Neutral Citation Number: [2024] EWCA Civ 182

Case No: CA-2023-000063

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
THE HONOURABLE MR JUSTICE SWEENEY
[2022] EWHC 3120 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 February 2024

Before:

LORD JUSTICE BEAN
LADY JUSTICE ASPLIN
and
LORD JUSTICE LEWIS

- -

Between:

AUDI DAMA MASOZERA JOHNSON	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Anthony Metzer KC and Russell Wilcox (instructed by **DCK**) for the **Appellant**
Andrew Deakin (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 31 January 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 29 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This an appeal against a decision of Sweeney J. (the judge) dismissing a claim for false imprisonment arising out of the detention of the appellant, Audi Johnson. In brief, Mr Johnson, who is not a British citizen, was detained between 16 February 2014 and 19 June 2015 under powers conferred by the UK Borders Act 2007 ("the 2007 Act"). The appellant had been convicted of an offence of aggravated burglary and was sentenced to eight years' imprisonment. The respondent made a deportation order pursuant to section 32(5) of the 2007 Act and also detained the appellant. The respondent attempted to remove the appellant to Uganda between 9 and 10 December 2014 but that attempt was unsuccessful and the appellant returned to the United Kingdom. The respondent continued to detain the appellant until 18 June 2015. The respondent ultimately accepted that the Ugandan authorities did not consider that the appellant still had Ugandan citizenship and so he was, in effect, stateless. The deportation order was revoked. It was accepted that the detention between 17 March 2014 and 10 April 2014 was unlawful as the respondent had not carried out a review of the appellant's detention as required by his policies. This appeal concerns the lawfulness of the remaining periods of detention.

2. The judge held that the deportation order was lawful as the conditions for making an order, namely that the appellant was not a British citizen and had been convicted in the United Kingdom of an offence and sentenced to a period of at least 12 months' imprisonment, were satisfied. The fact it was not possible to remove the appellant because the Ugandan authorities would not accept that he had Ugandan citizenship did not render the deportation order unlawful. Further, the judge held that the detention of the appellant during the relevant period was lawful as it complied with the principles established in *R (Hardial Singh) v Governor of Durham* Prison [1983] EWHC 1 (QB) and approved in subsequent cases. The judge found that the respondent (1) intended to deport the appellant and was not using the power to deport for other purposes and (2) detained the appellant only for a period that was reasonable in all the circumstances and it had not, during that period, become apparent that the respondent would not be able to effect deportation during that period.

3. The appellant has permission to appeal on four grounds, namely, that:

   (1) the judge was wrong to hold that the deportation order made pursuant to section 32 of the 2007 Act was lawful and remained lawful throughout the entirety of the appellant's detention

   (2) the judge was wrong to find that the detention satisfied the first principle in *Hardial Singh* namely that the appellant was detained because the respondent intended to deport him and was using the power to detain solely for that purpose;

   (3) the judge was wrong to find that the appellant was only detained for a reasonable period and when his removal within a reasonable time was in prospect;

   (4) the judge's factual findings were unsafe in that, owing to the length of time between trial and judgment or otherwise, he inadequately evaluated the weight or significance of the evidence before him.

4. The respondent submitted that the judge's reasoning was correct. He also seeks to uphold the decision on an additional ground, namely that the appellant had appealed to the First-tier Tribunal against the decision to make a deportation order and that appeal had been dismissed. The appellant could have appealed, but did not, on the basis that the decision was not in accordance with law as he was stateless. The appeal to the First-tier Tribunal proceeded on the basis that the appellant was a Ugandan citizen, that is what the First-tier Tribunal found, and there was no appeal against that finding. In the circumstances, the respondent submitted that the principle of *res judicata* applies and the appellant cannot now argue in these proceedings that the deportation order was invalid because he was stateless.

THE LEGAL FRAMEWORK

British Citizenship

5. The acquisition of British citizenship by birth is governed by section 1 of the British Nationality Act 1981 ("the 1981 Act"). A person born in the United Kingdom does not acquire British citizenship by virtue of birth alone in the United Kingdom. Section 1(1) of the 1981 Act so far as material provides:

> "1(1). A person born in the United Kingdom after commencement…..shall be a British citizen if at the time of his birth his father or mother is-
>
> (a) a British citizen; or
>
> (b) settled in the United Kingdom…..".

Deportation of non-British citizens

6. Section 3(5) of the 1971 Act provides that:

> "(5) A person who is not a British citizen is liable to deportation from the United Kingdom if –
>
> (a) the Secretary of State deems his deportation to be conducive to the public good; or
>
> (b) another person to whose family he belongs is or has been ordered to be deported."

7. Section 5(1) of the 1971 Act provides that where a person is liable under section 3(5) to deportation:

> "the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave the United Kingdom and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force."

8. A deportation order may be revoked at any time by further order of the Secretary of State: section 5(2) of the 1971 Act.

9. Section 32 of the 2007 Act deals with automatic deportation of foreign nationals who have been convicted of certain crimes. It provides that:

> "**32 Automatic deportation**
>
> (1) In this section *"foreign criminal"* means a person–
>
> (a) who is not a British citizen or an Irish citizen,
>
> (b) who is convicted in the United Kingdom of an offence, and
>
> (c) to whom Condition 1 or 2 applies.
>
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
>
> (3) Condition 2 is that–
>
> (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and
>
> (b) the person is sentenced to a period of imprisonment.
>
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 … the deportation of a foreign criminal is conducive to the public good.
>
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).
>
> (6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless–
>
> (a) he thinks that an exception under section 33 applies,
>
> (b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or
>
> (c) section 34(4) applies.
>
> (7) Subsection (5) does not create a private right of action in respect of consequences of non-compliance by the Secretary of State.

10. At the material time, section 33 of the 2007 Act provided that, subject to section 33(7), section 32(4) and (5) did not apply where certain specified exceptions apply. Exception 1 is "where removal of the foreign criminal in pursuance of the deportation order would breach" a person's Convention rights (that is, the rights guaranteed by the

Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")) or the obligations of the United Kingdom under the Refugee Convention. Exception 2 is where the Secretary of State thinks the foreign criminal was under 18 at the date of conviction. Exception 3 applied where the removal of the foreign criminal would breach his rights under the European Union Treaties (that exception has now been repealed). Exception 4 deals with foreign criminals subject to certain provisions of the Extradition Act 2003. Exception 5 applies where the foreign criminal is subject to one of a number of specified orders such as a hospital order. Exception 6 applies where the Secretary of State thinks that the application of section 32(4) or (5) would breach obligations under the Convention against Trafficking in Human Beings. Section 33(7) provides that:

> "(7) The application of an exception –
>
> (a) does not prevent the making of a deportation order;
>
> (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good; but section 32(4) applies despite the application of Exception 1 or 4."

11. The result of that subsection is that the fact that an exception applies does not prevent the making of a deportation order. Where one of exceptions 2,3,5 and 6 applies, deportation is not automatically to be treated as conducive to the public good. In cases where Exception 1 or 4 applies, the deportation of a foreign national criminal is still automatically regarded as being conducive to the public good.

12. Finally, section 34 of the 2007 Act deals with the timing of making a deportation order under section 32(5). Section 34(4) provides that:

> "(4) The Secretary of State may withdraw a decision that section 32(5) applies, or revoke a deportation order made in accordance with section 32(5), for the purpose of–
>
> (a) taking action under the Immigration Acts or rules made under section 3 of the Immigration Act 1971 (c. 77) (immigration rules), and
>
> (b) subsequently taking a new decision that section 32(5) applies and making a deportation order in accordance with section 32(5)."

13. For completeness, section 38(4) of the 2007 Act confirms that the reference to a deportation order in sections 32 and 33 is a reference to an order under section 5 of the 1971 Act, made by virtue of section 3(5) of that Act.

Detention

14. Where a person has been given notice of a decision to make a deportation order, or where a deportation order is in force against him, the person may be detained under the authority of the Secretary of State pursuant to powers conferred by paragraphs 2 and 3 of Schedule 3 to the 1971 Act.

15. Section 36 of the 2007 Act also deals with detention pending a decision that section 32(5) applies and the making of a deportation order and once an order has been made. At the time of the detention imposed in the present case, that section provided, so far as material, that:

> "(1) A person who has served a period of imprisonment may be detained under the authority of the Secretary of State–
>
> (a) while the Secretary of State considers whether section 32(5) applies, and
>
> (b) where the Secretary of State thinks that section 32(5) applies, pending the making of the deportation order.
>
> (2) Where a deportation order is made in accordance with section 32(5) the Secretary of State shall exercise the power of detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971 … (detention pending removal) unless in the circumstances the Secretary of State thinks it inappropriate.

