PRIVATE LAW CLAIMS IN IMMIGRATION DETENTION CASES

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Introduction

1. This paper covers some of the key issues that arise in private law immigration detention claims, as opposed to public law claims. It is not exhaustive but aims to provide an overview of the points that lawyers bringing civil claims need to be aware of. The session is intended to be discursive and we are happy to deal with any questions or conundrums as we go along, either arising out of the areas covered below, or relating to other issues that come up in immigration detention civil claims.

2. The areas covered in this paper are:
   i) Key issues of practice and procedure
      - Funding and costs
      - Stages of a claim
      - Multiple defendants and costs
      - Mediation and settlement
      - Transferring JR proceedings
      - What to do with the client's damages
   ii) Vicarious liability
   iii) Non-delegable duties of care
   iv) Public law errors and private law damages
   v) Damages claims and abuse of process
   vi) Quantum of damages in immigration detention cases
   vii) Table of reported cases and damages awards.

Key issues of practice and procedure

3. Before commencing a civil claim in immigration detention, consider the following preliminary issues:
   i) What are the heads of challenge?
   ii) Which procedure should be used: County Court, High Court, JR?

iii) How will the claim be funded and is there sufficient cost benefit in bringing a claim?
iv) Who should be sued?
v) What further information is needed? Can the Freedom of Information Act 2000 or Data Protection Act 1998 be used to obtain it?
vi) What is the limitation period? Note the short time limits for HRA 1998 (12 months) and Equality Act 2010 (6 months) claims.
vii) Should the claim be brought on its own or are there are other claims that could be linked to it?

4. Once you have decided to commence a civil claim, consider the following:
   i) Should the claimant be anonymised? See the latest guidance on anonymity orders from the Court of Appeal in *JX MX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96 at [33] onwards.
   ii) Is the claim suitable for mediation? What non-financial remedies does the client want to seek that could be achieved by mediating the claim?
   iii) Does the claim need to be issued protectively or can the pre-action protocol be worked through before the claim is issued?
   iv) Does the claimant lack capacity or is the claimant a child? If so, a litigation friend will need to be in place under CPR Part 21.

5. Once you have got your claim off the ground, you will need to bear in mind a number of strategic and practical issues as you go along. These include:
   i) Time frames for service e.g. do you need to seek an extension of time for particularising the claim in order to obtain expert evidence?
   ii) Expert evidence.
   iii) CPR Part 18 requests for further information.
   iv) Requests for specific disclosure under CPR Part 31.
   v) Alternative dispute resolution.
   vi) Part 36 offers of settlement, including quantum (consider basic, aggravated and exemplary damages, as well as special damages), non-financial remedies, liability only offers and issues of confidentiality. See the end of this paper for more information about quantum in immigration detention claims.
   vii) Preparation of costs budget and directions for trial.

viii) Consideration of whether to have the action tried by a jury if it includes a claim for false imprisonment and/or malicious prosecution.

ix) Media and publicity.

6. If you succeed in your claim, either following settlement or after trial, you will then need to think about what to do with the claimant's damages because they may affect their eligibility for support and legal aid.

Funding and costs

7. Funding and costs in relation to private law actions – both public and private has become more difficult and complicated since April 2013 and the introduction of LASPO, followed by other government 'reforms'.

Public funding

8. Most if not all private law actions against the immigration authorities and their contractors can be dealt with under the **"**action against police etc" franchise. The category allows a contracted provider to provide initial Legal Help and thereafter a license to provide certificated work for amongst other matters claims for assault, trespass, false imprisonment, malicious prosecution, personal injury or death in custody, misfeasance in public office or other abuse of authority. However cases where overall costs are likely to exceed £25,000 are dealt with by the AAP team in Brighton, see here for their specialised guidance.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312274/legal-aid-actions-against-the-police.pdf

9. Since LASPO cases covered by Legal Aid are those in Schedule 1 of LASPO.

Conditional Fee Agreements (CFA's)

10. If because of a client's means or for some other reason public funding is not available there is the prospect of pursuing these actions by CFAs. However, under LASPO, success fees and the ability to recovery a premium for after the even insurance have been removed. Instead QWOCs (Qualified One Way

Costs shifting) introduced but are currently restricted to only certain kinds of claims which include personal injury, but do not explicitly include false imprisonment or claims under the HRA for instance. Without insurance to cover the risk of losing, entering into CFAs for these sorts of claims is much more risky.

