Neutral Citation Number: [2005] EWCA Civ 38

Case No: B2/2004/0847

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
Judge Crawford Lindsay QC
District Judge Lightman

Royal Courts of Justice
Strand, London, WC2A 2LL

27 January 2005

B e f o r e :

LORD JUSTICE BROOKE
Vice-President of the Court of Appeal (Civil Division)
LORD JUSTICE THOMAS
and
LORD JUSTICE JACOB

Between:

ID & OTHERS	**Claimants/ Appellants**
- and -	
THE HOME OFFICE	**Defendants/ Respondents**

Rabinder Singh QC and Raza Husain (instructed by Bhatt Murphy) for the Appellants
Stuart Catchpole QC and Jenni Richards (instructed by the Treasury Solicitor) for the Respondents
Richard Gordon QC, Nadine Finch and Richard Hermer (instructed by Birnberg Peirce & Partners) for Bail for Immigration Detainees and the Immigration Law Practitioners' Assocation as Interveners
Hearing dates: 23rd – 24th November 2004

HTML VERSION OF JUDGMENT

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Lord Justice Brooke:

This is an appeal by the claimants, who are a Czech family of Roma ethnic origin, against an order made by Judge Crawford Lindsay QC in the Central London County Court on 7th April 2004. The judge had allowed an appeal by the Home Office against an order made by District Judge Lightman in the same court on 7th August 2003 who had struck out their application to strike out (or grant them summary judgment in respect of) significant parts of the particulars of claim.

1. The Claim made in the County Court

1. By the Amended Particulars of Claim in this action the claimants claimed:

> (i) a declaration that the Home Office had acted incompatibly with their Convention rights, and in particular those arising out of Articles 2, 3, 5, 8 and 14 set out in Schedule 1 to the Human Rights Act 1998 ("the 1998 Act");
>
> (ii) a declaration that the Home Office had wrongfully discriminated against them contrary to section 29 of the Sex Discrimination Act 1975 and/or sections 19B and/or 20 of the Race Relations Act 1976;
>
> (iii) damages for false imprisonment;
>
> (iv) damages for negligence;
>
> (v) aggravated and/or exemplary damages.

2. On 28th February 2003 the Home Office applied for an order striking out and/or awarding summary judgment in their favour in relation to all the claims set out under (i), (ii) and (iii) above, other than the claims which related to their Convention rights under Article 14 of the European Convention on Human Rights ("ECHR") and the claim which related to section 19B of the Race Relations Act 1976. District Judge Lightman struck out this application. Judge Crawford Lindsay QC, in allowing the Home Office's appeal, granted them the relief they sought. On 27th May 2004 Laws LJ granted the claimants permission to appeal to this court as a second appeal, observing:

> "I consider that the appellants may face a *very* uphill struggle; but the relation between (1) administrative detention under the immigration legislation, (2) the tort of false imprisonment, and (3) Article 5 of the ECHR is fit for examination in the Court of Appeal and this is an appropriate case for that to be done."

3. It will be noted that as things now stand the claimants' claims under ECHR Article 14 and section 19B of the Race Relations Act, and for damages for negligence, will be proceeding to trial in the county court in any event. On this second appeal they have made no attempt to resuscitate their claims under section 29 of the Sex Discrimination Act and section 20 of the Race Relations Act. What is in issue before us is the viability of their claims for damages for false imprisonment, and of their claims under ECHR Articles 2, 3, 5 and 8. Because of the importance of the issues raised by the appeal, we granted permission to Bail for Immigration Detainees ("BID") and the Immigration Law Practitioners' Assocation ("ILPA") to intervene. We also granted them permission to file short witness statements articulating the nature of their concerns in relation to the issues raised on the appeal. We were told that their intervention was supported by the Refugee Children's Consortium, of which they are both members. The Home Office filed a witness statement in reply.

4. The first claimant ID is the wife of the second claimant AD, and their two daughters TD and ID are now 14 and 10 respectively. They arrived at Waterloo station on the morning of 6th February 2002 by a Eurostar train. On arrival, the first claimant claimed asylum, and her husband's and daughters' claims were dependent on her claim. Her husband was immediately detained, whereas she and her daughters were granted temporary admission on the basis that they were to stay overnight with her husband's maternal uncle. He had already been granted refugee status. Her husband was kept at Waterloo station until midnight. He was then taken to a police station for the night and returned to Waterloo at 8.30 a.m. the following day. On the same day the first claimant came back to Waterloo with their daughters, and the whole family was then transported to Oakington Detention Centre ("Oakington").

5. By a letter dated 12th February 2002 the Home Office refused the first claimant's application for asylum, and on 13th February she was refused leave to enter.

6. On 14th February 2002 the family were moved to Yarl's Wood Detention Centre, arriving there at about 1 pm. The facts set out in the Amended Particulars of Claim must be taken to be true for the purposes of this appeal. The family was kept in a waiting area until about 6 pm, and were taken to their rooms in C Block at about 8 pm. They had not eaten since midday, but they were told that they would soon receive food, and they were given a key with which they could lock up their possessions.

7. Nobody in fact came back to see them, and during that evening there was a serious disturbance at Yarl's Wood, followed by a fire. Staff evacuated the centre leaving the claimants locked up in the centre, and they only managed to escape with the help of other detainees. The fire destroyed much of Yarl's Wood. All the claimants' possessions

were lost or destroyed, and they were terrified by what had happened. At about 7.45 am the following day they were taken to Harmondsworth Detention Centre in a state of shock, and were detained there until 19th February. On 18th February the first claimant appealed to an adjudicator, and her notice of appeal was sent to the Home Office the following day. The family were then granted temporary admission on the basis that they stayed with the second claimant's uncle.

8. The original Particulars of Claim were accompanied by medical reports on each of the claimants. The general gist of these reports was that they were all suffering from post-traumatic stress disorder, although in the parents' case this disorder had originally been triggered by distressing events prior to their arrival in England. They were also all suffering from depressive disorders of varying intensity.

9. As I have said, three of their claims will be proceeding to trial at any event. The claim for damages for negligence is founded on the proposition that it was negligent to detain the family at Yarl's Wood and Harmondsworth because the Home Office thereby breached their obligation to take reasonable care for the family's safety, health, welfare and security. In particular it was said that insufficient or no regard was had for fire safety and for the family's safety from the criminal acts of others.

10. These allegations flow from the facts averred in paragraphs 3 to 8 of the Amended Particulars of Claim, which run along the following lines. During the period between about May 2000 and 19th November 2001 when Yarl's Wood Detention Centre was being developed and constructed, the local county fire and rescue service had strongly advised the Home Office to install fire sprinklers in order to protect life. They gave them this advice because of the use that was being proposed for Yarl's Wood, its remoteness, the water supply that was available to it, and the type of construction that was being used. In the event the centre opened on 19th November 2001 with no sprinklers having been put in place.

11. In the same month a fire occurred at Campsfield Detention Centre, and as a result a number of the detainees who had been held there were transferred to Yarl's Wood. These included a number of people who had caused problems at Campsfield. They were still at Yarl's Wood when the claimants arrived there in February 2002.

12. Tension increased at Yarl's Wood in January and February 2002. Detainees issued threats that the place would burn, and in the days leading up to the 14th February intelligence reports indicated that a serious incident was likely to occur there. It was for all these reasons that it is said that the Home Office did not exercise proper care for the claimants' safety when they transferred them there on 14th February. Although paragraph 19 of the Amended Particulars of Claim also refers to the claimants' safety at Harmondsworth, no separate particulars are given of this allegation.

13. The claims under ECHR Article 14 fall into two parts. The first relates to the initial detention of the second claimant over the night of 6th-7th February. This gives rise to the complaint that the Home Office's policy of selecting the male head of a household for detention was unlawfully discriminatory on the grounds of sex. The second relates to the detention of the whole family between 7th and 19th February. Here complaint is made that the Home Office discriminated against them on the grounds of their Czech national origin and their Roma ethnic origin. Reliance is placed in this context on the provisions of ECHR 5, 8 and 14. The claim under section 19B of the Race Relations Act relates to the second of these complaints.

2. The scope of the Immigration Act 1971

14. All the actions of the Home Office that were under challenge on this appeal were the actions of immigration officers purporting to act under powers conferred on them by the Immigration Act 1971, as amended. Section 3 of that Act makes general provision for regulation and control of the entry of immigrants into this country. It provides, so far as is material:

> "3(1) Except as provided by or under this Act, where a person is not a British citizen
>
> > (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;
> >
> > (b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period…"

15. Section 3(2) provides for the Secretary of State to lay before Parliament statements of the rules, or of any changes to the rules, laid down by him for the practice to be followed in the administration of the Act. Such statements are subject to the negative resolution procedure.

16. Section 4 distinguishes between the role of immigration officers and the role of the Secretary of State in the administration of immigration control. In particular:

> "4(1) The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom…shall be exercised by the Secretary of State…
>
> (2) The provisions of Schedule 2 to this Act shall have effect with respect to -
>
> > ….
> >
> > (c) the exercise by immigration officers of their powers in relation to entry into the United Kingdom, and the removal from the United Kingdom of persons refused leave to enter or entering or remaining unlawfully; and
> >
> > (d) the detention of persons pending examination or pending removal from the United Kingdom…."

17. Section 11(1) of the Act provides in relation to arrivals in the United Kingdom, that

> "…a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers contained in Schedule 2 to this Act…"

18. Before I come on to refer to the powers of an immigration officer contained in that schedule, there are three provisions in Part III of the Act (which is concerned with criminal

proceedings) that deserve attention. Section 24 creates a number of criminal offences in connection with illegal entry or ancillary matters, and section 24A creates offences of deception in connection with obtaining leave to enter or remain here, or with efforts to secure the avoidance, postponement or revocation of enforcement action. And section 28A(1) provides that:

> "28 A (1) A constable or immigration officer may arrest without warrant a person –
>
> (a) who has committed or attempted to commit an offence under section 24 or 24A; or
>
> (b) whom he has reasonable grounds for suspecting has committed or attempted to commit such an offence"

Sections 28A(3)-(5) contain further powers of arrest without warrant that are granted to immigration officers in connection with offences created elsewhere in Part III.