16. The courts developed a set of principles, known as the *Hardial Singh* principles, for determining whether the exercise of the power to detain was lawful. Those principles are set out in *R (I) v Secretary of Home Department* [2002] EWCA Civ 888; [2023] INLR 196 at paragraph 46, and approved by Lord Dyson (with whom Lord Walker, Baroness Hale, Lord Collins, and Lord Kerr agreed) in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 at paragraphs 22 and 102 and see on this point Lord Brown at paragraph 347. The principles are that:

(1) the Secretary of State must intend to deport the person and can only use the power for that purpose;

(2) the deportee may only be detained for a period that is reasonable in all the circumstances;

(3) if, before the expiry of the relevant period, it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, he should not continue to exercise the power of detention; and

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

17. Factors that are relevant to the reasonableness of the period of detention include (1) the length of the period (2) the nature of the obstacles preventing deportation (3) the conditions in which the detained person is kept and the effect on him and his family (4) the risk that, if released, the detained person will abscond and (5) the danger that, if released, the detained person will commit further offences: see per Lord Dyson in *Lumba* at paragraph 104.

THE FACTS

The Appellant and His Family

18. The facts are set out fully in the judgment of the judge below. Counsel for the appellant expressly acknowledged at the hearing that he was not challenging the findings of primary fact although he did challenge the analysis and whether certain conclusions could properly be said to follow from those facts. For convenience, I set out the main facts that appear to me to be material to this appeal. I do not seek to refer to each fact, or each document relied upon, but the appellant and the respondent can be sure that I have considered all the facts found, all the documents relied upon and all the submissions made orally and in writing.

19. On 1 October 1989, the appellant's mother, a Ugandan citizen, arrived in the United Kingdom, with leave to enter the United Kingdom for six months as a visitor. The appellant's father is also a Ugandan citizen. The appellant was born on 24 December 1989. The appellant was in fact born in the United Kingdom. An application by the appellant's mother for asylum was made in January 1991 but refused in March 1997.

20. On 6 September 2002, the appellant (then aged 12) was issued with a Ugandan passport which was due to expire in 2007. That passport recorded that the appellant's place of birth was Rwerere in Uganda.

21. In 2005, the appellant's mother (who was represented by solicitors) applied for leave to remain in the United Kingdom, with her three dependants (her children including the appellant) on the basis of long residence in the United Kingdom. That application stated that the appellant was a Ugandan national. It included his Ugandan passport. It also included a copy of a birth certificate showing the appellant's place of birth as the Central Middlesex Hospital, Park Royal in London. The relevant officials made enquiries as to the discrepancy between the place of birth as shown in the passport (Rwerere) and the birth certificate (London) but the discrepancy was never explained by the appellant's mother. The appellant's mother was eventually granted leave to remain but the appellant's application was not, it seems, decided until January 2014 when it was refused.

The Appellant's 2010 Conviction

22. In September 2010, the appellant (who already had a number of convictions) was convicted of aggravated burglary. In short, on Christmas Day 2009, the appellant and five others broke into a house where a young family were living and threatened the father and the mother with a gun (it was unclear whether it was a real or an imitation firearm) and a knife was also used at one point. On 12 September 2010, the appellant was sentenced to 8 years' for the aggravated burglary and assault.

The Making of the Deportation Order

23. Toward the end of the custodial part of the appellant's sentence, Home Office officials began considering whether section 32(5) applied to the appellant and whether to make a deportation order. A note in the Home Office records dated 9 January 2014 shows that the Home Office were aware of the discrepancy between the birth certificate and the passport. A document headed "Auto deport minute" dated 3 February 2014 summarised the immigration history. The note recorded, amongst other things, that information had been requested from the Central Middlesex Hospital's records department and that someone (presumably in that department) had confirmed by telephone that the birth was registered there. The note recorded that "a request was

made for written confirmation but no reply had been received". The judge summarised these facts at paragraph 18 of his judgment, where he noted that, on 17 January 2014, a fax had been sent to the Central Middlesex Hospital's records department to ask them to check the details of the birth certificate. He noted that no response was received to *that* fax and the authenticity of the birth certificate was not confirmed until after 20 July 2015 (that is, after the appellant had been released from detention). As the judge said at paragraph 207, some steps had already been taken to check the validity of the UK birth certificate but they had come to nothing by this time.

24. On 17 January 2014, the appellant was invited to provide reasons as to why he should not be deported on release from custody. On 22 January 2014, a notice of liability to deportation was served on the appellant. He responded indicating that he was a British citizen. Pausing there, and irrespective of where he was born, the appellant was not a British citizen. Even if the appellant had been born in the United Kingdom, he would not have acquired British citizenship as neither his mother nor father was a British citizen or settled in the United Kingdom at the time of his birth in 1989.

25. In February 2014, the appellant was served with notice of the decision of the respondent that section 32(5) of the 2007 Act applied in his case. The notice gave the reasons. In brief, the appellant was a foreign national who had been convicted of offences in the United Kingdom and sentenced to 8 years' imprisonment and none of the exceptions to automatic deportation under section 33 applied. On 17 February 2014, a deportation order was made. That order recorded that the appellant was "a foreign criminal as defined by section 32(1) of the UK Borders Act 2007". That order required that, once the appellant had exercised any right of appeal and such a right had been dismissed, the appellant was required to leave the United Kingdom and was prohibited from entering the United Kingdom so long as the order was in force.

The Appellant's Detention

26. Prior to the making of the deportation order, the respondent also considered whether the appellant should be detained under section 36 of the 2007 Act at the end of the custodial period of his sentence. The relevant minute dated 27 January 2014 is set out at paragraph 20 of the judgment below. In brief, under the heading "Evidence of previous disregard of immigration law", it noted that the appellant had given a false identity to the prison service and used nine aliases. He had 17 convictions for 30 offences which included failing to surrender to custody, breach of conditional discharge and a breach of a community order. The minute considered the likelihood of removal within a reasonable time scale and noted that the appellant was at the beginning of the deportation process, and his removal could not realistically be expected to be effected in the near future. It noted that there was a copy of an expired Ugandan passport on file and that attempts should be made to obtain documents at the earliest opportunity. Under the heading "Proposal" the officer recommended that the appellant be detained as his criminal behaviour had escalated, he had been convicted of violent crime and sentenced to 8 years imprisonment, he had an earlier conviction for an offence of violence and he was seen as "posing a real threat to the public". The officer considered that the appellant would not comply with the restrictions of immigration control given that he had not previously complied with the conditions of his release or court orders. The authorising officer agreed and authorised detention.

27. On 16 February 2014, the appellant was detained pursuant to section 36 of the 2007 Act. That detention should have been reviewed on 17 March 2014 but that was not done due to administrative error. The respondent conceded that the appellant was unlawfully detained between 17 March 2014 and the next review on 10 April 2014.

The General Position in March- April 2014

28. Other facts on which the appellant places particular reliance include the following. On 26 and 27 March 2014, the respondent received e-mails in respect of two other cases involving Uganda, neither involving the appellant. An e-mail on the 27 March 2014 dealt with a person who was no longer registered as a Ugandan citizen and referred to Ugandan legislation providing that a minister may in certain circumstances deprive a person of his Ugandan citizenship if he had obtained that citizenship by registration. That is not the position of the appellant. The e-mail of 26 March 2014 referred to another individual and noted that Ugandan officials at, it seems, a meeting at the Ugandan High Commission in London, had explained that the individual would not be classified as a Ugandan national on reaching the age of 18 and he would have to apply for Ugandan citizenship. It said that if the individual had been in the United Kingdom for a substantial period he may lose his right of entry to Uganda. Applications for citizenship would be considered on a case by case basis. It noted that, regardless of that, the Ugandan High Commission would not issue an emergency travel document (referred to as "ETD") unless certain information was provided which the respondent could not provide at present and so the ETD process was being paused.

29. The appellant also relies upon the acceptance by Ms Buckle, who gave evidence for the respondent, that it was clear by April 2014 that there were significant questions as to whether an individual born in the United Kingdom could be a Ugandan citizen. It is right to note, however, that paragraph 29 of the judgment also records that her department was guided by another group in the Home Office, known as Returns Logistics, who approached the Ugandan authorities and asked whether a return was possible and no one had said it was not possible.

The Position of the Appellant Between April 2014 and October 2014.

30. On 2 April 2014, the appellant appealed to the First-tier Tribunal against the refusal to revoke the deportation order. He was given permission to appeal out of time on 4 April 2014. The appellant's detention was reviewed on 10 April 2014 and continued. The detention was reviewed periodically after that date. On 24 April 2014, the notes record that foreign national criminals could be removed with a European Union letter (referred to as an EUL as distinct from an ETD). On a review on 9 June 2014, it was noted that the appellant should be able to exhaust his appeal rights and could be removed thereafter aided by an EUL.