Issue fees

11. This April the government quietly slipped in a momentus change to the cost of issuing claims in court which will impact on the ability to commence claims where cost benefit is already difficult. http://hmctsformfinder.justice.gov.uk/courtfinder/forms/ex050-eng.pdf sets out the full details but note that where before the cost of issuing a claim between the value of £15,000 and £50,000 was £350. The fee is now 5% of the overall value of the claim. Eg a £50,000 claim will cost you £2,500 to issue.

Cost budgeting

12. LASPO has also introduced cost budgeting to enable to court to control litigation costs. Detailed budgets need to be prepared at an early stage and agreed if possible with the other side. If they can't be agreed a judge will go through each estimated item and massively reduce what you can claim in the event of winning and claiming at inter-parties rates. Anecdotal evidence is that even in cases where cost budgets have been agreed between the parties, the judge has still cut costs in the Claimant's budget.

Stages of a claim

13. We have set out below a case plan for a civil claim it is not designed to cover all eventualities but is intended as a guide to the progression of a civil claim in both the High Court and County Court.

	Step	**What this means**
	Assessment of case	An early assessment will need to be made as to whether there is a potential civil case or what further information is required for a proper assessment to be carried out.
	Obtain funding	Legal Aid or private/CFA

	Gather further evidence	Subject access requests, medical evidence etc
	Notification to the Defendant	Let the other side know that a claim is contemplated, so can ensure that all necessary paperwork has been preserved.
	Letter before claim	It is important to give the Defendant a proper opportunity to respond and to explore settlement. Should not issue and serve proceedings until have given the Defendant in region of 4 months to consider the claim.
	Issuing & service of proceedings	In the event that personal injury is alleged an expert report will need to be served with the Claim Form and the Particulars of Claim. Ensure the claim is issued within time limits and extend where necessary.
	Defence	Defendant must serve acknowledgment and |Defence within 28 days, extendable by agreement up to a further 28 days, thereafter by application to court]
	Reply	Made only if a new issue needs to be addressed
	Jury trial?	Available in cases of false imprisonment and malicious prosecution – but may not be appropriate for these kinds of claims due to complexity and public attitudes around immigration
	Allocation and directions	The court will decide how the case should be conducted up to and including the trial, for most immigration detention claims this will be multi-track. You will be required to complete Directions Questionnaires and indicate whether you seek a stay for settlement. If not you need to set out issues around disclosure and seek to agree a costs budget and directions timetable with the Defendant. The court will usually also arrange a **case management conference** to discuss and agree a timetable for the further preparation of the trial. You can attend the conference and it is usually a good idea to do so.
	Clarification of statements of case	It may be necessary to ask or respond to a request for further information about each parties' statement of case (Part 18 CPR). You can also serve a Notice to admit (Part 32 CPR)
	Trial date	The Court will fix the date for trial having regard to the parties dates to avoid, the precise time in the process that the Court will fix the date will depend on the circumstances of the case.
	Disclosure	This is the process by which the parties disclose documents as required by Part CPR 31. If standard disclosure does not provide all you need, consider an application for specific disclosure and also 'non party disclosure'

	Witness statements	The parties will need to exchange at the same time the factual evidence that they are seeking to rely on in support of their case.
	Expert reports	The Defendant will now have to serve any expert reports upon which they intend to rely. The Claimant will also have to serve any further expert evidence. The parties can ask for clarification of the reports (Part 35 CPR) and there may be a meeting of experts in order to seek to agree the evidence. Part 35 Guidance from the Civil Justice Council: https://www.judiciary.gov.uk/wp-content/uploads/2014/08/experts-guidance-cjc-aug-14-amended1.pdf
	Listing Questionnaire	At about this stage the court will request information about the proposed trial date and try to ensure that your trial takes place on the date planned. There may be a hearing to discuss this.
	Trial preparation	There will need to be extensive preparation prior to trial and there may be some formal requirements such as to exchange skeleton arguments and such like before the trial date.
	Trial	
	Costs	Agreeing or assessing bill of costs if you win or legal aid assessment if you lose

Multiple defendants and costs

14. It will not be unusual when considering a claim that you may identify a number of different Defendants. The Home Office may have been responsible for detaining your client, but the detention centre where they suffered maltreatment was run by a privately contracted company who subcontracted out the healthcare service to a different private company. The escort service that took your client to the airport was run by a third private company and when the removal failed they were taken to another detention centre run by a fourth private company. Etc. Sometimes you will find that all these companies played some role in the case giving rise to the claim.