19. I turn now to Schedule 2. Paragraph 1(1) empowers the Secretary of State to appoint immigration officers for the purposes of the Act, and paragraph 1(3) provides that:

> "(3) In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (not inconsistent with the immigration rules) as may be given them by the Secretary of State."

Paragraph 2 empowers an immigration officer to examine any persons who have arrived in the United Kingdom for the purpose of determining the matters prescribed in that paragraph. Paragraph 4 provides that where such a person is to be given a limited leave to enter the United Kingdom or is to be refused leave,

> "the notice giving or refusing leave shall be given not later than twenty-four hours after the conclusion of his examination (or any further examination) under [paragraph 2]."

20. Paragraphs 8 to 11 make provision for removal directions after a person arriving in the United Kingdom has been refused leave to enter, and paragraphs 12 to 14 make provision for similar directions in relation to seamen and members of an aircrew. It is the provisions of paragraphs 16 to 18 that are most directly relevant to the claims for damages for false imprisonment and the claims in respect of the alleged violations of the claimants' Convention rights under ECHR Article 5. They provide, so far as is material:

> "16 (1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.
>
> ….
>
> (2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10 or 12 to 14, that person may be detained under the authority of an immigration officer pending -

(a) a decision whether or not to give such directions;

(b) his removal in pursuance of such directions.

….

17 (1) A person liable to be detained under paragraph 16 above may be arrested without warrant by a constable or immigration officer.

….

18 (1) Persons may be detained under paragraph 16 or such places as the Secretary of State may direct….

….

(4) A person shall be deemed to be in legal custody at any time when he is detained under paragraph 16….

21 (1) A person liable to detention or detained under paragraph 16 above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; but this shall not prejudice a later exercise of the power to detain him."

21. Finally, Schedule 3 to the Act contains supplementary provision as to deportation. Paragraph 2(2) provides for a power of detention under the authority of the Secretary of State pending the making of a deportation order, and paragraph 2(3) provides for a similar power of detention pending a deportee's removal or departure from this country. Paragraph 7 contains relevant powers of arrest to bolster any restrictions that may have been imposed on a person under Schedule 3.

22. It will be evident that the provisions of the Act which I have cited envisage three different scenarios in which a person's liberty may be restricted;

i) detention under the authority of an immigration officer pending:

a) examination by an immigration officer; or

b) a decision to give or refuse leave to enter; or

c) a decision whether or not to give removal directions.

d) removal.

ii) detention under the authority of the Secretary of State pending:

a) the making of a deportation order; or

b) a deportee's removal or departure from the country;

iii) arrest without warrant by a constable or an immigration officer pursuant to the powers created by section 28A of the Act, para 17(1) of Schedule 2 or para 7 of Schedule 3.

3. The power of the Immigration Officer to detain

23. In the present case we are concerned only with the first of these scenarios. The claimants were variously detained under the authority of an immigration officer between 6th and 19th February

    i) pending the examination of the first claimant at Oakington;

    ii) pending the decision to refuse her leave to enter; and

    iii) pending the decision whether or not to give removal directions.

24. In *R (Saadi) v Home Secretary* [2002] UKHL 41, [2002] 1 WLR 3131 the House of Lords cast helpful light on both the scope and the limits of an immigration officer's powers of detention under Schedule 2 of the Act. Lord Slynn of Hadley delivered the only substantive speech. The effect of paragraphs 22 – 26 of his speech can be summarised in this way:

    i) The power to detain pending examination and decision is not subject to any qualification to the effect that the Secretary of State must show that detention is necessary because the applicants would run away if not detained;

    ii) Nor is it limited to those who cannot appropriately be granted temporary admission, for whatever reason;

    iii) The period of such detention must be reasonable in all the circumstances;

    iv) The immigration officer must act reasonably in fixing the time for examination and for arriving at a decision in the light of the objective of promoting speedy decision-making.

25. Lord Slynn referred with approval to the judgment of Woolf J in *R v Governor of Durham Prison ex p* ***Hardial Singh*** [1984] 1 WLR 704, in which he said at p 706 in relation to the power to detain pending deportation:

    > "… [A]s the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case."

26. In paragraphs 11 - 20 of his speech Lord Slynn set out or summarised the evidence that had been given about the Oakington regime. Since the present claimants were detained at Oakington for seven days, it is worth recalling certain features of this regime. The purpose of this centre is to deal quickly with what are perceived to be straightforward asylum claims. Cases are selected on the basis that they are seen to be capable of a speedy decision. Interviews generally take place in the third day at the centre, and there are up to 150 scheduled interviews every day. Asylum-seekers have access to independent legal advice on site, supplied through the auspices of two non-governmental

organisations. Over 90% of those accepted into the Oakington process have their claims decided while they are there (as happened in the claimants' case), and after a decision has been taken to refuse asylum, 80% are then released on temporary admission pursuant to para 21(1) of Schedule 2 (see para 21 above). The average length of stay at Oakington is 7–10 days. In paragraph 24 of his speech Lord Slynn concluded that the need to consider the claims of a large number of applicants intensively in a short period justified their detention as being reasonably necessary, as a matter of English law, provided that the physical conditions of detention were acceptable.

4. The general scope of Article 5

27. In *Saadi* the appellants' main challenge to the lawfulness of the Oakington regime was founded on ECHR Article 5. That article prescribes that everyone has the right to liberty and security of person, and that no one shall be deprived of liberty save in six defined categories of case, and in accordance with a procedure prescribed by law. In this appeal no argument was addressed to the second and fourth of these categories. The other four, so far as is material, comprise:

    i) The lawful detention of a person after conviction by a competent court (5(1)(a));

    ii) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence (5(1)(c));

    iii) The lawful detention of persons of unsound mind (5(1)(e));

    iv) The lawful arrest or detention of a person to prevent his effecting an unauthorised entry in the country…(5(1)(f)).

28. Article 5 (5) provides that:

    > "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

29. In *Saadi* Lord Slynn held (at para 43) that subject to any question of proportionality the action taken at Oakington was "to prevent [a person] effecting an unauthorised entry into the country" within the meaning of Article 5(1)(f) and that for the reasons he gave in paras 45-47 the balance was in favour of recognising that detention under the Oakington procedure was proportionate and reasonable.

30. Although the 1998 Act was not yet in force, Article 5 had attracted the attention of the House of Lords in *R v Governor of Brockhill Prison ex p Evans (No 2)* [2001] 2 AC 19. Lord Hobhouse of Woodborough explained (at p 47) that for detention to be lawful under Article 5, a double test is applied. The detention impugned must be lawful under domestic law, and the domestic law must be in compliance with the ECHR both substantively and procedurally:

    > "If it fails either test, it is unlawful for the purposes of article 5 and 5(5) applies. Here the detention failed the domestic law test (*Evans (No 1)*) and, like English law, article 5(5) requires compensation to be paid."

31. Lord Hope of Craighead traversed similar ground. After saying that any detention which is unlawful in domestic law will automatically be unlawful under Article 5(1), carrying with it a mandatory right to compensation under Article 5(5), he continued (at p 38C-E):

> "The second question is whether, assuming that the detention is lawful under domestic law, it nevertheless complies with the general requirements of the Convention. These are based upon the principle that any restriction on human rights and fundamental freedoms must be prescribed by law: see articles 8 to 11 of the Convention. They include the requirements that the domestic law must be sufficiently accessible to the individual and that it must be sufficiently precise to enable the individual to foresee the consequences of the restriction… The third question is whether, again assuming that the detention is lawful under domestic law, it is nevertheless open to criticism on the ground that it is arbitrary because, for example, it was resorted to in bad faith or was not proportionate…"

32. In *Nadarajah v Home Secretary* [2003] EWCA Civ 1768, [2004] INLR 139 Lord Phillips MR said (at para 54):

> "Thus the relevance of Article 5 is that the domestic law must not provide for, or permit, detention for reasons that are arbitrary. Our domestic law comprehends both the provisions of Schedule 2 to the Immigration Act 1971 and the Secretary of State's published policy, which, under principles of public law, he is obliged to follow. These appeals raise the following questions:
>
> (1) What is the Secretary of State's policy?
>
> (2) Is that policy lawful?
>
> (3) Is that policy accessible?
>
> (4) Having regard to the answers to the above questions, were N and A lawfully detained?"

5. The claimants' formulation of the challenges made

33. The Amended Particulars of Claim in this action did not identify the sources of the different principles of law which it is alleged that the immigration officers failed to take into account properly or at all when from time to time they authorised the detention, or the continued detention, of the four claimants. This court, however, directed them to particularise their claims in this respect and it then became clear that reliance was being placed on Chapter 38 of the version of the Operations Enforcement Manual then current (for this manual see para 26 of the judgment in *Nadarajah*), reinforced by Article 37(b) of the UN Convention on the Rights of the Child.