31. On 10 June 2014, the respondent contacted the Ugandan High Commission and asked if the appellant could be removed to Uganda on an EUL with his Ugandan passport (a copy of which was attached). On 11 June 2014, an official at the High Commission replied saying that "The Mission has no objection to the request however it would be appreciated if we had a look at the physical passport as the details on the biodata page look suspect. This is because it is an old passport."

32. Further reviews of the detention were carried out on 7 June 2014, 4 August 2014, and 1 September 2014 and the detention was continued. On 29 September 2014, detention was authorised for a further 28 days pending the outcome of the appellant's appeal to the First-tier Tribunal.

The Meeting at the Ugandan High Commission in September 2014

33. On 25 September 2014, Home Office officials met with officials from the Ugandan High Commission. The Ugandan High Commissioner was also present. The purpose of the meeting was to discuss Ugandan citizenship laws and four outstanding cases (none of which involved the appellant). The note of the meeting recorded that the High Commissioner commented that for those living overseas Ugandan citizenship lapsed at the age of 18 and they had to apply for citizenship to be reinstated. There was a discussion about EUL and a Home Office official explained that the United Kingdom had been returning Ugandans on such documents for a number of years. There was discussion about changes to the process to allow for verification. The note of the meeting records that the action and next steps to be taken was to escalate the citizenship issue with the Foreign and Commonwealth Office, to take specific steps in relation to the four outstanding cases, and to draft an internal operating instruction outlining the new process for verification.

The Appellant's Appeal to the First-tier Tribunal

34. The appellant's appeal to the First-tier Tribunal against the decision to deport him was heard on 24 September 2014 and judgment promulgated on 18 October 2014. The appeal was dismissed. Paragraph 1 of the First-tier Tribunal's reasons records that the "appellant is a citizen of Uganda". The reasons record that there was no doubt that the appellant was a foreign criminal who fell within the automatic deportation provisions of section 32 of the 2007 Act. At paragraph 52, the reasons record that it was uncertain, and was not necessary to determine, whether the appellant was born in the United Kingdom or not. It explained that the appellant was not a British national by reason of the 1981 Act and would only have been British if his mother or father had British nationality and they did not. The reasons further record that the appellant's nationality was Ugandan.

The Appellant's Removal to Uganda

35. A review of the detention was completed on 27 October 2014. It noted that the appellant's appeal had been dismissed and that this was likely to increase the risk of him absconding if he were released from detention. It noted that it was possible that removal could be arranged within a matter of weeks. Continued detention was authorised. A further review on 24 November 2014 authorised continued detention.

36. On 8 December 2014, the appellant's expired Ugandan passport was taken to the Ugandan High Commission where it was verified. On 9 December 2014, the passport was collected from the High Commission and taken to Heathrow for collection by the team responsible for removing the appellant to Uganda. A note of 9 December 2014 says his birth certificate was to be couriered to the removals team but that was not done.

37. On 8 December 2014, the appellant served further representations and grounds for appealing the First-tier Tribunal out of time. Those grounds stated that the appellant was a Ugandan national. The grounds said that he had been born in the United Kingdom. The respondent declined to defer removal. Permission to appeal was ultimately refused on 30 December 2014.

38. On 9 December 2014, the appellant was collected from HMP Lewes and taken to Heathrow. He was then flown to Nairobi and then to Entebbe. An allegation of harassment and misfeasance in a public office in the way that the removal was effected was dismissed by the judge. Mr Metzer at the hearing confirmed that there is no appeal against that decision.

39. On arrival at Entebbe, the appellant was refused entry to Uganda. He was returned to the United Kingdom. In a minute dated 10 December 2014 an official in the removals team recorded that:

> "Despite the best efforts of TASCOR / FCO Entebbe and NBO and CROS, this sub has been refused entry by the UGA authorities.
>
> When I left yesterday evening the High Commission in London had spoken to the UGA authorities and were supportive of our efforts to try and get Mr M admitted as they had verified his passport as genuine. As I understand it though Immigration were of the view:
>
> a. It was their decision whether or not to admit him.
>
> b. They were unsure that the correct process had been followed in London.
>
> c. Their citizenship laws had changed so that [the appellant] may have lost his citizenship.
>
> d. He had been away an awfully long time (they also mentioned at some time that they did not the UK (sic) to use UGA as its dumping ground).
>
> It was not helped that [the appellant] had a UK birth certificate which he himself presented to immigration there, further muddying the waters. After many hours of deliberation it seems the UGA auth decided late last night to refuse the appellant entry.
>
> He has therefore had to come back and is en route …
>
> ….. you will need to liaise with [country returns operation strategy] re next steps re trying to get [the appellant] accepted once we know the final decision for the reason not to admit him. We will of course work to assist you in trying to remove him, as and when he is removable."

The Position After the Appellant's Return to the United Kingdom

40. On his arrival at Heathrow, the appellant was detained at an immigration removal centre. On 10 December 2014, that detention was reviewed and continued detention authorised. The authorisation documentation noted that the reasons given for refusal of entry to Uganda had been raised with the relevant Home Office team and, in view of the evidence available and the support of the Ugandan High Commission in London, it was thought that removal could be achieved within a reasonable period. The authorising officer noted that the Home Office team had raised the reasons for refusal with the Foreign and Commonwealth Office who needed to clarify the position before a further removal was effected and further instructions were awaited. In the meantime continued detention was considered to be appropriate given the risk of harm to the public, the risk of re-offending and the risk of the appellant absconding. That authorisation was also considered by the head of casework for the region who agreed that detention should be maintained as removal was a realistic prospect in the near future and the appellant posed "a very high risk of serious harm to the public". On 19 January 2015, continued detention was authorised as a response was awaited from the Foreign and Commonwealth Office and, while it was noted that that may cause some delay to removal, movement was expected on the issue in the near future. On 16 February 2015, there was a further review and continued detention authorised. The authorising officer, Ms Buckle noted that:

> "Negotiations are ongoing with the Ugandan authorities, and we are hopeful of progress shortly. We are content that the documentation that we hold is genuine, and that removal can be effected swiftly. Detention is authorised for a further 28 days based upon a risk of harm, reoffending and absconding which I consider sufficient to outweigh the presumption of liberty."

41. On 3 March 2015, Home Office records noted that removals to Uganda using a EUL or ETD had been paused but talks were taking place that week. Shortly afterwards, the respondent issued an Interim Operational Instruction in relation to removals to Uganda, indicating that an agreement had been reached to suspend removals using an EUL and to apply for an ETD, the minimum requirements for which were a submission letter, an ETD application form, a consular registration form, supporting evidence to include a passport or birth certificate or identity card, bio data, and passport photographs. In each case a face to face interview at the Ugandan High Commission would be required.

42. Between 11 and 16 March 2015, the detention was reviewed and continued detention authorised as the respondent still held a copy of the appellant's Ugandan passport and removal could be achieved once an ETD application was submitted. The authorising officer noted that the only barrier to removal was obtaining an ETD and application was now to be submitted. On 13 April 2015, a further review was carried out. The authorising officer noted that the barrier to removal was the absence of an ETD. He noted that the appellant was a prolific offender with a history of non-compliance but "that said we cannot hold him indefinitely". He authorised continued detention but required certain steps to be taken.

43. On 14 April 2015, an application for an ETD for the appellant was completed. That application was submitted to the Ugandan High Commission on 17 April 2015 and a

face to face interview with the appellant arranged. That interview took place on 29 April 2015.

44. On 11 May 2015, a further review of detention was carried out. It was noted that all the steps identified in the 13 April 2015 review had been carried out and an application for an ETD had been submitted and an interview carried out and that the outcome of that interview was awaited. Continued detention was authorised for 28 days, and the outcome was to be chased within one month of the interview. On 3 June 2015, the respondent chased the Ugandan High Commission by phone and e-mail for the outcome of the interview.

45. On 8 June 2015, continued detention was authorised. On 15 June 2015, the Ugandan High Commission was again chased for an outcome of the ETD application. On 18 June 2015 the appellant was granted bail and ceased to be detained.

46. On 25 June 2015, Home Office officials were notified that the Ugandan authorities would not accept the appellant into Uganda. In mid-July 2015, an e-mail from a Home Office official noted that the High Commission was now refusing to issue documentation and would not accept anyone back in Uganda if they were born, or had a long period of residence, in the United Kingdom. The stance of Uganda was described as being that after a long period of time outside Uganda, Ugandan nationals lost their nationality. In September 2015 the Ugandan High Commission confirmed that they would not accept a person who was born, or had a long period of residence, in the United Kingdom.