15. However careful consideration will need to be given as to who should be named as a Defendant. Ultimately if you are successful and awarded damages against one Defendant, but lose or discontinue against another, the Claimant's damages may have to be used to pay another party's costs!

Mediation and settlement

16. There is an extremely strong emphasis of achieving settlement prior to trial in order to save costs. In Harriet's twenty years of practice she has settled scores if not hundreds of claims and taken under ten to trial.

17. Reasons to consider settlement:

- If your client is legally aided, you have a responsibility to the legal aid agency to avoid risky and expensive litigation. You must also have regard to the **cost/benefit test** (see section on public funding above), the LAA will not fund your case to trial if the likely costs exceed the benefits.
- Litigation is unpredictable, however strong your claim may be, where facts are disputed there is always a risk you may lose.
- In immigration detention cases you may be experiencing the additional disadvantage that some of your witnesses (and possibly even the Claimant) have been removed.
- Many claimants will be very vulnerable and psychiatrically damaged by the experiences. You will need to consider whether the trial itself will be a traumatic experience. Indeed the litigation experience as a whole can have a detrimental impact on your client's well being, as you will need to meet with them and go through the details of their traumatic experience repeatedly as you progress their case.

18. For these reasons, it is important to continually give consideration to the possibility of settlement. Costs considerations and litigation risk will be a pressure for the Defendant too and it is for this reason it is very rare for a case to go to trial. You can attempt to settle a case at any stage and it is not unusual for claims to settle prior to the issue of proceedings.

19. Settlements often incorporate confidentiality agreements. This may be something your client wants, but often it is a disadvantage if one of the reasons for bringing a claim is to expose wrong doing. In contrast, if you do go to trial, then the hearing and outcome are open to the public and the press can report.

Part 36 offers

20. Part 36 offers can be made by Claimants or Defendants and can prove to be an effective way of putting pressure on the opposing side to settle. If a Part 36 offer is made by the Defendant, but not accepted and then at trial the Claimant is (at least in part) successful but fails to beat the offer, then they will have to pay the Defendant's costs from the date the offer was made from their damages. (and the Claimant will also not get their own costs from that date). If a Claimant makes a Part 36 offer which is refused, but then goes on to recover substantially more damages at trial then they offered, the Claimant's costs from the date of offer will be assessed on an indemnity basis rather than standard basis.

21. You should ensure that you comply with the terms of Part 36 CPR in setting out your offer.

22. A good formula for calculating the correct level to offer is to consider what your claim is worth at full value and then discount by the amount of litigation risk. Thus if you consider your claim is worth £20,000 and the chances of success are 60%, an appropriate offer might be £12,000.

23. Under the current version of Part 36, a "time-limited" offer (i.e. an offer which is open for acceptance for only a limited period) is not capable of being a valid Part 36 offer so does not carry the costs sanctions associated with Part 36 (though the court can still take it into account in exercising its discretion on costs). This was established by the Court of Appeal decision in C v D [2011] EWCA Civ 646, considered here.

24. Some commentators consider that this gives rise to an anomaly, in that a Part 36 offer can be withdrawn after expiry of the initial offer period (normally 21 days) by sending a separate notice, but cannot be automatically withdrawn after that period. In other words, a Part 36 offer can be withdrawn by writing two letters, but not by writing just one.

25. **This perceived anomaly has been addressed by a new provision at CPR 36.9(4)(b), which allows a Part 36 offer to be automatically withdrawn after expiry of the relevant period in accordance with its terms.**

26. However, since under CPR 36.17(7) the Part 36 costs consequences do not apply to an offer that has been withdrawn, it is hard to see any advantage in making a Part 36 offer if it is to be automatically withdrawn in this way.

Mediation

27. Is increasingly used and can help you achieve a good outcome including, sometimes remedies other that money which may be equally or more important to the Claimant. For example, you can ask for a letter of apology, a promise that the company will look at their procedures in relation to a particular issue, an agreement from the Home Office that they will expedite your client's fresh asylum claim, etc.

28. A formal mediation will involve a mediator, lawyers from both sides, the Claimant and a representative of the Defendant (possibly Home Office officials or representative from the insurers of private companies). It will usually last several hours, if not all day. Parties will be in separate rooms and come together perhaps only at the very beginning and end of the mediation, with the mediator going between the parties in trying to help achieve an outcome. During the process when the parties come face to face, it can provide an opportunity for the Claimant to tell those responsible for hurting him or her how they feel, and for the Defendant representatives to provide them with some kind of apology of explanation. A principle of mediation is that the parties must at the start agree to promise confidentiality. This is intended to help. Before entering mediation you should be clear in advance that the costs will be 'costs in the case'.