34. The claimants derived the following principles of Home Office internal policy from the text of Chapter 38:

> i) Detention should be a last resort;

a) "The White Paper confirmed that there was a presumption in favour of temporary admission or release and that, wherever possible, we would use alternatives to detention." (38.1)

b) "In all cases detention must be for the shortest possible time. The aim should be to detain at the end of the process." (38.1)

c) "All reasonable alternatives to detention must be considered before detention is authorised." (38.3)

ii) Detention must be strictly necessary when the consequences are the splitting up of a family;

"It may be necessary on occasion to detain the head of the household only, thus separating a family … it would have to be shown to a court that a decision to detain corresponded with one of the legitimate interests which justify interference and that the interference to family life went no further than was strictly necessary to achieve that aim." (38.1.1.2)

iii) There had to be strong grounds for believing that individuals were absconding risks or that they had no incentive to comply with temporary admission;

"There is a presumption in favour of temporary admission or temporary release. There must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified." (38.3)

iv) Detention may be appropriate if there has been subterfuge or deception practised by individuals in order to enter the United Kingdom;

"Factors influencing a decision to detain: …Has the subject taken part in a determined attempt to breach immigration laws?" (38.3)

v) The detention of a family with children, or of children themselves, is to be effected only as a last resort and/or where it is necessary;

"Families will normally only be detained to effect removal, and detention should be planned to be effected as close to removal as possible so as to ensure that families are not detained for more than a few days." (38.3)

35. Finally, Article 37(b) of the UN Convention on the Rights of the Child provides that:

"37. States Parties shall ensure that:

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

For the duty to interpret the ECHR in the light of other obligations in international law, including treaty obligations, see *T and V v United Kingdom* (2000) 30 EHRR 121 at para 76.

36. Apart from the complaints about unlawful discrimination which are either proceeding to trial or have been struck out by the judge without being appealed (see para 4 above), the claimants' claims in relation to their detention come variously under five different headings. Each claim is preceded by the general rubric that the detention for the period in question was an unlawful exercise of the power to detain under the 1971 Act. In short, they variously contend that the detention in question:

    i) was unreasonable (Head 1);

    ii) was disproportionate (Head 2);

    iii) was unlawful because of a failure to follow applicable internal policy (Head 3);

    iv) failed to safeguard or protect the best interests of the two children (Head 4); and/or

    v) was unlawful at common law (Head 5).

37. Their complaints embrace the original detention of AD over the night of 5th-6th February and the detention of the whole family at Oakington (7th–14th), Yarl's Wood (14th–15th) and Harmondsworth (15th–19th). I omit from what follows all the complaints about discriminatory treatment that are proceeding to trial in any event.

38. So far as AD's original detention is concerned, there are unparticularised complaints under Heads (1), (2) and (4) above. More significantly, the complaints under Head 3 contain assertions that insufficient or no regard was had to the following requirements of internal policy:

    i) that detention should be a last resort;

    ii) that where the consequences were the splitting of a family, a test of strict necessity should be applied before detention was authorised;

    iii) that in order to justify detention in this case there had to be strong grounds for believing;

        a) that ID or AD represented absconding risks;

        b) that ID or AD had no incentive to comply with the terms of temporary admission; and/or

    iv) that to justify detention on the grounds of deceit, there had to be subterfuge or deception practised by the claimants in order to enter this country.

39. The detention of the whole family at Oakington is challenged under all five Heads, although the complaints under Head 4 merge into the other complaints relating to this period. In short, it is said under Heads 3 and 5 that the immigration officer in question paid insufficient or no regard to the question whether the detention of the four claimants as a family, and/or the detention of the two children as children, was a last resort and/or

necessary. As to Heads 1 and 2, complaint is made that insufficient or no regard was had:

i) to the suitability of other detainees who were to be detained at the Centre with the children;

ii) to the suitability of detaining the two children with adults;

iii) to the fact that detention would not safeguard and promote the welfare of the two children.

40. Apart from the fact that they were not being split up, all the earlier complaints are repeated in relation to the five-day period when the family were detained at Yarl's Wood and Harmondsworth. In addition, complaint is made under Heads 1 and 2 on the grounds that:

i) the claimants were not absconding risks, and removal was not sufficiently imminent to justify detention;

ii) even if they were to be regarded as absconding risks, removal could not reasonably be said to be sufficiently imminent or possible within a reasonable timescale, having regard in particular to the age of the two children;

iii) insufficient or no regard was had for:

a) the claimants' safety;

b) fire safety;

c) the safety of the claimants from the criminal acts of others.

41. Finally, in respect of the detention at Harmondsworth, complaint is made under Heads 1 and 2 to the effect that insufficient regard was had to the experiences the family had undergone at Yarl's Wood.

42. These are the complaints underlying the claims for damages for false imprisonment. In relation to their claims for compensation under ECHR Article 5(5) and for damages under the 1998 Act, they contend that the entirety of their detention was not "necessary". It was therefore not in accordance with domestic law or the Home Office's own policy. They also contend that their detention at Yarl's Wood and Harmondsworth fell foul of ECHR Article 5(1)(f) by reason of the three complaints about their safety at Yarl's Wood which appear in para 41(iii) above.

43. We are also concerned on this appeal with the claims under ECHR Article 2, 3 and 8 (see paras 2 and 4 above). The claims under Articles 2 and 3 are founded on the contention that in all the circumstances of the case the family should not have been detained at Yarl's Wood because it was not a safe place for them. Under Article 2 it is said that their detention at Yarl's Wood:

i) exposed them to a real risk to life; and/or

ii) [led them to face] a real and immediate risk to life of which the Home Office had actual or constructive knowledge, and in respect of which it failed to offer

sufficient protection and/or to take operational steps to secure Yarl's Wood as safe.

44. The scope of the Article 3 complaint includes the family's detention in Harmondsworth. It is said that their detention both there and at Yarl's Wood amounted to inhuman and degrading treatment in that it caused or materially contributed to mental suffering and feelings of fear and anguish in them and/or amounted to a severe interference with their dignity.

45. Finally, it is said that the entirety of their detention violated Article 8 since it unjustifiably interfered with their right to respect for mental and physical integrity and/or their dignity. Particular complaint is also made about the decision to split up the family on the first night of their arrival. This is said to have constituted an unjustifiable interference with their right to respect for family life.

46. It is unnecessary to refer in any detail to the contents of the defendant's strike-out application. I have summarised its effect in para 3 above, and I will be referring to their different arguments when I come to address the merits of the appeal. In short, it was being said that the claimants were detained in accordance with statutory powers. They could not therefore complain of false imprisonment, and in any event the initiation of proceedings in the county court represented an abuse of process. The application also contained contentions to the effect that there was no reasonable prospect of success in relation to the claims which the defendants were seeking to strike out, and that the ECHR Articles 2 and 5 claims did not disclose a cause of action known to English law. (Amendments were made to the language of those two claims before the defendants' application was heard).

47. It is also unnecessary to say very much about the proceedings before District Judge Lightman. The claimants' solicitors had written a long letter to the Treasury Solicitor on 22nd July 2003, followed (in the absence of any substantive reaction of any kind) by an application on 30th July to strike out the defendants' application. In short, the district judge was very concerned about the extent to which the resources of the court were going to be taken up by preliminary skirmishing in an action which was going to proceed to "a big trial of issues" in any event. He was also singularly unimpressed by the lack of any effective response by the defendants to the claimants' solicitor's long letter, and by the fact that they had instructed counsel to attend a one-day hearing without enabling him to make submissions about anything other than the procedural directions that might be given.

48. Judge Crawford Lindsay, for his part, determined the appeal on the (mistaken) basis that the claimants were not contending that their detention had been in breach of policy. In these circumstances he held that their claims for damages "on the basis of an authorised detention" should have been brought in the Administrative Court. He was influenced in this regard by a *dictum* of Simon Brown LJ in *Percy v Hall* [1997] QB 925 to the effect that English law provides no cause of action for invalid administrative acts as such, and by a contention that the Secretary of State was not vicariously liable for "the individuals who undertook the detention of the claimants" who were "protected by the warrant of execution". He rejected the claims under ECHR Articles 2, 3, 5 and 8 quite summarily, saying variously that they should be struck out or that judgment should be entered in relation to each of them. From his decisions the claimants now appeal.

6. The evidence

49. It would be inappropriate to say very much about the evidence submitted on this appeal by the interveners, or the evidence given in response by the official in charge of the

Home Office's Detention Services Policy Unit. Suffice it to say that they evidence on the one hand grave contemporary concern about different aspects of the practical implementation of Home Office policies (particularly in relation to the detention of children and members of vulnerable groups "such as torture survivors, those with serious mental and physical health problems and 'disputed minors'"), and on the other hand a desire at policy level within the Home Office that any period of detention should comply with the humane conditions prescribed by the Detention Centre Rules 2002, and that cases involving families should be subject to particularly rigorous review from the very outset.

50. It would be impossible (and unnecessary for the purposes of this appeal) to attempt to reconcile the conflicting evidence we received. It is sufficient to say that ILPA's evidence, in the form of the witness statement of a solicitor who has acted in many cases involving detainees, was to the effect that there is currently a very real problem about access to justice for detained immigration clients, for the reasons on which he expanded in his statement. BID's similar evidence was given by a policy and research officer at their headquarters. She said:

> "Mechanisms of application for Adjudicator bail and challenges in the High Court are frequently not exercised as a result of a lack of access to effective legal representation. In BID's experience, current policies and practices of immigration detention render those detained exceptionally vulnerable to unlawful detention as there is no adequate check on the power of the immigration service to detain. In BID's opinion, pursuit of civil actions by former detainees provides a crucial mechanism for redress and holding those responsible to account. The importance of access to quality legal representation, and a right to seek damages, is even more important given the increase in the use of detention under fast track processes and the increase in the use of detention for families."

51. One of the impediments in the path of access to justice is said to be the very low level of remuneration that is now available for publicly funded basic asylum work. For a London-based supplier, travel to and from a detention centre, and waiting time, is paid for at the rate of £30.30 per hour. Legal help is paid for at £57.30 per hour. These rates are significantly lower than the rates for other types of legal work. The Legal Services Commission told BID in February 2004 that it acknowledged their concerns about access to legal advice, in particular for detainees at prisons.

52. The interveners made the point that the driving purpose of the ECHR is to secure practical and effective rights. Their clients are often traumatised people who do not speak English and who have had no experience of any proper judicial system, let alone one with the procedural peculiarities of the system in England and Wales. BID is often contacted by clients who have had no legal representation, or whose representative is unwilling or unable to apply for bail on their behalf. In their experience, in the early months of 2002 (the period to which the present claims relate), the average length of time one of their clients spent in detention before the first review by a court was four months. Self-representation was said not to be a practical option, although more recently detainees' use of simple written guidance has achieved their liberty in a number of cases.