The Revocation of the Deportation Order

47. The appellant also relied upon the facts and reasons surrounding the revocation of the deportation order and the grant of discretionary leave outside the Immigration Rules. The appellant applied for leave as a stateless person. In a document dated 20 November 2019, it was noted that the "whilst the applicant appears to meet the requirements for Ugandan citizenship and has been issued a passport in the past by the Ugandan authorities, it is clear the Ugandans are now refusing to accept him as a national". It further noted that "Based on the above information, it is accepted that the applicant is stateless as it is clear he will not be accepted by the Ugandan authorities as a Ugandan national". He was accepted as being stateless within the meaning of rule 401 of the Immigration Rules but refused leave to remain as a stateless person by reason of rule 332(5). He was subsequently granted discretionary leave for 30 months outside the Immigration Rules.

48. On 26 November 2019, a Home Office official recommended that the deportation order be revoked. The official noted that the position of the relevant national authorities, rather than the letter of the law, was likely to be decisive in concluding that a person was not a national. The Ugandan authorities would not accept or document the appellant as a Ugandan national and he had no entitlement to any other nationality. There were therefore no workable options for achieving removal under schedule 3 to the 1971 Act and the deportation order could not be enforced and served no purpose. An acting director agreed not to pursue deportation action and the deportation order was revoked on 12 December 2019. The revocation was said to be done in "pursuance of the power conferred upon them under section 34(4) of the UK Borders Act 2007".

49. For completeness, I note that this Court is not asked to, and is not in a position to give a definitive ruling on whether the appellant had Ugandan nationality, whether he has lost that nationality and if so when, or whether he would be entitled under Ugandan law to acquire Ugandan nationality. Those are matters which depend upon Ugandan law. We have not been provided with relevant Ugandan law, and, in any event, questions of foreign law are matters of fact as far as the courts in England and Wales are concerned. The likelihood is that expert evidence would have been needed on that issue. We proceed on the basis that Ugandan officials are at present asserting that the appellant is not a national of Uganda and the respondent has proceeded on that basis.

THE JUDGMENT

50. First, the judge rejected the argument that the deportation order was unlawful and that, therefore, the detention was unlawful. He said this at paragraph 164 of his judgment:

> "164. My conclusions are as follows:
>
> (1) I reject the Claimant's submission that, to avoid an absurd result, the automatic deportation provisions in section 32 of the 2007 Act must be construed as excluding from the definition of a "foreign criminal" a non-British citizen who is incapable of being removed because they are stateless. I agree with the Defendant that, for the reasons summarised in para. 162(2) – (6) above:
>
> (a) The plain meaning of the section is that the first relevant question under section 32(1) is whether the person is not a British citizen, not whether they are a national of a foreign state.
>
> (b) That plain meaning does not produce an absurd result, such as to require the suggested judicial re-drafting of the section.
>
> (2) Thus the Claimant met the definition of "foreign criminal", Condition 1 undoubtedly applied and therefore, in the particular circumstances of this case, a Deportation Order had to be made which was, and remained, lawful.
>
> (3) The Claimant further submits that the Defendant must prove that, at all material times, the Defendant had a reasonable belief that the Claimant was Ugandan; that he was removable, as a matter of fact; and that in consequence he was subject to the automatic deportation provisions.
>
> (4) Applying that approach:
>
> (a) I find that the recognition, in November 2019, that the Claimant was stateless was reached on *de facto* grounds, and that it does not thereby follow that he was *de jure* stateless at

> the time that the Order was made, or that he became *de jure* stateless during the course of his detention.
>
> (b) Against the background of my outline findings of fact (above), including those relied on by the Defendant (as recorded in para 162(1) above), and the other findings of fact made below when considering the remaining heads, I find as facts that, at all material times, the Defendant had a reasonable belief that the Claimant was Ugandan; that he was removable, as a matter of fact; and that in consequence he was subject to the automatic deportation provisions.
>
> (5) In the result, it is not necessary to reach any conclusions in relation to the arguments about res judicata / issue estoppel.

51. On the question of whether detention had breached the first *Hardial Singh* principle, the judge said this at paragraph 175 of his judgment:

> "175 This can be dealt with shortly:
>
> (1) On all the evidence, I have no hesitation in finding as facts that, throughout, the Defendant:
>
> (a) Intended to deport the Claimant.
>
> (b) Only used the power to detain for that purpose.
>
> (c) Had no intention to act unlawfully.
>
> (2) That is dispositive of this head of claim, and it is not necessary to reach any conclusion as to the lawfulness of the failure to supply the Defendant's then disputed UK birth certificate to the Ugandan authorities prior to the attempted removal, and/or as to whether that point is justiciable. However, it should not be thought that I agree with the Claimant that the failure was irrational and therefore unlawful.

52. Given the number and the wide-ranging nature of the criticisms made of the judge's conclusion in relation to the second and third *Hardial Singh* principles it is necessary to set out a substantial part of the judge's judgment on that issue. The judge set out the submissions of the parties in some detail. He identified the relevant principles of law. He said that he had no doubt that at the time the appellant was first detained, and throughout the period of detention, the appellant posed a high risk of absconding, a high risk of re-offending, and a high risk of causing serious harm and each of those factors was relevant and significant. He said that he found counsel for the respondent's arguments and reasons summarised in paragraphs 189, 190(4) and 192 to 198 to be telling. He then said:

> "207. At the time of the authorisation of the Claimant's detention on 27 January 2014 (see paras 20 & 21 above) it had already been (rightly) concluded that he was liable to automatic

deportation as he was a foreign criminal and had been sentenced to more than 12 months' custody. Thus he would be required to be detained unless such detention was inappropriate. The expired Ugandan passport was evidence of Ugandan nationality. Even if born in the UK he was, by the operation of the British Nationality Act 1981, Ugandan. The observation that the Claimant "… *..is at the beginning of the deportation process. His removal could not be realistically expected to be effected in the near future"* did not render detention unlawful. It was no more than a reflection of the fact that the process would be highly likely to include an appeal by the Claimant (which would be unlikely to succeed, but likely to take some considerable time to complete). Against the background that some steps had already been taken to check the validity of the UK birth certificate, and albeit that they had come to nothing by that stage, it was within the appropriate range to concentrate on investigating the passport, and to identify the need for a decision in relation to deportation to be made at the earliest opportunity. Taking into account the risks posed by the Claimant, the *Hardial Singh* principles were complied with."

208. By the time of the first review on 10/11 April 2014 (see paras 31 & 32 above) the Claimant had been detained (on 16 February 2014); the Deportation Order had been made (on 17 February 2014); a Notice of Decision (served on 19 February 2014) had included a presumption (in the Claimant's favour) that he had been born in the Central Middlesex Hospital, but rightly concluded that he was a Ugandan citizen; the Claimant had sought to appeal (out of time) to deportation and (on 4 April 2014) had been given permission to do so. Equally, whilst guidance of general application had been given in relation to returns on an EUL, and complex issues had arisen in relation to two other proposed returns to Uganda (see paras 25, & 27-29 above) the Defendant was entitled to proceed on the basis that a return was still possible. The review (para. 31 above) rightly recognised the need, before the next review, to establish whether the evidence of nationality held was sufficient for removal on an EUL. The authority (see para. 32 above) spelled out the risks that the Claimant posed and why. In my view the *Hardial Singh* principles were complied with.

209. By the time of the second review on 12 May 2014 (see para.35 above) the Claimant had tried to hang himself, and it had been confirmed that, as the Defendant had a copy of his Ugandan passport, the Claimant could be removed on an EUL once his appeal rights had been exhausted (see para.34 above). The need, prior to the next review, to establish that the passport was sufficient for an EUL was recognised. In my view, notwithstanding the Claimant's attempt to hang himself, and the

apparent minor error as to the date of the appeal hearing (in this and other reviews) the *Hardial Singh* principles were complied with.

210. By the time of the third review on 9 June 2014 (see para. 36 above) it had been confirmed that a Ugandan passport page and bio data were sufficient to remove on an EUL. It was appropriate to proceed on the basis that, once the Claimant had exhausted his appeal rights, removal could be made within a reasonable time. In my view, the *Hardial Singh* principles were complied with.

211. By the time of the fourth review on 7 July 2014 (see para. 41 above), the Defendant had (on 10 June 2014) supplied the Ugandan High Commission with a copy of the Claimant's expired passport and requested confirmation that he could be removed on an EUL, and (the following day) the High Commission had confirmed that it had no objection to the removal, but asked to look at the original. In my view, the *Hardial Singh* principles were complied with.