29. There is no particular reason why you have to have a mediator present. Sometimes you can achieve equally good results using the same formula, but with the lawyers coordinating between the parties.

Transferring judicial review proceedings

30. Where you have started an action as a judicial review and included a claim for damages, if there are significant and contested evidence that may determine the outcome of the case and or the assessment and determination of damages is complex and/or significantly disputed, then it may make sense to transfer the claim to the Queen's Bench Division.

31. Under CPR 54.20 the court may transfer the claim and give directions about the future management of the claim.

What to do with the client's damages

32. An issue that often arises in immigration detention claims is whether and how an award of damages may affect your client's entitlement to support and legal aid. Often when you settle a claim, your client may be in receipt of NASS or benefits (if they have been granted status). They may still be involved in challenging the Home Office decisions in relation to their asylum claim and have the benefit of legal aid. You may have to give consideration to how an award of damages may affect their entitlements.

33. If a client is on normal state benefits then they may be able to set up a Special Needs Trust**,** if the award is at least in part for personal injuries. However if they are on NASS or Section 4 support, these are only provided to obviate extreme hardship or poverty and if they receive the income they may be deemed no longer entitled to this support (until the damages run out), Of course if they are not entitled to any support or they are working, then the award of damages is a bonus. An award of damages may also affect their entitlement to legal aid if they have a public funding certificate.

34. If the client has been legally aided, you can hold on to their damages until costs have been determined and an assessment made as to whether the statutory charge applies.

Vicarious liability

35. It is well established that employers owe a duty of care in negligence for the acts or omissions of their employees that arise in the course of their employment. Ordinarily it is only in circumstances where an employee is "on a frolic of her own" that the employer will escape vicarious liability for the employee's acts or omissions. One of the policy justifications behind the principle of vicarious liability is that claimants should be able to recover compensation for the wrongs that they have suffered but are unlikely to do so if forced to sue the employee in his/her personal capacity (see *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 at [34D]).

36. When establishing whether or not an employer is vicariously liable for an employee's actions, the courts will look at whether there is there sufficient connection linking the relationship between the employer and the employee with the tort committed by the employee. This includes the fact that the nature of the employment is such that it creates a risk of abuse:

> *"Vicarious liability is imposed where a defendant, whose relationship with the abuser put it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse...Creation of risk is not enough, of itself, to give rise to vicarious liability for abuse but it is always likely to be an important element in the facts that give rise to such liability." Catholic Child Welfare Society* at [86]

37. *Lister v Hesley Hall* [2001] UKHL 22 concerned the systemic sexual abuse of children by a warden in a children's home. The House of Lords considered whether the owner's of the children's home could be vicariously liable for the abuse perpetrated by the warden. Their Lordships rejected a formalistic approach to the question of whether a person was acting in the course of their employment, preferring to consider whether there was a very close connection between the torts committed and the employment. In finding that such a close connection existed, the House of Lords observed that the torts were committed in the time and on the premises of the employers while the warden was busy carrying out his role of caring for the children ([20D]). The sexual abuse was therefore "*inextricably interwoven*" with the warden's duties

([28D]), although it was noted that the mere fact that an act is committed at the time and place of employment, does not automatically mean that it falls within the scope of the employment ([44C]).

38. In *Mohamud v WM Morrison Supermarkets PLC* [2014] EWCA Civ 116 the Court of Appeal found that an employer was not liable for the actions of its employee because none of the following factors were present:
    i) An abuse of power;
    ii) Commission of the tort did not and could not have furthered the employer's aims;
    iii) The situation was not one in which friction, confrontation or intimacy were inherent in the employee's role;
    iv) No relevant power was conferred on the employee as regards the customer and he was not in a position of authority or responsibility in relation to him; and
    v) There was no special vulnerability of the claimant.

39. These factors are a helpful checklist when considering whether or not vicarious liability can be made out. In the context of immigration detention is clear that the majority of these factors will routinely be present, particularly (iii), (iv) and (v).

40. However, vicarious liability is rarely contested in immigration detention claims. It is only controversial in cases where the acts or omissions of an individual employee are so egregrious and outside of his or her employment role that the Home Office may seek to argue that they should not be held liable. But even in these cases it should be borne in mind that the argument that the more serious the wrong, the less likely the employer is to be vicariously liable, has been rejected: see *Lister* at [24G] and [50H] - "*an abuse of his position and an abnegation of his duty does not sever the connection with his employment*" - and *Catholic Child Welfare Society* at [92].