7. The causation of the alleged loss: the detentions by the immigration officers

53. After this necessarily long introduction I turn to the issues we have to determine on this appeal. I will start with those arising out of the fact of the detentions themselves. Fortunately it is possible to clear out of the way quite quickly some of the issues that caused difficulty before the judge. Thus:

i) The detentions were *caused* at each stage of the history by the immigration officers who authorised them;

ii) The fact that their authority was given protects the detention centre staff and others who acted under their authority, but it does not protect the immigration officers themselves if the giving of their authority was an unlawful act;

iii) Subject to any particular considerations arising out of the interpretation of Schedule 2 to the 1971 Act, on first principles the claimants, having been deprived of their liberty, would have the makings of a claim against the relevant immigration officer arising out of their detention, and the burden would lie on the immigration officer to establish a defence to that claim, whether by way of lawful justification or otherwise;

iv) Although the decision in each case was that of the immigration officer in whom statutory authority was vested, it was not argued that the Home Office did not have vicarious responsibility for their acts – and if it had been, the matter would have been readily corrected by appropriate amendments to the title of the suit and the joinder of new parties.

54. For the need to identify with precision the true cause of the detention, see *Grinham v Willey* (1859) 4 H & N 496, 498; *Austin v Dowling* (1870) LR 5 CP 534, 538; and, more recently, *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597, 601–605. For the concept that a "second actor" may be blameless if he detains a person in reliance on what appears to be a lawful authority, whether issued by a "first actor" or otherwise (eg by bye-laws), see *Percy v Hall* [1997] QB 924, 947-8; *R v Central London County Court ex p London* [1998] QB 1261, 1274F–1278E; and *R v Governor of Brockhill Prison ex p Evans (No 2)* [2001] 2 AC 19, 29 A-C, 46A-B. See, too, *Harnett v Bond* [1924] 2 KB 517 for the liability of a "first actor" until such time its decision to detain is superseded by a similar decision taken by another "first actor".

55. There are two other preliminary matters that may also be dealt with quite quickly. The first is that if it is established that any of these immigration officers made decisions in a manner which fell outside the jurisdiction conferred on them by the 1971 Act, then their decisions would have been *ultra vires* and unlawful (see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 171B–F and 195 A–C; *R v Hull University Visitor ex p Page* [1993] AC 632, 701; and *Boddington v British Transport Police* [1999] 2 AC 143, 171-2).

56. The second is that there is on the face of it nothing in the slightest bit peculiar about an individual bringing a private law claim for damages against an executive official who has unlawfully infringed his private rights. For this proposition it is unnecessary to go much further than *AV Dicey, Introduction to the Study of the Law of the Constitution*, 8th Edition (being the last edition for which the original author was responsible) at p 114:

> "In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their jurisdiction."

See, also, *Wade and Forsyth, Administrative Law, 9th Edition* (2004) at p 751:

> "Public authorities, including ministers of the Crown, enjoy no dispensation from the ordinary law of tort and contract, except in so far as statute gives it to them. Unless acting within their powers, they are liable like any other person for trespass, nuisance, negligence and so forth. This is an important aspect of the rule of law."

57. It should be noted in this context that although CPR Part 54 now permits the Administrative Court to award damages in addition to other relief on an application for judicial review, it has no jurisdiction to entertain a claim for damages alone (see CPR 54.3(2)).

58. The difficult questions we have to determine are whether the law grants any form of immunity to an immigration officer in respect of what would normally be regarded as an unlawful act causing a loss of liberty, and whether a complainant's remedy is limited to a declaration that the act was unlawful and/or a quashing order, or whether it sounds in damages as well, or as an alternative remedy.

8. The immigration officers' claim to immunity for their actions

59. In paragraph 28 above I highlighted four different routes whereby a person may be lawfully deprived of his liberty as a matter of English law. So far as the first is concerned, before the very limited changes brought about by the 1998 Act, there were special rules granting immunity from suit for those performing judicial acts. By section 108 of the Courts and Legal Services Act 1990 an action now lies against a magistrate only if it can be proved that he/she acted both in bad faith and in excess of jurisdiction, and in *Re McC* [1985] AC 528 the House of Lords reaffirmed the common law rule that judges of the higher courts were immune from suit even if it could be shown that they had been actuated by malice.

60. So far as a constable's power of arrest is concerned, it has long been settled that he will not be liable in trespass to the person so long as he can show that he did honestly suspect the matter on which he was entitled to rely, and that his grounds for suspicion were objectively reasonable. It has recently been held that if his discretionary decision to effect an arrest is called into question, its lawfulness will be judged on ordinary *Wednesbury* principles not only in proceedings for judicial review but also in actions for false imprisonment (see *Holgate-Mohammed v Duke* [1984] AC 437, 443 and *Paul v Chief Constable of Humberside* [2004] EWCA Civ 308 at [30]).

61. Mr Catchpole QC, who appeared for the Home Office, argued that Lord Diplock's guidance in *Holgate-Mohammed* was *obiter* (and was also incorrect). He said that it had been conceded in the Court of Appeal in that case that the police must act reasonably when deciding whether to exercise their powers of arrest (see [1984] QB 209, 213 B-C). In the House of Lords, however, the main issue identified by counsel for the appellant was whether a police constable might lawfully exercise his power of arrest when his sole object was to put the suspected person under greater pressure in order to induce a confession. In those circumstances the basis on which the reasonableness of the officer's action was to be tested was at the heart of the matters to be determined on the appeal. In any event Lord Diplock was doing no more than identifying the basis on which such an exercise of executive discretion is invariably tested.

62. The third situation, in which a mental patient may be lawfully detained without the intervention of a court, has traditionally afforded immunity by statute to those whose

actions comply with the requirements of the relevant Act of Parliament so long as they act in good faith and with reasonable care. At the time when *Everett v Griffiths* [1921] AC 631 was decided, the protection was afforded by section 330 of the Lunacy Act 1890. Similar protection, with a shift in the burden of proof onto the complainant detainee, is now to be found in section 139(1) of the Mental Health Act 1983. The reason why one of the defendants was held liable for false imprisonment in *Harnett v Bond* [1924] 2 KB 517 was that as a Commissioner in Lunacy he had no power to direct the detention of anyone (see pp 546, 555 and 566).

63. The case of *Everett v Griffiths* shows the House of Lords grappling with problems they did not finally resolve until *Anisminic* was decided nearly 50 years later. Viscount Haldane started with the principle that if an administrative officer performs functions which have some judicial attributes he/she is entitled to a measure of immunity. For instance, he said at p 659:

> "The point of law is to-day not as simple as it was, comparatively speaking, some years ago. The recent decisions of this House in *Board of Education v. Rice* [1911] AC 179 and in *Local Government Board v. Arlidge* [1915] AC 150 indicate that in the case of administrative awards there are at least some enforceable obligations which those making them must observe. What these are and to what extent they go has to be ascertained by considering the statutes creating the quasi-judicial powers, and the particular forms in which a general principle has been implied in the establishment of such judicial authority. This question may prove in particular cases a delicate and obscure one. Some limitation of the application in such instances of the broad principle of complete judicial immunity may well prove to be involved in its resolution."

64. See also Lord Atkinson at p 682. It was a passage in the speech of Lord Moulton, however, at p 695 which set out a principle which was followed in later cases, as we shall see:

> "If a man is required in the discharge of a public duty to make a decision which affects, by its legal consequences, the liberty or property of others, and he performs that duty and makes that decision honestly and in good faith, it is, in my opinion, a fundamental principle of our law that he is protected. It is not consonant with the principles of our law to require a man to make such a decision in the discharge of his duty to the public and then to leave him in peril by reason of the consequences to others of that decision, provided that he has acted honestly in making that decision."

65. The editors of the ninth edition of *Wade & Forsyth, Administrative Law* (2004), quoted the first part of this passage (at p 790) and then commented:

> "This wide statement ought probably to be confined to decisions made within jurisdiction, since at the time it was made there was undoubtedly liability for interference with personal liberty or property where there was no jurisdiction. It probably means no more than that members of a tribunal which acts within its jurisdiction and in good faith are not personally liable to actions for negligence or for acting on no evidence. In this case the House of Lords were aware of the need to define judicial immunity with reference to the growing adjudicatory powers of administrative authorities, 'a fresh legal problem of far-reaching

> importance' (see Lord Haldane at p 659) but they did not attempt to do it."

66. In *Everett v Griffiths* the defendant Griffiths was the chairman of the Board of Guardians. He had the responsibility of signing orders for the reception of persons in pauper lunatic asylums, and his order when signed had effect as if it had been made by a justice of the peace under the 1890 Act. It was this consideration which enabled the majority of the House of Lords to equate his position with that of a justice of the peace and afford him equivalent immunity (see pp 658-660, 665-7, 676-8 and 682-7) without attempting to state any wider principle: for Lord Haldane's extreme reluctance to do so in a case in which one side was argued by a litigant in person, see pp 659-660.

67. It is noticeable that in 1921 the House of Lords was more protective of the decision-maker than of those whose right to liberty might have been wrongly infringed. They were left without a remedy. In the later case of *Harnett v Bond*, reference was made at p 539 to a *dictum* of Lord Lindley in *R v Whitfield* (1885) 15 QBD 122, 150 when he said of the Lunatic Asylums Act 1853 that it gave justices of the peace and medical men large powers, and that it was based on the theory that they could be trusted. Reliance on this theory led to many reverses for this country in the European Court of Human Rights between 1965 and 2000, particularly in cases involving the rights of prisoners and detainees in mental hospitals. It would therefore be unsafe to adopt it as a reliable guide in resolving the present appeal now that the 1998 Act is in force.