212. In my view, it is self-evident that the *Hardial Singh* principles were also complied with in relation to the fifth review on 4 August 2014 (see para. 42 above) and the sixth review on 1 September 2014 (see para. 43 above).

213. By the time of the seventh review on 29 September 2014 (see para. 47 above) the Claimant's appeal (during which it had not been disputed that the Claimant was Ugandan) had been heard on 24 September 2014, and judgment had been reserved (see para. 44 above); and on 25 September 2014 there had been a meeting between representatives of the Defendant and the Ugandan High Commissioner (see para. 45 above) to discuss Ugandan citizenship laws and how they related to a number of 'home grown' criminal casework cases, noting a recent change in the EUL system, and a possible further change. However, in my view, against the background of the confirmation already given by the High Commission in relation to the Claimant, and the absence of any withdrawal of that confirmation, the Claimant was entitled to proceed upon the basis that removal within a reasonable time was still realistic in his case. Hence, in my view, the *Hardial Singh* principles were complied with.

214. By the time of the eighth review on 27 October 2014 (see para. 50 above) the Defendant had issued an Interim Operational Instruction on 6 October 2014 in relation to removals to Uganda on EULs (see para. 48 above) which clarified a hybrid arrangement that had been agreed with the Ugandan authorities – and which could still be used if there was supporting evidence, with the further ability (on a case by case basis) to seek an ETD; and Judge Wiseman had given

judgment on 16 October 2014, in emphatic terms, confirming that the Claimant was Ugandan, and dismissing his appeal (see para.49 above). In the result, the Defendant was entitled to conclude both that the risk of absconding was likely to have increased, and that removal might be arranged within weeks. In my view, the *Hardial Singh* principles were complied with.

215. By the time of the ninth review on 24 November 2014 (see para. 53 above) the Claimant's removal to Uganda had been authorised on 31 October 2014 (see para. 51 above), and was set for 18 December 2014. In my view the *Hardial Singh* principles were complied with.

216. By the time of the tenth review on 19 December 2014 (see para.65 above) the Ugandan High Commission had verified the original of the Claimant's expired Ugandan Passport on 8/9 December 2014 (see para. 56 above); the attempt to remove the Claimant had taken place over 9-11 December 2014 (see e.g. paras 58 – 64 above), and the Ugandan authorities had a copy of the Claimant's UK birth certificate. In my view there was nothing in the Minute dated 10 December 2014 (see para. 59 above) which precluded the ultimate decision made in the review that removal within a reasonable time remained a realistic prospect. Given that the Claimant had been in detention since February 2014, combined with the refusal to admit him, the review required and was given anxious and careful consideration by appropriately senior members of staff, including a Deputy Director and the Head of Casework South. In my view, against the background of the Interim Operational Instruction issued on 6 October 2014 (see para. 48 above), the support of the High Commission, and the increased level of risk posed by the Claimant, the *Hardial Singh* principles were complied with.

217. By the time of the eleventh review on 19 January 2015 (see para. 72 above) the Defendant had received representations on behalf of the Claimant that he was not a Ugandan National (see para. 68 above), and on 30 December 2014 the Claimant's application for permission to appeal to the Upper Tribunal (which included an acceptance by counsel that the Claimant was Ugandan) had been refused (see para. 69 above). The review required, and was given, anxious and careful consideration by appropriately senior members of staff, including a Director (who had already raised the wider issue with CROS and the FCO, and who expected movement on the issue in the near future). In my view, the principles were complied with.

218. By the time of the twelfth review on 16 February 2015 (see paras 80 & 81 above) the Claimant had asked why he was still being detained and the Defendant had replied to the effect

that, for the reasons explained in the reply, the Claimant remained considered to be a Ugandan national (see paras 74 & 75 above). The Defendant's Country Specialist team had indicated that confirmation had been sought that the Claimant would be permitted to enter Uganda, and that a meeting was being arranged with the High Commission. In the review it was recorded that the Country Specialist Team had advised on 10 February 2014 that the proposed meeting with the High Commission was likely to be agreed imminently. In those circumstances, and given the risks posed by the Claimant, the *Hardial Singh* principles were complied with.

219. By the time of the thirteenth review on 11 March 2015 (see paras 86 & 87 above) CROS had confirmed on 3 March 2015 (see para 83 above) that EUL / ETD removals to Uganda were on hold, but that removal talks were to take place that week, in which CROS had agreed to enquire about the Claimant's case. Shortly thereafter (see para. 84 above) an Interim Instruction in relation to removals to Uganda had been issued which indicated that an agreement had been reached to suspend the use of EULs and to institute an ETD process – the minimum requirements for which were set out. Thereafter, on 9 March 2015, in an email in relation to the Claimant (see para. 85 above) CROS had advised the completion of an ETD application. The review (which involved an Acting Assistant Director) was thus entitled to conclude that removal could be achieved within a reasonable period, albeit that it may be some way off. Thus, against the background of the risk factors, the *Hardial Singh* principles were complied with.

220. At the time of the fourteenth review on 13 April 2015 (see para 89 above) it was recorded that the Claimant had been in custody for fourteen months, and that therefore serious and careful consideration had been given to his detention. It was further recorded that the Defendant "will now be submitting an ETD". The Deputy Director who authorised detention noted that it was a difficult case, carefully balanced the competing factors, and identified the necessary actions to be taken within two weeks of the review. In my view, again against the background of the risk factors, the *Hardial Singh* principles were complied with.

221. On 14 April 2015, the day after the fourteenth review, the Claimant's ETD application form was completed. On 17 February 2015 it was submitted to the Ugandan High Commission, and on 29 April 2015 the Claimant had a face to face interview there, absent any representative of the Defendant (see para. 90 above). On 7 May 2015 (see para. 91 above) the Defendant was advised to wait for a month before contacting

> the High Commission. Miss Buckle understood that the issue was being referred to the authorities in Uganda.
>
> 222. The fifteenth review took place on 11 May 2015 (see para.92 above). The events since the fourteenth review were recorded, and it was observed that the actions suggested by that review had been completed, and that the Defendant had been advised that the outcome could not be chased for a month. In my view, again against the background of the risk factors, the *Hardial Singh* principles were complied with.
>
> 223. On 28 May 2015 (i.e. a month after the Claimant's face to face interview at the High Commission) his solicitors wrote to the Claimant (see para.93 above) asserting that (at the time of the interview) he had been told that an ETD would not be issued, and that therefore his continued detention was unlawful. On 3 June 2015 (i.e. some five weeks after the interview – see para. 94 above) the Defendant chased the High Commission without success.
>
> 224. The sixteenth and final review took place on 8 June 2015 (see paras 95 & 96 above). It required, and was given, careful consideration, including by an Acting Assistant Director. In my view, given the Claimant's criminal background and interest in the outcome, the Defendant was entitled not to be persuaded by his claim that there would be no ETD, but rather to await the official outcome from the High Commission. Equally, at that point, five days after the outcome had first been chased, the Defendant was entitled to conclude that there remained a reasonable prospect of removal within a reasonable time. Consequently, and as ever against the background of the risk factors, the *Hardial Singh* principles were complied with.
>
> 225. Seven days later, on 15 June 2015, and thus nearly seven weeks after the Claimant's face to face interview, the High Commission was chased again, without success. Had the Claimant's detention gone much beyond 18 June 2015, I would have concluded that the *Hardial Singh* principles were not complied with. However, the detention did not go beyond that date, and thus I conclude that the principles were complied with."

THE FIRST GROUND OF APPEAL – THE LAWFULNESS OF THE DEPORTATON ORDER

Submissions

53. Mr Metzer KC, with Dr Wilcox, for the appellant, submitted that the judge was wrong to hold that the deportation order was lawful. He submitted that a deportation order was an order requiring a person to leave the United Kingdom. If that individual was

incapable of being removed from the United Kingdom because he was stateless, the purpose of the deportation order could not be met. The automatic deportation regime in section 32 of the 2007 could not therefore apply to all non-British citizens and some, in particular those like the appellant who were stateless, must fall outside the automatic deportation regime. He submitted that the obligation in section 32(5) to make a deportation order was, therefore, subject to an exception or qualification in the case of persons who were stateless. He submitted there was a presumption that legislation should be interpreted so as to avoid absurd consequences. Further, he submitted that the fact that the respondent revoked the order pursuant to section 34(4) of the 2007 Act because the appellant was stateless and could not be removed was an indication that the respondent did not consider that the automatic deportation regime applied to persons such as the appellant who were stateless. He further submitted that the judge erred in holding that the respondent had a reasonable belief that the appellant was a Ugandan national. Mr Metzer submitted that if the deportation order was unlawful and, consequently, detention premised upon that order was also unlawful, relying on the decision in *R (DN (Rwanda)) v Secretary of State for the Home Department (Bail for Immigration Detainees Intervening)* [2020] UKSC 7; [2020] AC 698.

