would have made the same decision if she had operated in accordance with her publicly known policy. The majority of the Supreme Court held that only nominal damages were available.
32. The judge came to the opposite conclusion in paragraph 64:-

“...it is well-established in the case-law that the legality of detention is considered on the basis of the material that was before the Secretary of State (§17 above). That is a principled approach which can, and in my judgment should, cut both ways. The Secretary of State is not to be castigated, but neither exonerated, by material of which she was not aware at the time of the decision to detain or continue detention. It is one thing to say, on the same evidence as was before the Secretary of State at the time, that a decision involving some public law breach would have been the same absent that breach. That in my judgment is what the approach to nominal damages [in] Lumba is envisaging (§19 above). It is quite another thing to posit different material as having been before the Secretary of State. Even if that would be a correct approach in a case based on the public law breach being a failure of the so-called *Tameside* duty of sufficient enquiry, I agree with Ms Dubinsky: that is not this case. The Article 27.2 standards involve an enquiry, as part of a substantively reasoned and justified outcome. The wording and clear purpose of the Article 27.2 standards stand, in my judgment, as meaningful protection for the individual from action lacking a presently evaluated and informed justification based on individual conduct and threat. The state can make an informed decision, or not impose the restriction. In my judgment, it would undermine the disciplined safeguard of the Article 27.2 standards were the executive able to avoid liability for unlawful detention, under standards of proportionality and necessity, by reference to what an individualised enquiry would have elicited had it been undertaken. That reasoning stands to excuse detention based on suspicion, provided that the suspicion proves well-founded after the event. It stands to legitimise a “detain first, ask questions later” arbitrariness. That would be very surprising, given that the protection against arbitrariness is a central value of standards of proportionality. I recognise that the law often treats proportionality as a function of outcome, not reason or

reasoning. But I cannot see, especially in the context of executive deprivation of liberty and Article 27.2, how it is consistent with the rule of law to excuse and legitimise detention for which the detaining decision-maker has no adequate justifying material at the time of the detention. Only clear binding authority to that effect, on this specific point, would lead me to such a conclusion. I was shown none.”

In spite of the apparent force of the deputy judge’s view, I cannot agree with him in this respect.

33. In the first place, the deputy judge has in my view conflated the concepts of liability and damages in this paragraph because he continues to focus on the position of the Secretary of State (not to be “castigated” and not to be “exonerated”) rather than on the position of the claimant (as Lumba requires). Damages are intended to compensate the claimant not to be a disciplinary or vindictory vehicle to express a judge’s disapproval of state action.
34. Secondly the real choice is not, as the deputy judge would have it, between making “an informed decision” or not to “impose the restriction”. In a case in which the breach of public law duty is to fail to gather relevant information within an appropriate time-scale, the relevant question is what would the Secretary of State have done if she had gathered the correct information at the right time. If she would have detained the claimant in any event, the claimant has suffered no loss in respect of which he is entitled to substantial damages.
35. Thirdly there is no question of “detaining first, asking questions later”. The initial detention has itself to be sufficiently individualised not an automatic decision and the judge held that it was, provided more individual information was speedily sought. The right question is, as I say, to ask what would have happened if that information had been available to the Secretary of State when it should have been.
36. Fourthly there is ample authority to this effect. The leading case is that of Lumba. But there are also cases of wrongful detention of persons suffering from mental illness which provide an apt analogy. If the Secretary of State had called for and/or acted upon correct information, and the result would have been a compulsory transfer to hospital rather than continued immigration detention, the damages will have to be assessed on the basis that such a transfer would have occurred, see R (Das) v SSHD [2014] 1 WLR 3358.
37. Ms Dubinsky submitted that, even if all this is correct, what would have happened in fact is that the entire process would have been accelerated so that Mr Lauzikas would have been released correspondingly early rather than at the end of stage 5 on 29<sup>th</sup> April 2015.
38. I cannot accept this. The position is that the trigger for release on bail was the fact that the Secretary of State cancelled her removal directions. That was triggered by the application for judicial review which was itself triggered by the removal directions of 5<sup>th</sup> March 2015 which were themselves triggered by the decision to deport and the certification of capability of removal pending appeal. That decision and certification could not take place until the claimant had made representations as to why he should

not be deported; on 9<sup>th</sup> February 2015 Mr Lauzikas had given two reasons why he should not be deported but asked for further time to respond to the Secretary of State's proposal; on 12<sup>th</sup> February 2015 he returned the questionnaire he had been asked to fill in. In all these circumstances it is highly unlikely that, even if the Secretary of State had already had in her possession the pre-sentence report and the judge's sentencing remarks on 28<sup>th</sup> January as she should have done, the actual decision to deport would have been reached any earlier than 24<sup>th</sup> February and that the overall time-scale would have been any shorter than it was.

39. I cannot, therefore, with respect, agree with the deputy judge that it was appropriate to award substantial damages for stage 2 even though I agree with him that the actual detention during that stage was unlawful.

#### **Stage 4 – 12<sup>th</sup> March – 9<sup>th</sup> April**

40. As I have said the deputy judge held that there was a reasonable prospect of deportation during this period which only receded on 9<sup>th</sup> April when the (third) detention review authorised detention for a further 28 days. In this respect the deputy judge was, in my view, too generous to the Secretary of State.
41. The factual position was that the Secretary of State, on receipt of the judicial review application, had (quite correctly) on the very next day (12<sup>th</sup> March) cancelled her removal directions pending a decision on the judicial review application. The state of the lists of the Administrative Court meant, however, that a by no means simple judicial review application was most unlikely to be dealt with in a reasonable time in accordance with the Hardial Singh principles unless an application to expedite the hearing of the judicial review claim was made and such application was granted. It may be questioned whether any such application, if made, would have been granted (it would be necessary to ventilate the question of bail in much the same way as it was eventually ventilated in April) but that need not detain this court. The fact is that no such application was made and without such application it is impossible for anyone to say with confidence that the judicial review proceedings would be concluded within a reasonable time-scale.
42. Ms Dubinsky had an alternative argument that at the very least the prospect of deportation within a reasonable time had receded at the time the Secretary of State filed her acknowledgement of service on 30<sup>th</sup> March and an obvious opportunity to ask for expedition was missed. In the light of my conclusions in the previous paragraph it is not necessary to say anything about that submission except (perhaps) that it is obviously correct.
43. On any view the damages for wrongful detention during stage 4 must, therefore be substantial rather than nominal.
44. Normally an appellate court should respect the trial judge's evaluation of the application of the Hardial Singh principle, see R (Muqtaar) v SSHD [2012] EWCA Civ 1270; [2013] 1 WLR 649, para 46. But in this instance the judge failed with respect to take into account exactly how unlikely it was that the Administrative Court could deal with the matter if it was not expedited.

#### **Overall conclusion**

45. I would therefore uphold the judge in relation to stage 1, uphold him in relation to unlawfulness but reverse him as to damages in relation to stage 2, reverse his decision in relation to stage 4 and award substantial damages to be assessed in relation to that period.

**Lord Justice Hickinbottom:**

46. I agree.

**Lady Justice Nicola Davies:**

47. I also agree.