68. The present case is concerned with the liberty of the person. Long before the 1998 Act came into force English law attached particular importance to the right to liberty. Two citations from Lord Atkin and one from Lord Griffiths will be sufficient to make this point:

> "… [N]o member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive." (*Eshugbayi Eleko v Government of Nigeria* [1931] AC 662 per Lord Atkin at p 670).

> "[I]n English law every imprisonment is prima facie unlawful and … it is for a person directing imprisonment to justify his act. The only exception is in respect of imprisonment ordered by a judge, who from the nature of his office cannot be sued, and the validity of whose judicial decisions cannot in such proceedings as the present be questioned." (*Liversidge v Anderson* [1942] AC 206, per Lord Atkin at p 245).

> "The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage." (*Murray v Ministry of Defence* [1988] 1 WLR 692, per Lord Griffiths at pp 703-3).

69. In *ex p Evans (No 2)* Lord Steyn cited the first of Lord Atkin's dicta at p 28 and then said:

> "It represents the traditional common law view. It points to a decision in the present case that the applicant is entitled to recover compensation on the ground of false imprisonment where the executive can no longer support the lawfulness of the detention."

70. It was an important part of Mr Catchpole's argument that foreign nationals who have not been granted leave to enter this country fall into a very special category. He reminded us that the power of a state to control immigration is well recognised in international law and under the ECHR (see Lord Slynn in *Saadi* at para 31), and that this right extends beyond the simple control of entry to encompass the treatment of aliens and the control of their activities whilst they are present or resident in the state. He cited in support of this proposition well known passages from *Nishimura Ekiu v United States* 142 US 651, 659 (1892); *Musgrove v Chun Teong Toy* [1891] AC 272, 283; and *Attorney-General for Canada v Cain* [1906] AC 542, 546. For present purposes it is only necessary to quote from the speech of Lord Atkinson, giving the opinion of the Privy Council in the third of these cases:

> "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests… [A]s it is conceded that by the law of nations the supreme power in every State has the right to make laws for the exclusion or expulsion of aliens, and to enforce those laws, it necessarily follows that the State has the power to do those things which must be done in the very act of expulsion…"

71. The judgment of Lord Denning MR in *R v Governor of Brixton Prison ex p Soblen* [1963] 2 QB 243 shows at p 300 that powers of the type under discussion in this appeal were originally exercised under the Royal prerogative. Sir William Blackstone in volume 1 of his *Commentaries* (1765) said at pp 259-260 that strangers who came spontaneously were liable to be sent home whenever the king saw occasion. After referring to an unreported case decided in 1896, Lord Denning said:

> "It seems clear from that case that by international law any country is entitled to expel an alien if his presence is for any reason obnoxious to it; and as incidental to this right, it can arrest him, detain him, and put him on board a ship bound for his own country."

72. These powers were first codified in the Aliens Orders 1916 and 1953, and Lord Denning shows how very distinguished academic writers queried the legality of the Crown's earlier powers of arrest and expulsion. However that may be – and the matter was never tested in the courts – legal challenges under the Aliens Orders tended to be directed towards the validity of the underlying deportation order rather than to the detention itself. So long as that order was not a sham, or made with a lack of bona fides, or for any unlawful or ulterior purpose (see *ex p Soblen* at p 305) the courts would not interfere with the consequential direction for administrative detention.

73. It should be remembered that all these early cases preceded the reforms to judicial review in the mid-1970s. Indeed, Atkin LJ's famous *dictum* in *R v Electricity Commissioners ex p London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 was designed to ensure that administrative decisions affecting a person's legal rights were subject to the rule of law:

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

> The word "subjects" needed some qualification in 1924 because aliens lawfully within this country in time of peace were accorded the same civil rights as British citizens (*Johnstone v Pedlar* [1921] 2 AC 262).

74. In *R v Home Secretary ex p Khawaja* [1984] AC 74 Lord Scarman at pp 111-112 put it beyond doubt that the rule of law extended to aliens subject to administrative detention:

> > "… [D]oes our law's protection extend to aliens and non-patrials? There is a suggestion that because an alien is liable to expulsion under the royal prerogative and a non-patrial has no right of abode, it is less difficult to infer a parliamentary intention to deprive them of effective judicial review of a decision to infringe their liberty….
> >
> > Habeas corpus protection is often expressed as limited to 'British subjects.' Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'no' to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed 'the black' in *Sommersett's* Case (1772) 20 St Tr 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed."
>
> See also Lord Templeman at p 127E-8G.

75. It follows that although people like the present claimants are described in the statute as being "liable to detention", so that they can be subjected to administrative detention under the authority of an immigration officer without any reference to a court of law, English law will remain jealous of their right to liberty and will scrutinise with care the legality of any executive act that deprives them of that liberty. So much is apparent from the decision of Woolf J in ***Hardial Singh*** (see para 26 above) which later received the approval of the Privy Council in *Tau Te Lam v Superintendent of Tai A Chan Detention* Centre [1997] AC 97, 111A-D, and the House of Lords in *Saadi* (see para 25).

9. The scope of the remedy

76. Mr Catchpole showed us a line of cases in which it was stated that English law provides no cause of action for invalid administrative acts as such: see *X v Bedfordshire County Council* [1995] 2 AC 633, 732 C-E and 734H-735A; *Percy v Hall* at p 947; and *W v the Home Office* [1997] Imm AR 302, 309 and 311. He suggested that if the claimants' arguments were correct, the courts would for the first time be creating a strict liability at common law for what he described, rather unhappily (since personal liberty is in issue), as a "simple public law error."

77. The first two of these cases do no more than restate a well known proposition of public law, one which led to the re-emergence in recent years of the tort of misfeasance in public office which requires a finding of malice to complete the cause of action. The third, *W v the Home Office*, requires closer attention.

78. In that case an immigrant was wrongfully detained for nine days because of a filing error. He was released immediately the error came to light, and he later brought a civil action against the Home Office for damages for negligence: it was not a false imprisonment case. His claim failed. Lord Woolf MR, giving the judgment of this court, said at p 305 that

it was necessary for the powers exercised by the immigration officers to be considered in the context of the statutory policy of the 1971 Act as a whole. After reciting, as I have done, the relevant statutory provisions, he identified at pp 307-8 five features of the scheme which were common ground between the parties:

> "(1) … [I]ndividuals requiring leave to enter enjoy no right or presumption that they should be entitled to be at large before leave is granted;
>
> (2) A wide discretion is given to the Immigration Officers not only whether to admit detain or release but also in respect of the investigations they are entitled to make;
>
> (3) The relevant statutory provisions are concerned with the giving of authority to detain; actual detention is in hands of other persons;
>
> (4) It is not contested in this case that the Plaintiff was lawfully detained at all times; and
>
> (5) It is not contended that an invalid decision authorising detention makes the detention unlawful."

79. He went on to say (at p 308):

> "The powers given to immigration officers by the Act are quintessentially those which are enforced by judicial review, and in the normal way if a decision to release an immigrant is improperly delayed the remedy is an order of mandamus, not to release the immigrant, but to come to a decision whether to release or not. If that decision is improperly taken the remedy is again to seek a prerogative order, this time certiorari. In both cases no personal cause of action exists which could give a right to recover damages for breach of statutory duty and no such breach is alleged."

80. He then went on to consider, and dismiss, the contention that the plaintiff had a viable cause of action in negligence. He said (at p 311):

> "The essence of the allegation made is that the decision making body has 'negligently' taken into account matters it should not have taken into account by having regard to some irrelevant, and indeed if the allegation be right, misleading information, namely that contained in the questionnaire. But this cannot constitute the tort of negligence. If it did it is difficult to see why any maladministration does not give rise to a liability to pay damages at common law. In fact it is because there is no liability to pay damages for maladministration in the ordinary way that the Central and Local Government 'Ombudsmen' are required to investigate maladministration and where they find a complaint proved to exercise their discretion as to whether to recommend the payment of compensation."

81. This decision provides strong support for Mr Catchpole's submissions. But it must be observed that it preceded the coming into force of the 1998 Act and the vigorous observations made by the House of Lords in recent years about the importance of the right to liberty. I have already observed that the plaintiff did not claim damages for false imprisonment, a cause of action which was to be lifted out of the shadows three years

later by the House of Lords in *ex p Evans (No 2)*. The decision also preceded the publication of the powerful analysis by Dr Christopher Forsyth in 1998 about the different positions of the "first actor" and the "second actor" (see Lord Steyn's admiring comments in *Boddington v British Transport Police* [1999] 2 AC 143, 169F-G, 172-C). The concession in para 79(5) above views the situation from the second actor's standpoint.

82. Before leaving *W v the Home Office* I should mention that Lord Woolf added at p 312:

> "In gathering information and taking it into account, the Defendants are acting pursuant to their statutory powers and within that area of their discretion where only deliberate abuse would provide a private remedy. For them to owe a duty of care to immigrants would be inconsistent with the proper performance of their responsibilities as immigration officers. In conducting their inquiries, and making decisions in relation to immigrants, including whether they should be detained pending those inquiries, they are acting in that capacity of public servant to which the considerations outlined above apply."

83. After citing Lord Moulton's *dictum* in *Everett v Griffiths* (see para 65 above) Lord Woolf said:

> "Lord Moulton may in the context of that case have been contemplating immunity from suit for negligence but the sentiment supports the concept of it not being fair or reasonable to impose liability for negligence in the case of an immigration officer performing his public duty."

84. The effect of this decision is that if Home Office officials get their files into a muddle with the result that an immigrant loses his liberty unnecessarily, he has no right to compensation from anyone. On the other hand, if his loss of liberty had been directed by a court, the court ought to have detected such a muddle before making its decision. And although the court would possess immunity from suit if a mistake were made, the immigrant would have a cause of action against his lawyers who negligently failed to read the papers properly.