54. In his written submissions for the respondent, Mr Deakin submitted that the automatic provisions applied where the conditions in section 32(1) of the 2007 Act were satisfied. There was no requirement that an individual be removable. Further, it was clear from section 33(2) and (7)(a) of the 2007 Act that the respondent could make a deportation order in cases where the individual falls within section 32(1) but where removal would involve a breach of his rights under the Convention or the Refugee Convention. There was no basis for considering that a deportation order could not be made in the case of a person who was irremovable at present because he was stateless. We did not call on Mr Deakin for oral submissions on ground 1.

Discussion and Conclusion

55. The appellant is seeking damages for false imprisonment. That requires that the appellant was in fact detained (which he was) and the absence of any lawful authority for that detention. The respondent relies upon the deportation order as providing the lawful authority for the appellant's detention. Ground 1, therefore, concerns the question of whether the deportation order was lawful. If not, there was no lawful authority for detention: see *(DN (Rwanda))*. That issue concerns the proper interpretation of sections 32(1) and (5) of the 2007 Act which, in turn, involves considering the words of the statutory provision, read in context and having regard to the purpose underlying the statute, and bearing in mind any legitimate aids to statutory interpretation. A word or a phrase must be read in the context of the section as a whole and may need to be read in the context of a wider group of sections, as that may provide the relevant context for ascertaining, objectively, what meaning the legislature was seeking to convey in using those words. See generally, *R (O) v Secretary of State for the Home Department, R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 at paragraphs 29 to 31.

56. First, it is necessary to consider the wording of section 32 of the 2007 Act. Section 32(1) sets out the definition of "foreign criminal". It provides that "foreign criminal" means a person (a) who is not a British citizen (b) who is convicted in the United

Kingdom of an offence and (c) to whom condition 1 or 2 applies (i.e. has been subject to a sentence of imprisonment for at least 12 months or committed a specified offence). A person who is not a British citizen falls within section 32(1)(a) and is capable of falling within the definition if he meets the conditions in section 31(1)(b) and (c). On its wording, therefore, section 32(1)(a) includes persons who are nationals of other countries or who have no nationality because they are stateless. It is clear from the wording of section 32(1) of the 2007 Act that there is no basis for excluding stateless persons from the definition of foreign national criminals.

57. Secondly, the wording of section 32(5) provides that the Secretary of State "must make a deportation order in respect of a foreign criminal (subject to section 33)". Section 33 provides for a number of specified exceptions where the obligation in section 32(5) does not apply. Those exceptions do not include a situation where the foreign criminal is stateless. It is clear from the wording of section 32 and 33, therefore, that there is no basis for interpreting the obligation in section 32(5) as subject to a further exception in the case of stateless persons.

58. I note in passing that, as Bean LJ observed in argument, Parliament has in other contexts specifically provided for exceptions in cases where persons are stateless. Section 40(4) of the 1981 Act, for example, provides that the Secretary of State may not make an order depriving a person of British citizenship if he is satisfied that the person is stateless. Section 33 of the 2007 Act, by contrast, provides no specific exception in respect of persons who are stateless.

59. The submissions of Mr Metzer do not alter that conclusion. First the statutory scheme enacted by Parliament has expressly set out the exceptions to the obligation to make a deportation order in section 33 and they do not include an exception where the foreign criminal is irremovable because he is stateless. Further, section 33(7) specifically provides that the fact that an exception applies "does not prevent the making of a deportation order". It is impossible, therefore, to see on what basis a court could legitimately interpret section 32(5) as being subject to an additional exception in the case of stateless persons who were irremovable, and then to read in a further qualification to the effect that a deportation order could not be made in respect of such people. That would not be to interpret and apply the statutory scheme; it would be to re-write the statute and require the Secretary of State to operate in a way that was contrary to the scheme enacted by Parliament. That is not the role of the court which is to interpret and apply the law as enacted by Parliament.

60. Mr Metzer submitted that there was a difference between situations where a person could not be removed because to do so would breach that person's legal rights and a situation where a person was stateless and there was no country to which he could be removed. It must be doubtful as to whether there is any material or legally relevant difference between the two situations in the present context. In each case, for different reasons, the person is irremovable but a deportation order may be made. But, in any event, there is no basis for interpreting sections 32 and 33 on the basis of such a distinction where the wording of those sections provide no basis for doing so.

61. Secondly, Mr Metzer relied upon the presumption that courts will generally avoid adopting an interpretation of legislation which gives rise to absurd results. This does not assist the appellant in this case. The task of the court is ascertain the legislative intent. Any such presumption, if applicable, will be displaced if the legislative

intention is clear (see *Bennion, Bailey and Norbury* on Statutory Interpretation 8th edition at paragraph 13.1). The legislative intention is clear here from the words used and the statutory context. Further, I do not accept that the interpretation and application of sections 32 and 33 does lead to absurd results. A deportation order is an order that a person is required to leave the United Kingdom and is prohibited from re-entering the United Kingdom and invalidates any leave to enter or remain already granted. There may well be situations where a person will not, or will not be able to, leave the United Kingdom and where the Secretary of State may not be able to remove the person. The obligation to make a deportation order in such cases does not, however, produce absurd results. Making a deportation order still has other consequences (including invalidating any leave to remain already granted). Further, if circumstances change, it may become possible for the person to leave the United Kingdom (if, for example, a stateless person is able and does acquire another nationality by registration or if he marries a national of another country and has rights to go to that other country). It is not possible to say the obligation to make a deportation order has absurd results simply because a person who is required to leave the United Kingdom cannot, or cannot at present, be removed if he does not. In any event, that is what Parliament has expressly provided for in cases where section 32(1) and (5) apply.

62. Finally, Mr Metzer relied upon the fact that the Secretary of State revoked the deportation order under section 34(4) of the 2007 Act because it would serve no purpose. That, he submitted, indicated that the provisions of the automatic deportation regime did not apply where removal could not be effected as the provisions served no purpose. That submission needs to be analysed with care. The issue here is the proper interpretation of section 32 of the 2007 Act. The views or decisions of individual civil servants in individual cases are not a legitimate aid to the interpretation of a statute and do not assist in determining what Parliament intended. Section 32 needs to be interpreted in accordance with the usual principles of statutory interpretation and cannot be given a different meaning because civil servants have taken decisions in particular cases about how they will operate the statutory regime. Furthermore, we did not receive detailed submissions about the operation of section 34(4) and how it applied in this or other cases. It may be (and I express no concluded view) that section 34(4) could operate on the basis that a deportation order could be revoked for the purpose of taking action under the Immigration Rules (in this case, for example, to consider an application for leave to remain as a stateless person) and subsequently making a deportation order if circumstances change. It may be (and again I express no concluded view) the decision to exercise the powers section 34(4) to revoke the deportation order was wrong. In any event, the decision taken in this case cannot legitimately be used as a means of interpreting section 32 of the 2007 Act.

63. In conclusion, therefore the deportation order was lawfully made in this case. The appellant is a foreign criminal within the meaning of section 32(1). He is not a British citizen. He has been convicted of an offence in the United Kingdom and sentenced to a term of imprisonment of at least 12 months. The respondent was obliged to make a deportation order under section 32(5) of the 2007 Act. It remained in force until revoked in December 2019. The appellant was liable to detention under section 36(2) of the 2007 Act. The judge was correct to conclude that the deportation order was lawful at paragraphs 164(1) and (2) of his judgment. It is not necessary to consider the respondent's notice and the question of whether or not any principle of *res judicata*

applies to prevent the appellant challenging the validity of the deportation order as that order was lawful in any event.

64. It is not necessary to consider the further ground of appeal, namely that the judge erred in concluding at paragraph 164(3) and (4) of his judgment that the respondent had a reasonable belief that the appellant was a Ugandan national and that he was removable as a matter of fact and so was subject to the automatic deportation provisions. The question of whether or not the respondent reasonably believed that the appellant had Ugandan nationality is not the legally relevant fact for the purposes of section 32(1) and (5). The legally relevant fact is that the appellant was not a British national. For the avoidance of doubt, however, I do not consider that the judge did make any error of law. He was entitled to reach the conclusion that he did, on the materials before him, for the reasons that he gave.

65. For those reasons, ground 1 of the appeal fails.

THE SECOND GROUND OF APPEAL – THE FIRST *HARDIAL SINGH* PRINCIPLE

66. The next question is whether the exercise of the power to detain was unlawful for any particular period. That depends upon the application of the principles in *Hardial Singh*. Ground 2 concerns the application of the first principle, namely that "the Secretary of State must intend to deport the person and can only use the power to detain for that purpose".