Non-delegable duties of care

41. Vicarious liability has never extended to independent contractors and so there has historically been an issue about suing the Home Office for the negligent acts of private providers, as opposed to the negligent acts of those who are acting in the course of their employment in Home Office-run detention centres.

42. However, the law governing non-delegable duties of care, set out by the Supreme Court in *Woodland v Swimming Teachers Association & Others* [2013] UKSC 55 and applied in the immigration detention context in *GB v Home Office* [2015] EWHC 819 (QB), provides lawyers with an avenue for suing the Home Office for the negligent acts and omissions of independent providers.

43. A non-delegable duty arises where the law imposes personal liability for the acts or omissions of others, despite the duty holder not being personally at fault. As the Supreme Court explained, a non-delegable duty is a way of describing those cases in which a duty extends beyond being careful, to procuring the careful performance of work delegated to others (*Woodland* at [5]). It means that although the work required to perform the duty may be delegable, the duty itself remains the defendant's. Its delegation makes no different to the defendant's legal responsibility for the proper performance of a duty which is in law his own (*Woodland* at [7]).

44. *Woodland* itself was an entirely different context. It concerned a 10 year old girl who was seriously injured during a swimming lesson. It was alleged that the swimming teacher and lifeguard had been negligent. Neither the teacher nor the lifeguard were employed by the school or by the local education authority: they were employed by an independent contractor who had contracted with the education authority to provide swimming lessons to its pupils. The Supreme Court held that in these circumstances the education authority had a non-delegable duty of care to secure that reasonable care was taken of the child during the school day and that it could therefore be liable for the negligent acts of the teacher and the lifeguard.

45. Lord Sumption gave guidance at [23] about when a non-delegable duty of care will arise. He stated that the following were defining features of the circumstances in which such a duty exists:

    i) The claimant is a patient or child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury;

    ii) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission, (a) which places the claimant in the actual custody, charge or care of the defendant and (b) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will reasonably foreseeably damage the claimant. Such a relationship will usually involve an element of control;

    iii) The claimant has no control over how the defendant chooses to perform its obligations, i.e. whether personally, through employees or through independent contractors;

    iv) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it; and

    v) The third party has been negligent not in some collateral respect but in the performance of the very function delegated by the defendant to him.

46. If these five criteria are met then, unless it is unfair, unjust or unreasonable to impose the duty, one will be found to exist. The Supreme Court stated that in circumstances where the five criteria are met, it would be unlikely that there would be an unreasonable burden (see [25]).

47. In *GB v Home Office* [2015] EWHC 819 (QB) the application of *Woodland* in the context of healthcare provision in immigration detention centres was tested. In that case the claimant was a woman who, while pregnant in Yarl's

Wood IRC, had been prescribed an anti-malarial drug (Mefloquine) that caused her to suffer a severe psychotic reaction. Yarl's Wood IRC is run by Serco. The claimant claimed that the Home Office was liable for the negligent prescription of the drug because it owed her a non-delegable duty of care to take reasonable care in the medical advice and treatment provided to her whilst she was a detainee.

48. In considering this question as a preliminary issue Coulson J noted that there is a legal and policy framework in place governing the provision of healthcare in IRCs and the oversight function of the SSHD. Although under Part VIII of the Immigration and Asylum Act 1999 the SSHD may contract out the running of IRCs, she retains oversight and regulation of the centres through, for example, the requirement that she approve the appointment of detention centre managers, that she put in place contract monitors to report to her on the management of IRCs and that she appoint visiting committees. Detailed rules about the provision of healthcare are also contained the SSHD's Detention Centre Rules 2001, the Detention Services Operating Standards Manual and the policy contained in the Enforcement Instructions and Guidance.