85. Even stronger support for Mr Catchpole's arguments was forthcoming from the decision of a two-judge division of this court in *Mohammed Ullah v the Home Secretary* [1995] Imm AR 166. In that case notice of intention to make a deportation order was served on the plaintiff, who was then detained for 17 days under the authority of the Secretary of State before being released once the Secretary of State had decided "that the decision to deport was not in accordance with the law due to the fact that full consideration was not given to all your applications prior to service of the deportation notice." This was another case involving an administrative muddle within the Home Office: in this case officials had overlooked or been unaware of the existence of no fewer than four different applications made by the plaintiff for indefinite permission to remain to which he had received no response at all.

86. The plaintiff in that case instituted an action for damages for false imprisonment, and Gatehouse J, overruling Master Hutt, refused to strike it out. This court (Kennedy and Millett LJJ) allowed the Home Secretary's appeal. This was of course a Schedule 3 case (see para 22 above). Kennedy LJ held (at p 170) that the giving of a notice of intention to make a deportation order made Mr Ullah's detention legitimate:

> "That condition precedent would not be fulfilled if no such intention had been formed, or if the intention had been formed in bad faith, but

> otherwise once notice is given in accordance with the regulations to a person liable to be deported, that person may be detained, and his detention will be lawful even if the notice is later withdrawn or set aside."

He had earlier said (at p 170) that the Home Secretary's action was "plainly not *ultra vires*", although it may have been irrational and therefore liable to be declared void.

87. Millett LJ, for his part, rested his decision on his interpretation of para 2(2) of Schedule 3 to the 1971 Act, which read:

> "When notice has been given to a person in accordance with regulations under Schedule 18 of this Act of a decision to make a deportation order against him… he may be detained under the authority of the Home Secretary pending the making of the deportation order."

He observed that where the requirements of that paragraph were satisfied, the detention was lawful and no claim for false imprisonment could be maintained.

88. He was willing (at p 171) to contemplate that the exercise of the power of detention would have been unlawful not only if no notice in the proper form had been served, but also if the contents of the notice had been untrue. If the Home Secretary had not in fact made any decision to deport the plaintiff, or if he had made such a decision in bad faith, or if the person served with the notice was not a person liable to deportation, there would not have been a decision of a kind contemplated by paragraph 2(2). What the paragraph did not require, however, was that the decision should be the right decision, or without flaw, or otherwise impervious to successful challenge by way of judicial review:

> "A decision made by the Secretary of State in good faith against a person liable to be deported is a decision within the contemplation of the paragraph even if it later appears that it is a decision which he should not have made or which he should not have made without further consideration."

10. The effect of the Human Rights Act 1998 on the remedy

89. The judgment in *Ullah* is, on the face of it, binding on us, in so far as the two members of the court spoke with one voice on any material issue. It is therefore necessary to consider whether either the coming into force of the 1998 Act or any subsequent pronouncements of the House of Lords have made any material difference to the law since *Ullah* was decided. *Ullah* was clearly treated as a "second actor" case. So long as there appeared to be a valid notice of intention to deport, which was not vitiated in any of the ways suggested in the judgments, no challenge could be made to the legality of the administrative detention that followed.

90. *ex p Evans (No 2)* (see para 31 above) was also a false imprisonment case. The plaintiff had been sentenced to two years imprisonment, but she had served a period of time in prison before her trial, and the prison authorities had to work out when her correct release date was. They were not assisted in their task by the impenetrability of the relevant criminal justice legislation and some earlier Divisional Court caselaw on which the prison governor understandably relied. This caselaw was later held to be wrong. As a result the plaintiff served two months longer in prison than she should have done.

91. The House of Lords ruled unanimously that she was entitled to recover damages for false imprisonment. They made a clear distinction between detention for the period provided for by the order of the Crown Court, when properly computed, and the later period which arose out of a miscalculation by an officer of the executive, however understandable. Although the 1998 Act was not in force, reference was made to its effect in three of the speeches.

92. Lord Steyn said (at p 28) that a balance had to be struck between "the injustice of holding the governor liable in tort" and "the injustice of leaving the victim of a substantial period of unlawful imprisonment without a remedy". When he considered the "comparative potency" of the competing claims to "the just solution of the case" he thought that on balance the applicant's arguments outweighed those of the Solicitor General. He cited for the second time in three years Lord Atkin's *dictum* in *Eshugbayi Eleko* (see para 70 above for his comment on that case).

93. Of ECHR Article 5 he said, quite briefly, that it reinforced the view which he had already accepted. In his view its provisions ruled out the defence that the governor had acted in accordance with the law as it was understood at the time.

94. Lord Hope of Craighead, for his part, went back (at p 32) to first principles in analysing the ingredients of the tort of false imprisonment. It was a tort of strict liability to which there was an answer if the defendant could prove, among other things, that his act was permitted by law. This question had to be determined at the time of the imprisonment. At p 35 he said that it was no answer to a claim based on a tort of strict liability to say that the governor took reasonable care, or that he had acted in good faith when he made his calculations:

> "The authorities are at one in treating it as a tort of strict liability. That strikes the right balance between the liberty of the subject and the public interest in the detection and punishment of crime. The defence of justification must be based upon a rigorous application of the principle that the liberty of the subject can be interfered with only upon grounds which a court will uphold as lawful."

95. He went on (at p 37) to consider ECHR Article 5 because the application of tort of false imprisonment to the facts of *ex p Evans* had raised a novel point of some difficulty, and it was of interest to see whether the provisions of Article 5 supported the conclusion he favoured as to the present state of domestic law. I have quoted the relevant passage in his speech at para 32 above. In short, he said that there were three aspects of Article 5(1) which had to be satisfied:

> i) The detention must be lawful under domestic law;
>
> ii) As an extra requirement, domestic law must be sufficiently accessible to the individual and sufficiently precise to enable him to foresee the consequences of the restriction on his rights;
>
> iii) Domestic law must not be arbitrary (in the sense that it was resorted to in bad faith) or disproportionate.
>
> Since the last two months of detention in *ex p Evans* were not lawful under domestic law, the defence of lawful justification would have fallen at the first hurdle under the ECHR.

96. Lord Hobhouse spoke even more eloquently about the importance of personal liberty. He said at p 42E-F:

> "Imprisonment involves the infringement of a legally protected right and therefore must be justified. If it cannot be lawfully justified, it is no defence for the defendant to say that he believed that he could justify it. In contrast with the tort of misfeasance in public office, bad faith is not an ingredient of the tort; it is not a defence for the defendant to say that he acted in good faith."

97. And at p 43F:

> "It is contrary to principle that the executive should not be liable for illegally interfering with the liberty of the subject. The remedy of habeas corpus and the tort of false imprisonment are important constitutional safeguards of the liberty of the subject against the executive."

98. At pp 45H-46H he traversed again the arguments relating to the entitlement of a "second actor" to rely on an order made by a court of competent jurisdiction, and he then went on to consider ECHR Article 5. He found that it corresponded to existing English law. In particular it recognised "an affirmation of the basic right not to be deprived of one's personal liberty (Lord Atkin)" and it required "the payment of compensation for unlawful detention as does English law (Lord Atkin)". He concluded on this aspect of the case (at p 47D-F):

> "In the present case, the State (through the legislature) has defined the power of detention; the State (through the executive) has detained the plaintiff in excess of that power; it creates no injustice that the State should compensate the plaintiff. It certainly does not make it just for the State to fail to compensate the plaintiff that one or more emanations of the State have misunderstood the legislation. Under the Convention, the State is already under an obligation to compensate; when the Human Rights Act 1998 comes into force it will also be under a domestic law obligation to do so."

99. *ex p Evans (No 2)* is an important case for the purposes of this appeal for three main reasons. The first is that it reaffirmed in ringing tones the importance that English law attaches to personal liberty even before the Human Rights Act came into force. Secondly, it shows Lord Hobhouse making a clear distinction between a case where a person's liberty is taken away by an unlawful executive act, where bad faith is not an essential ingredient of the tort, and the situations embraced by the tort of misfeasance in public office, where it is. And thirdly it shows how ECHR Article 5 not only made compensation for its violation mandatory but was also to add two further important ingredients into our law if the executive is to succeed in a defence of lawful justification: the law must be accessible and it must be proportionate.

100. I have already referred (see para 33 above) to the decision of this court in *Nadarajah*. In that case two immigrants challenged the lawfulness of their detention under a policy which legitimised their detention so long as their removal from this country was imminent. The court, citing *Chahal v UK* (1997) 23 EHRR 413 at para 112, held that all that was required under Article 5(1)(f) was that "action is being taken with a view to deportation": it did not import the stricter test of proportionality for which the applicants were contending. The reason why the court held that the detentions were unlawful was because the law was not accessible. The evidence showed that the immigration service

was operating a policy, when considering the imminence of removal, of disregarding information from those acting for asylum-seekers to the effect that legal proceedings (whether by way of appeal or judicial review) were about to be initiated, however credible that evidence might be, and it had not made that policy public.

101. We were also referred to the recent decision of Field J in *Youssef v the Home Office* [2004] EWHC 1884 (QB) in which the legality of a long period of administrative detention was put in issue on a claim for damages for false imprisonment. The judge, applying Woolf J's test in ***Hardial Singh*** (see para 26 above), held that it was for him to judge whether the final period of detention was reasonable, although he should make allowance for the way in which government functions, and be slow to second-guess the executive's assessment of diplomatic negotiations. In the event he concluded that the detention should lawfully have ended 14 days earlier than it did. He added that he would have reached the same conclusion even if he had applied a *Wednesbury* standard of reasonableness to the Home Secretary's decision-making process.

102. I do not consider that it is necessary to dwell for very long on Mr Catchpole's contention that it was an abuse of process for the claimants to have brought this claim for damages for false imprisonment in the county court, thereby allegedly circumventing the safeguards of the judicial review regime. I must emphasise that this was a complaint about the choice of initiating process: it is always possible for a circuit judge to direct the transfer of part of a private law action to the High Court for trial by a judge with Administrative Court experience if this is thought desirable on case management grounds.