Submissions

67. Mr Metzer submitted that the intention to deport implied the intention to effect removal in a lawful manner, and insofar as there was an intention to remove the appellant in a manner that was not lawful, there was no intention to deport but simply an intention to remove. He submitted that the respondent had failed without good reason to act in accordance with the stated policy conditions for removal on an EUL and had secured approval of an EUL on the basis of information which he knew or ought to have known was materially misleading. He submitted that the judge erred by concluding that it was not necessary to decide those points.

68. Mr Deakin submitted that the first *Hardial Sing*h principle concerned the question of whether the Secretary of State intended to deport the individual and he could only use the power to detain for that purpose. The use of the power to detain for ancillary purposes was illustrated in cases such as *HXA v Home Office* [2010] EWHC 1177 (QB) and *AA (Nigeria) v Secretary of State for the Home Department* [2010] EWHC 2265. In the present case, the judge found in terms that the respondent intended to deport the appellant and detained him for that purpose. The respondent did not exercise the power to detain for any ancillary purpose. The judge found that the respondent intended to do so lawfully. There was no requirement for the judge when considering the first *Hardial Singh* principle to consider whether removal could be effected lawfully. Those matters were relevant to the second and third *Hardial Singh* principles.

Discussion and conclusion

69. The first *Hardial Singh* principle concerns the intention and purpose underlying the exercise of the power of detention. In the present case, the judge found that the respondent did intend to deport the appellant and the reason why he exercised the power to detain him, and to continue that detention, was to facilitate his removal. The judge was entitled to reach those conclusions on the material before him. Indeed, it is difficult to see how the judge could have reached any other conclusion given all the documentary evidence, including the documents relating to the initial detention and the sixteen reviews of the detention carried out between April 2014 and June 2015, and the witness statement of Ms Buckle and the transcript of her evidence. The appellant was a foreign criminal within the meaning of section 32(1) of the 2007 Act. The Secretary of State was required to make a deportation order by section 32(5) because the removal of the appellant was conducive to the public good as recognised by section 32(4). The intention of the respondent and his officials was to deport the appellant in accordance with the statutory regime. The appellant was detained to facilitate the deportation, not least because of the risk of him otherwise absconding and failing to co-operate with the immigration authorities. The respondent sought approval to remove him to Uganda in December 2014 and, when that failed, he made other attempts to obtain an ETD to enable the appellant to be removed. The judge was correct to conclude that the first *Hardial Singh* principle was met.

70. The submissions made on behalf of the appellant on this issue are not easy to follow. In essence, the submission is, or appears to be, that the intention to deport implies an intention to remove in a lawful manner. Consequently, it is said the judge should have considered whether the respondent failed to comply with particular policy guidance on information to be provided when seeking approval from the Ugandan High Commission for removal of a Ugandan national on an EUL, and the respondent provided materially misleading information (it seems, a birth certificate and biodata in a particular form). If the judge had done so, it is submitted that he would have found that the respondent intended to effect removal in an unlawful manner and, it seems, that that would be a breach of the first *Hardial Singh* principle as it would negative the respondent's intention lawfully to remove the appellant.

71. First, the first *Hardial Singh* principle is concerned with the intention of the decision-maker. The Secretary of State must intend to deport the person concerned and detain him only for that purpose. That was the case here. The judge was correct to say that he did not need to consider the way in which the respondent went about obtaining approval for removal on an EUL when considering the first *Hardial Singh* principle. If it transpired that were difficulties in obtaining the relevant approval, that may, depending on the facts, be relevant to the second and third *Hardial Singh* principles as it might (or might not) be relevant to any decision to continue detaining the individual if it had become apparent that he could not be removed within a reasonable period. That does not affect the question of whether the first *Hardial Singh* principle was met.

72. Secondly, and in any event, the judge found that the respondent had no intention to act unlawfully. The judge was entitled to reach that conclusion on the material before him. In that regard, the judge said that it should not be thought that he agreed with the appellant's submissions that the failure relied upon was irrational and therefore unlawful (see paragraph 175(2) of his judgment). I agree that there is no legitimate basis for inferring an intention to act unlawfully in the present case. The reliance on the EUL guidance is misplaced. That does not stipulate a set of conditions that must

be fulfilled before approval for removal on an EUL can be sought. The document relied upon is guidance to Home Office staff telling them the types of travel documents used to enforce removals and how to go about obtaining them. The requirements relied upon by the appellant are in a section of the guidance dealing with "what to consider when preparing a European Union letter (EUL) for removal purposes". That section says that EUL documentation must be completed as fully and comprehensively as possible. It refers to what to do if there is doubt about the person's identity or nationality. It said that a fully complete bio data form should be attached to all EUL letters to help demonstrate to authorities in the receiving state that the United Kingdom has taken reasonable steps to establish the nationality and identity of the person. It said the information should include the precise place of birth. Those matters amounted to internal guidance about how best to apply for approvals for removal on an EUL. They were not preconditions that had to be met for any removal to be lawful.

73. The respondent could, in any event, depart from the guidance in appropriate cases. Here the appellant was born of Ugandan parents and the Ugandan authorities had issued him with a passport showing that he had Ugandan nationality. There is no reasonable basis upon which it could said that seeking the approval of the Ugandan High Commission to removal on an EUL on the basis of the information provided was unlawful (still less that the failure to provide information evidenced an intention to act unlawfully which negatived an intent on the part of the respondent to intend to deport the appellant). The judge said, when considering the second and third *Hardial Singh* principles, that he found the submissions that the respondent had not misled the Ugandan authorities over the birth certificate as "telling" (see paragraph 206 referring to submissions to that effect recorded at paragraph 190(4) of his judgment). He expressly found that it was reasonable in the circumstances of this case to focus on the passport (see paragraphs 207 of his judgment). The judge was entitled to reach those conclusions.

74. For those reasons, ground 2 fails.

THE THIRD GROUND OF APPEAL – THE SECOND AND THIRD *HARDIAL SINGH* PRINCIPLES

75. The second and third *Hardial Singh* principles are that the person may only be detained for a period that is reasonable in all the circumstances and if before the expiry of that period it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, he should not seek to exercise the power of detention. Each and every period of detention will need to be considered to determine whether those principles have been breached in relation to any particular period of detention. In the present case, the appellant was detained between 16 February 2014 and 19 June 2015. It was conceded that the detention between 17 March 2014 and 10 April 2014 was unlawful (as the respondent failed to carry out a review of the detention in accordance with the relevant policy guidance). The question under this ground of appeal, therefore, was whether the judge was entitled to conclude that each and every other period of detention complied with the second and third *Hardial Singh* principles.

Submissions

76. Mr Metzer submitted that the judge erred in finding that the periods of detention complied with the second and third *Hardial Singh* principles. Although characterised as an error of law, the reality is that the bulk of the Mr Metzer's submissions were to the effect that the judge should not have concluded on the facts that the periods of detention were reasonable. Mr Metzer made a number of submissions but, essentially, they involved assertions that the fact that the respondent knew in March 2014, or in September 2014, about difficulties with returning persons born in the United Kingdom to Uganda, meant that the judge erred in concluding that the second and third *Hardial Singh* principles were met. Those submissions were accompanied by complaints that the judge had failed to give reasons for his conclusions, improperly adopted the submissions of the respondent as reasons, or failed to explore particular matters such as the fact that the respondent had not provided the appellant's birth certificate to the Ugandan High Commission and complaints about the accuracy or completeness of the bio data provided. He submitted that the judge was wrong to say there was no evidence that the Central Middlesex Hospital had confirmed the record of the appellant being born in the hospital; they had done so by telephone.

77. In addition, Mr Metzer submitted that the minute of the initial decision contained a recognition that overcoming the barriers to removal would likely take some considerable time, and that fact, together with other matters, undermined the judge's conclusion. Mr Metzer submitted that the judge failed to make any or any adequate findings in relation to the position in respect of the period after the failed attempt to return the appellant to Uganda. He submitted orally that it could not be reasonable to detain the appellant after 9 December 2014 as the respondent knew or ought to have known that the Ugandan authorities would not allow the appellant to enter Uganda. Finally he submitted that the judge failed to consider whether the failure to follow the policy on seeking approvals for return on an EUL or the provision of material which he submits the respondent knew or reasonably ought to know was misleading prevented the second and third *Hardial Singh* principles from applying.