103. It is greatly to be hoped that complaints of this kind about procedural exclusivity may fall away under the CPR regime, for the reasons given by Lord Woolf MR in *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 at paras 25-27 and 32-39. In particular, he said at para 39 that the relevant question was not whether "the right procedure" had been adopted, but whether the protection provided by what was still at that time RSC Order 53 had been flouted in circumstances which were inconsistent with the proceedings being able to be conducted justly in accordance with the general principles contained in CPR Part 1. "These principles are now central to determining what is now due process," he said.

104. I have no doubt at all that if these proceedings are viable, they are properly brought as a private law action. I have already shown (see para 58 above) that the Administrative Court has no jurisdiction to hear an action for damages alone. There are no facilities whereby a jury may be empanelled in the Administrative Court to try an action for damages for false imprisonment (see s 66(3)(b) of the County Courts Act 1984 and s 69(1)(b) of the Supreme Court Act 1981), and contested actions involving a human rights element often require cross-examination which is more conveniently provided for outside the Administrative Court list. In *R (Wilkinson) v Broadmoor Hospital Authority* [2001] EWCA Civ 1545, [2002] 1 WLR 419, Hale LJ said at para 62 that it should not matter whether proceedings in respect of forcible treatment of detained patients were brought by way of an ordinary action in tort, an action under section 7(1) of the 1998 Act, or judicial review: see also Simon Brown LJ at para 24, and *R(P) v Home Secretary* [2001] EWCA Civ 1151 at [20], [2001] 1 WLR 2002, 2037.

105. I would add that the evidence of the interveners suggests that compensation for unlawfully detained asylum-seekers will be hard to come by within the strict time limits required by CPR Part 54, given the severe difficulties over legal representation in those detention centres and prisons where such representation is not readily available on the spot. To restrict access to justice by insisting on proceeding by way of CPR Part 54 in a

damages claim would in such circumstances amount to the antithesis of the overriding objective in CPR Part 1.

106. I have already noted how in false imprisonment claims a judge in the county court will already have to apply *Wednesbury* principles in deciding whether a police officer's discretionary decision to effect an arrest was a reasonable one. Recent authority in this court includes not only my judgment in *Paul* (see para 61 above) but also the judgment of Latham LJ in *Cumming v Chief Constable of Northumbria Police* [2003] EWCA Civ 1844 in which he held at paras 43-44 that ECHR Article 5 did not require the court to evaluate the exercise of discretion in any different way from the exercise of any other executive discretion, although it must do so in the light of the important right to liberty which is at stake. See also *Boddington v British Transport Police* (see para 56 above) in which Lord Steyn said at p 172:

> "The rule of procedural exclusivity does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision."

107. There is, incidentally, nothing in the judgment of Lord Woolf CJ in *R (Anufrijeva) v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124 to suggest that the county court is not an appropriate forum for a damages claim of this kind which includes a human rights element, especially when part of it has to be litigated in the county court in any event (compare the decision of Collins J in *Andrews v Reading BC* [2004] EWHC 970 (QB)).

108. Mr Catchpole advanced a number of sound reasons why cases of this kind, if they are viable at all, should be entrusted to a judge with Administrative Court experience, at any rate until matters settle down and clear principles emerge from the caselaw. He was on less secure ground, however, when he suggested that the Civil Procedure Rules do not enable courts in private law actions to sieve out misconceived challenges just as effectively as the permission stage of the judicial review process, and his floodgates arguments contained an echo of those deployed unsuccessfully by his Home Office clients in the House of Lords in *ex p Leech* [1988] 1 AC 533. If an immigrant has been deprived of his liberty by unlawful executive action, he should not be denied access to the courts by recourse to floodgates arguments for the mandatory compensation to which he is entitled in respect of his false imprisonment.

109. Mr Catchpole also submitted that we should bear in mind the consideration that when the Administrative Court quashes a decision of an immigration officer on the grounds of public law error, there will be nothing to stop him/her making the same decision, this time by a lawful route. It appears to me that the answer to this objection lies in the field of causation. In *Nadarajah* this court held that if the immigration officers' decisions had not been tainted by their failure to disclose the policy on which they relied, the applicants' lawyers would have ensured that legal proceedings would have been in fact initiated, and not merely threatened, if this was what was needed to prevent their clients' detention. In *Saadi*, on the other hand, Lord Slynn observed at para 48 that the failure to give the right reason for the detention, and the giving of no reasons, or the wrong reasons, on the form delivered to the claimants, although procedurally inept, did not affect the legality of their detention.

110. Mr Catchpole sought to make a distinction between what he called "no power" cases (a category in which he placed *ex p Evans* and those police cases in which it is shown that a police officer did not have the requisite grounds for effecting an arrest) and cases where an immigration officer is given by Parliament what he described as an

extremely wide ranging power to detain. This distinction misses the point. If a court judges that in making his decision to detain, an immigration officer failed to take into account matters of material significance (viz he has overlooked relevant features of internal policy or paid no regard to the fact that the prospective detainee is a child protected by Article 37(b) of the UN Convention on the Rights of the Child), then he will have strayed outside his wide ranging powers. As a result he will have had "no power" to authorise the detention in question. This is what the doctrine of ultra vires is all about. Kennedy LJ must have been using the phrase in some different sense in *Ullah* (se para 87 above) when he suggested that an irrational decision is not necessarily a decision made *ultra vires*.

111. I do not consider that my judgment in *R v Home Secretary ex p Shingara* [1999] INLR 99 takes matters any further forward. That was a "second actor" case in which I said that it was far too late for Mr Shingara to challenge the lawfulness of an administrative direction made two years before he initiated judicial review proceedings. It was not a case in which he was claiming damages for any imprisonment that occurred at the time when the impugned direction was made.

11. Conclusion on the main issues as to immunity and the remedy

112. It is now necessary to pull the threads together, on the assumption that the claimants will be able to prove at trial that they were the victims of an unlawful decision. The critical questions we have to answer are whether the provisions of Schedule 2 to the 1971 Act place the claimants in some special category in which they are afforded a weaker recognition of their right to liberty, and whether English law, now viewed through the prism of the ECHR, affords an immunity to immigration officers in any way comparable to that afforded to courts of law. If the answers to these questions are that the detentions were unlawful by English law, there will be no defence to the claim for damages for false imprisonment. If, on the other hand, there is no illegality under English law, then we have to determine whether the detention of this family with their two young children was disproportionate in the light not only of Home Office internal policy but also of Article 37(b) of the UN Convention on the Rights of the Child. Needless to say, if it were to transpire, following disclosure of documents, that immigration officers were given some unpublished instructions relating to the treatment of the families of Roma asylum-seekers, then the defendants would encounter the same difficulties as they experienced in *Nadarajah*, but there is at present no sign of this in the evidence.

113. The high water mark of the defendants' case on the first issue is Lord Woolf's statement in *W v the Home Office* (see para 79 above) to the effect that individuals requiring leave to enter enjoy no right or presumption that they should be entitled to be at large before leave is granted. This, however, is no more than a statement of the obvious, because an immigration officer may lawfully detain them under Schedule 2 in the circumstances set out in para 23 above without the need for any further acts or omissions on anybody's part to trigger off the detention. In *Khawaja*, however, the House of Lords made it clear that their right to liberty was nevertheless protected by the law (see para 75 above). It follows that on the proper interpretation of Schedule 2 to the 1971 Act the courts will be just as zealous to scrutinise any complaints of an unlawful infringement of liberty in that context than they would in any other case where such a complaint is made. ECHR Article 5, after all, protects "everyone" (see para 28 above), and in *Saadi*, where the legality of Schedule 2 detentions was in issue, there was no hint of any suggestion that Article 5 did not apply at all.

114. The more difficult question is whether immigration officers whose grant of authority to detain can be set aside on *Anisminic* principles are nevertheless entitled to immunity from an action for damages for false imprisonment unless they acted in bad

faith or from some improper motive. This could only be on the basis that principles that were developed in pre-*Anisminic* case-law will still protect them unless they strayed wholly outside their jurisdiction (in the old, narrow sense). This seems to have been the approach of Kennedy LJ in *Ullah* (see para 87 above) although in that case, it must be noted, there was no challenge to the discretionary decision to detain.

115. The decision of the European Court of Human Rights in *Perks v United Kingdom* (1999) EHRR 33 contains at paras 37-40 a useful summary of English domestic law concerning the immunity of justices prior to the enactment of section 108 of the Courts and Legal Services Act 1990. The court summarised (at para 39) the effect of the decision of the House of Lords in *Re McC* (see para 60 above) in these terms:

> "In its judgment a magistrates' court acted in excess of jurisdiction in three circumstances only if: (1) it acted without having jurisdiction over the cause; (2) if, although it had jurisdiction, it were guilty of some gross and obvious irregularity of procedure, or (3) if it made an order that had no proper foundation in law because of a failure to observe a statutory condition precedent."

116. Mr Catchpole relied on protection of this kind for his clients, but apart from relying on Lord Moulton's *dictum* in *Everett v Griffiths* (see para 65 above) where he alone of the members of the House of Lords set out a wider principle governing non-court bodies exercising judicial functions – and it was not suggested to us that an immigration officer performed a judicial function – he did not show us any clear authority outside *Ullah* or *W v the Home Office*, or at any rate any that could survive the decision of the House of Lords in *ex p Evans (No 2)*.

117. In *In re A Company* [1981] AC 374 Lord Diplock made a very clear post-*Anisminic* distinction between courts on the one hand and administrative tribunals and other authorities possessing decision-making powers on the other. He said of the latter (at p 383C):

> ""Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity."

118. The position of courts was quite different (see p 383E-G). They performed judicial acts, for which they enjoyed judicial immunity. It was for this reason that Parliament had to make special provision in section 9(3) of the 1998 Act so as to recognise that whatever English domestic law might say, compensation might be payable under ECHR Article 5 even in respect of judicial acts done in good faith. It did not consider that any special provision was required in relation to the non-judicial acts of immigration officers which unlawfully infringed a claimant's right to liberty.