78. Mr Deakin submitted, first, that it was clear from a straightforward reading of the judgment as a whole that the judge had adequately addressed the evidence before him and that his conclusions were properly reasoned. He submitted, relying on the observations of Males LJ in *Simetra Global Assets Ltd. v Ikon Finance* [2019] 4 WLR 112, that it was not necessary for a judge to deal expressly with every point but that a judge must say enough to show that care had been taken and the evidence as a whole had been properly considered and the question of which points need to be dealt with and can be omitted requires an exercise of judgment. Secondly, he submitted that the judge did consider all the points raised by the appellants, notably, whether it was appropriate to rely on the passport rather than the birth certificate when seeking approval for removal on an EUL. The judge considered that it was reasonable following the unsuccessful attempt to return the appellant to take steps to canvass the position with the Ugandan authorities and to seek an ETD and await the outcome of that process. In effect, he submitted the appellant was saying that he disagreed with the judge and that the Court of Appeal should find in his favour. That however, is not the test. The question is whether the judge was wrong.

Discussion and Conclusion

79. There is no doubt that the judge correctly identified the relevant principles of law applicable to this ground of appeal. He set out the *Hardial Singh* principles at

paragraph 165 of his judgment. He correctly said at paragraph 203 of his judgment that he "must decide objectively whether there was sufficient prospect of removal within a reasonable time to warrant detention, or continued detention, when account is taken of all relevant factors". The judge referred to the relevant factors identified in *Lumba:* see paragraphs 170 and 204 of his judgment. No criticism is (or could be) made of the judge's identification of the relevant legal principles applicable.

80. The reality is that the substance of this ground of appeal is that the judge was wrong to find, on the facts, that the periods of detention were reasonable or and that there was a reasonable prospect of removal within a reasonable time. That is, in reality, an appeal on a question of fact. This court should not interfere with the judge's findings of fact unless satisfied that it was wrong, applying the principles summarised by Lewison LJ at paragraph 2 of his judgment in *Volpi v Volpi* [2022] EWCA Civ 464; [2022] 4 WLR 120 and the cases referred to in that judgment.

81. Here the reasons for the judge's conclusions are fully set out at paragraphs 201 onwards in his judgment, and, in particular, at paragraphs 207 to 224 set out above. Material, but not determinative, factors were that when the appellant was first detained and throughout the period of detention he posed a high risk of absconding, a high-risk of re-offending and a high risk of causing serious harm. Thereafter, the judge considered each and every period of detention and concluded that it was reasonable for the reasons given. I deal only with the principal points of his reasoning, and of Mr Metzer's submissions on this ground of appeal. It is unnecessary, and would be disproportionate, to deal individually with each and every one of the many criticisms made.

82. First, at the time of the initial detention, the appellant was liable to automatic deportation as he was not a British citizen. The judge dealt expressly with the claim that the recognition that removal could not realistically be expected in the near future meant that the period of detention was not reasonable. He reached the opposite conclusion, noting that that was simply a reflection of the fact that the process was likely to include an appeal by the appellant which would take some time (although an appeal was likely to be unsuccessful). There is no basis for concluding that that decision was wrong. Further, the judge considered the position in relation to the passport. The passport was evidence that the appellant had Ugandan nationality. The judge concluded that it was reasonable to concentrate on the appellant's passport, rather than the birth certificate. In that regard, he knew that a fax request had been sent to the Central Middlesex Hospital asking them to check the details but there had been no response to *that* request until July 2015 after the appellant had been released (see paragraph 18 of his judgment). In that context, he referred to the fact that some steps had already been taken to check the validity of the UK birth certificate but they had come to nothing by that stage, and considered that it was appropriate to concentrate on investigating the passport. There is no realistic prospect of the judge having failed to have regard to the evidence. His conclusion that it was reasonable to concentrate on investigating the passport was a decision which he was entitled to reach in all the circumstances.

83. Secondly, the judge expressly considered the fact that guidance on return on an EUL had been given, and that complex issues had arisen in April 2014 in two other cases. However, he concluded that the respondent was entitled to proceed on the basis that a return was still possible and noted that the review of detention in April 2014 had

recognised the need to establish whether the evidence of the appellant's nationality was sufficient for removal. Further, the judge had also expressly accepted the detailed submissions of counsel for the respondent as to why the provisions in the relevant guidance on removal on an EUL did not alter matters (see paragraph 201). There was no need for him to do more.

84. Thirdly, thereafter the Ugandan High Commission considered the passport and agreed to removal on an EUL. Again, there was no failure to consider the relevant evidence. The conclusions the judge reached were ones that were open to him.

85. Fourthly, the judge expressly considered the meeting at the Ugandan High Commission in September 2014 and what was discussed. Against the background of the confirmation that the Ugandan High Commission had given about removal of the appellant, the judge concluded, however, that the respondent was entitled to proceed on the basis that removal within a reasonable time was still realistic in the appellant's case: see paragraph 213 of his judgment. That was a conclusion that he was entitled to reach on the material before him.

86. Fifthly, the judge explained the steps taken after the failed attempt to remove the appellant in December 2014. He referred to the steps taken to raise matters with the Ugandan High Commission, the fact that agreement had been reached to use a process for seeking an ETD, the fact that an application for an ETD was completed and the Ugandan High Commission had arranged a face-to-face interview with the appellant. The judge was not bound to find, as Mr Metzer submitted, that the Ugandan authorities would inevitably refuse to allow the appellant to go to Uganda. The judge was entitled to infer (and it is indeed the most obvious inference) that the Ugandan authorities had agreed to interview the appellant to see if it were possible to remove him to Uganda on an ETD. Thereafter, the respondent chased the Ugandan High Commission for the outcome of the interview. All of that is set out at paragraphs 217 to 224 of the judgment. There is no proper basis for contending that the judge failed to have regard to the relevant evidence or that he failed to give his reasons. He obviously did do so. The conclusion that he reached in relation to each of the later periods of detention is one that he was entitled to reach on the material before him.

87. None of the criticism of the judge's consideration of the evidence, his conclusions, or his reasoning are made out. This ground of appeal fails.

THE FOURTH GROUND OF APPEAL – EVIDENTIAL ISSUES

88. The fourth ground of appeal is that the judge's factual findings are unsafe in that, owing to the length of time between trial and judgment or otherwise, the judge inadequately evaluated the weight or significant of the evidence. The reference to the length of time is the 17 months or so between completion of the hearing and the giving of judgment. The appellant's skeleton itemises five matters in respect of which it is said that errors occurred. In oral submissions, Mr Metzer accepted that delay of itself would not establish that the judge erred and that the matters relied on would have to be established. We did not ask Mr Deakin for submissions on this ground of appeal.

89. The principles governing the effect of a delay in producing a judgment are fully set out in the judgment of this Court in *Natwest Markets Plc and another v Bilta (UK)*

Ltd. (in Liquidation) and others [2021] EWCA Civ 680 and the cases referred to in that judgment. The Court identifies that the danger posed by a seriously delayed judgment in a case which involves assessments of fact and which depend at least in part on the oral evidence of witnesses is that the delay may have "so adversely affected the quality of the decision that it cannot be allowed to stand" (paragraph 43). Delay itself is insufficient to justify setting aside the judgment but may be an important factor when considering the trial judge's findings and treatment of the evidence and the court must exercise special care in reviewing the evidence, the judge's treatment of that evidence, his findings of fact and his reasoning.

90. I have carefully considered the judgment, the documentary evidence, the statement of Ms Buckle (the relevant witness on this part of the case) and the transcript of her oral evidence. Mr Metzer expressly accepted in argument that he does not challenge the judge's findings of primary facts. Rather, he disputes the reasoning or evaluation of those facts by the judge. To a large extent, that raises matters already considered in relation to ground 3 above. The judge's evaluation of the evidence, and his reasoning, appear clearly, fully and comprehensively from his judgment. There is no proper basis upon which it can be said that there was any error of the sort alleged in ground 4 of the appeal. For those reasons, ground 4 also fails.

CONCLUSION

91. The deportation order in the present case was lawfully made. The appellant is a foreign criminal within the definition of section 32(1) of the 2017. He is not a British citizen and he was convicted in the United Kingdom of an offence for which he received a sentence of at least 12 months' imprisonment. The respondent was obliged to make a deportation order by virtue of section 32(5) and there is no basis for qualifying that obligation because the appellant may no longer have Ugandan nationality and may be stateless. The judge was entitled to find that the exercise of the power to detain, and to continue to detain, the appellant (apart from the period between 17 March and 10 April 2014) complied with the principles set out in *Hardial Singh*. The respondent has demonstrated that there was lawful authority for the detention and that the exercise of the power to detain (save for that one period) was lawful. I would therefore dismiss the appeal.

LADY JUSTICE ASPLIN

92. I agree.

LORD JUSTICE BEAN

93. I also agree.