119. In my judgment we are entitled to regard ourselves as not bound by the decision in *Ullah* because (1) we heard far more argument on material questions of law than was available to the court in *Ullah*; (2) in *Ullah* there was no clear distinction between the liability of the first actor and the liability of the second actor (Dr Forsyth's analysis of the importance of this distinction post-dated *Ullah*), the challenge in that case was made to the decision of the second actor, and in the context of a Schedule 3 detention which raises different considerations; (3) the reach of the law of false imprisonment over unlawful acts of the executive that lead to an infringement of liberty has now been illuminated by the decision of the House of Lords in *ex Evans (No 2)*; (4) in *Ullah*

Kennedy LJ appears to have taken for granted that a pre-*Anisminic* approach to the decision of an officer of the executive was appropriate in the post-*Anisminic* world without explaining why; and (5) the policy considerations that inspired the *dictum* of Lord Moulton in *Everett v Griffiths* are no longer sustainable in cases concerned with the right to liberty in the light of the way in which the House of Lords weighed the balance in favour of the victim of a wrongful imprisonment in *ex p Evans*. Mr Gordon QC, who appeared for the interveners, advanced the valid argument that the policy arguments for denying a right to damages for unlawful detention pale by comparison with the policy arguments for admitting such a right, because of the enormous damage that is caused, on occasion, by unlawful detention in terms of suffering and damage to physical and mental health. Indeed, the claimants submit that this is such a case.

120. In short, it appears to me that we are at liberty, unconstrained by binding authority, to interpret Schedule 2 to the 1971 Act without any preconceived notions. If we do so, there is nothing there to suggest that Parliament intended to confer immunity from suit on immigration officers who asked themselves the wrong questions, so that their decision to deprive an immigrant of his/her liberty was a nullity and consequently unlawful. This is a conclusion at which one can arrive with a measure of satisfaction because it seems entirely wrong that someone who has been wrongly detained by the executive because of a filing error or some other incompetence in their offices should not be entitled to compensation as of right. I see no reason, incidentally, in relation to a claim against a first actor, to obtain first either a declaration that the detention was unlawful or a quashing order: it is sufficient that the claimant was unlawfully detained on his authority and suffered damage as a result.

121. I will now turn to the individual claims. In my judgment, apart from the complaint of discriminatory treatment relating to the father's detention on the first night, the Home Office is entitled to summary judgment on all the claims relating to the detention of members of the family up to the end of their stay at Oakington, where they were being detained for examination. Although it is true that in *Saadi* the House of Lords did not expressly determine any claim that the detention of a family with children under the Oakington process infringed the children's rights under the United Nations Convention on the Rights of the Child, I consider that following the decision in *Saadi* the claims that the detention of the family for a short period within that process was unlawful have no real prospect of success.

122. The continuing detention of the family thereafter raises different issues. My initial view (even when I had been apprised of the fact that no notice of appeal was served until 19th February, contrary to my earlier belief that the notice had been served at Oakington) was that it would be quite wrong, in the light of the view of the law which I had formed, to say that the family had no real prospect of successfully showing that they were unlawfully detained after the period of detention for examination at Oakington was complete. The only reason given for their continued detention thereafter was the risk of absconding. There was no clear evidence that their departure was imminent; the continued detention of the children raised additional questions of law to be determined; the question whether they were rationally to be regarded as an absconding risk or were rationally singled out for unusual treatment should await a trial on the facts; and issues relating to the appropriateness of Yarl's Wood (and then Harmondsworth) as a place of detention for this family were also fit for trial. Further issues of proportionality arose under ECHR Article 5 so far as the children's continuing detention was concerned. Before handing down this judgment, however, we have been shown the form on which an immigration officer authorised their continuing detention, and I consider that we should now hold a further short hearing at which we can hear the parties' further submissions on this issue now that the underlying facts have become clearer. If the claimants persuade us that such an order would still be appropriate, I would reinstate the claims for damages for

false imprisonment and/or compensation for breaches of Article 5 Convention rights from the time that the family was transported to Yarl's Wood to the time they were released at Harmondsworth five days later.

12. The contentions in respect of Articles 2, 3 and 8

123. I turn now to consider the free-standing claims under ECHR Articles 2, 3 and 8. So far as the first two are concerned, there was a dispute between the parties about the threshold criteria which should be applied to these claims. Put shortly, the defendants rely on *Osman v United Kingdom* (1998) 29 EHRR 245 at paras 115-116 and *Pretty v United Kingdom* (2002) 35 EHRR 1 at paras 49-51 as setting a high threshold, which they say that the claimants' case does not come within measurable distance of attaining. The claimants, on the other hand, contend that when the state itself is choosing to take positive steps that expose individuals to a real risk to their lives, or to treatment which objectively speaking can be categorised as inhuman, the threshold is significantly lower. They rely in this regard on *R (A and Others) v Lord Saville* [2001] EWCA Civ 2048, [2002] 1 WLR 1249 at paras 28-29, and on the general proposition that the state owes a particular duty to individuals who are detained (*Keenan v United Kingdom* (2001) 33 EHRR at para 90).

124. It seems to me that since the negligence claim is proceeding to trial in any event, it would be wrong to stop these claims from going to trial, too, since the claims in point of law are clearly arguable. The defendants sought to rely on their own case relating to the effect of the intelligence they had received about the trouble-makers' threats at Yarl's Wood, but this is exactly the kind of issue for which the majority of the House of Lords considered in *Three Rivers District Council v Bank of England (No 3*) [2001] UKHL 16, [2003] 2 AC 1 that claimants should have the benefit of disclosure of documents and cross-examination, and not see their claims extinguished at the summary judgment stage. These processes will have to be gone through in any event in this action in connection with the trial of the negligence claim.

125. Although I am sceptical about the merits of the Article 3 claim so far as it relates to the four days' detention at Harmondsworth, a claim of this kind is inevitably fact-sensitive, and it appears to me that it would be properly arguable that on the morning of 15th February this unhappy family were so clearly traumatised by their terrifying experiences at Yarl's Wood that to continue to lock them up amounted to inhuman treatment, especially as there could be no confident expectation of an early determination of their asylum appeal.

126. Article 8 considerations are involved in the claims under Articles 5 and 14, in so far as they are proceeding to trial. I do not consider that the claimants have a real prospect of success in relation to any free-standing Article 8 claim. There was a brave attempt to link the evidence in the medical reports with a viable Article 8 claim in that the short period of detention complained of infringed the claimants' right to mental stability (see *Bensaid v United Kingdom* (2001) 33 EHRR 205 at para 47), but the available evidence falls a long way short of what would be needed to establish a valid claim under Article 8 in its own right, and I prefer the arguments of the defendants on this issue.

13. Result of the Appeal

127. I would therefore allow the appeal and, subject to the outcome of the further hearing, set aside the order of the judge in so far as it extinguished the claims for damages for false imprisonment and/or compensation under ECHR Article 5(5) in relation to the continuing detention of the family after the period of detention for examination at

Oakington was completed, the claims for compensation under ECHR Article 2 in relation to the family's detention at Yarl's Wood, and the claims for compensation under ECHR Article 3 in relation to their detention at Yarl's Wood and Harmondsworth. Following the further hearing, the claimants should prepare appropriate amendments of the particulars of claim to give effect to this direction, and submit them to me as a single judge of the court for a written ruling if there is any dispute whether the proposed amendments correctly reflect the intention of the court.

128. There are issues in this action which must be tried in a county court, and there are also issues which must be tried by a judge with Administrative Court expertise. There is nothing to prevent a High Court judge with Administrative Court expertise sitting as a judge in the county court pursuant to section 5(3) of the County Courts Act 1984, and this would appear to be the appropriate way of conducting the trial of the action if the appropriate administrative arrangements can be made.

129. I know that the Home Office is concerned with the practical implications of a decision of this kind. The evidence of the interveners showed, however, that when the Home Office determined to embark on the policy of using powers of administrative detention on a far larger scale than hitherto, the practical implementation of that policy threw up very understandable concerns in individual cases. The transition from a world where decisions affecting personal liberty are made by officials of the executive who operate according to unpublished criteria, and where there is no way of compensating those who lose their liberty through administrative muddles and misfiling, to a world where the relevant criteria have to be published and where those officials are obliged to ensure that their decisions are proportionate and to justify them accordingly, is bound to be an uneasy one in the early years, and mistakes are bound to be made. But so long as detention, which may cause significant suffering, can be directed by executive decision and an order of a court (or court-like body) is not required, the language and the philosophy of human rights law, and the common law's emphatic reassertion in recent years of the importance of constitutional rights, drive inexorably, in my judgment, to the conclusion I have reached.

130. Of course courts must be astute to stop in their tracks those claims that have no obvious merit, and the skills and experience of the judges of the Administrative Court must be called in aid at any rate in the early days to ensure that the actions are efficiently tried, with no need for oral evidence and cross-examination except on issues that raise irresolvable issues of fact. But the courts have always shown themselves adept in altering their procedures to accommodate new challenges. In the last resort I see no reason why the claim of an immigrant deprived of his liberty by an unlawful decision of an immigration officer should go uncompensated by reason of practical concerns about administrative inconvenience.

131. After all, all that the law requires is that the policies for administrative detention are published and take appropriate heed of ECHR requirements, and that immigration officers do not stray outside the four corners of those policies when taking their decisions in individual cases. If they follow that course, the decision of the House of Lords in *Saadi* shows that they have nothing to worry about.

132. For these reasons, subject to the outcome of the further hearing, I would allow the appeal to the extent indicated in this judgment and remit the matter to the county court with a view to case management decisions being taken there to give effect to this judgment.

Lord Justice Thomas:

133. I agree.

Lord Justice Jacob:

134. I also agree.