49. Applying the five *Woodland* factors to the present case, Coulson J held:

    i) **Vulnerability and dependence:** Immigration detainees are especially vulnerable and dependent on the Home Office for protection. This vulnerability and dependence arises out of the fact that they are detained: [23]-[25];

    ii) **Antecedent relationship, control and positive duty:** The claimant was in the actual custody of the Home Office, who by virtue of the statutory and policy framework governing IRCs, exercised a significant amount of control and had a positive duty to protect the claimant from harm: [26]-[28];

    iii) **No control over performance of obligations:** Coulson J accepted that the claimant had no control over how she was dealt with, stating, "*Although she could have asked to see another medical practitioner, the rules make clear that that would have been at her own expense.*

It was completely different to the choices open to someone who was at liberty, and who could choose which NHS practice they went to and which doctor within that practice that they saw": [29]-[31];

iv) **Delegation to a third party:** Although finding this criterion the most difficult to decide in this case, Coulson J found that the Home Office had delegated the provision of medical care to Serco and that this was an integral part of the positive duty owed by the Home Office to the claimant. There were two reasons for this. First, the Detention Centre Rules all stress the importance of the provision of proper medical care to detainees. Second, on the facts of the case, the only reason that the claimant had been given anti-malarial drugs was because preparations were being made to remove her to Nigeria. Coulson J stated, *"This was one of the defendant's key responsibilities: not to remove an over-stayer to a country where malaria is prevalent, without taking steps to protect that person from that disease when he or she was returned. Thus a prescription of the anti-malarial drug (which is at the heart of the claimant's case in negligence), arose directly out of the defendant's detention and control of GB prior to removal, and was therefore an integral part of the positive duty assumed towards GB, the performance of which had been delegated to Serco"*: [32]-[36];

v) **Negligence:** Coulson J accepted that although liability was a matter for trial, it was sufficiently made out for the purposes of the preliminary issue and the *Woodland* criteria.

50. Coulson J also accepted that it was fair, just and reasonable to impose a non-delegable duty in these circumstances. He held at [42]-[43]:

> *"The out-sourcing should be irrelevant in law. Rather, it should not be for GB to have to try and work out which private contractor or individual doctor might be liable for which failure, and then litigate on the basis of that assessment. She was detained by the defendant; she was in the defendant's control; she was entitled to look to the defendant for proper protection. If she did not receive it, the defendant was in breach of its duty. Accordingly, for all these reasons, I conclude that the imposition of a non-delegable duty in this case is fair, just and reasonable.*

It is also worth undertaking something of a reality check at this point. The defendant decided to detain GB, and consequently had clear responsibilities for her treatment as a detainee as a result. It would not be just, fair or reasonable to conclude that those responsibilities disappeared simply because of an outsourcing decision."

51. This decision chimes with findings in the public law context that the SSHD remains liable for the decision to detain in unlawful detention cases (see for example, *R (HA (Nigeria)) v SSHD* [2010] EWHC 979 at [170] and *R (EH) v SSHD* [2012] EWHC 2569 at [152]) and for human rights breaches in IRC, including where those relate to healthcare failings (see for example, *R (HA (Nigeria)) v SSHD* [2010] EWHC 979 at [182], *R (S) v SSHD* [2011] 2120 at [221] and *R (MD) v SSHD* [2014] EWHC 2249 at [134]-[142]).

52. The question of whether non-delegable duties may apply in the case of intentional torts, such as assault, is one that is yet to be tested in this context. In *MA v Nottinghamshire County Council* [2014] EWHC 4005 QB the claimant argued that the defendant was liable in negligence for the physical and sexual abuse she had suffered at the hands of her foster parents. Males J found that Lord Sumption's five defining features were present but nevertheless concluded that imposing a non-delegable duty of care was not fair, just and reasonable. In an *obiter* passage Males J rejected the defendant's argument that there could not be a non-delegable duty of care because the alleged abuse was deliberate and negligent (at [211]) but this point did not strictly arise because of his conclusion on the fair, just and reasonable issue.

Public law errors and private law damages

53. It is now well established that a public law error which bears on and is material to the decision to detain vitiates the authority for detention and means that detention is unlawful: *Lumba; Kambadzi*.

54. What kinds of public law errors count?
    (a) Failure to apply published policy: *Lumba; Kambadzi;*
    (b) Incorrectly interpreting and therefore misapplying published policy which bears on the decision to detain

(c) Failing to make sufficient enquiries to enable a proper decision to be taken under the policy: *R (Das) v SSHD* [2014] 1 WLR 3538

(d) Application of an unlawful or unpublished policy: *Lumba;*

(e) Failure to take account of relevant considerations

(f) Failure to comply with s. 55 duty and guidance (duty to have regard to the best interests and welfare of children): *R (Abdollahi) v SSHD* [2012] EWHC 878 (Admin); *R (M) v SSHD* [2012] EWHC 1424 (Admin)

(g) A decision to detain which is predicated on an irrational immigration decision: *R (Alo) v SSHD* [2012] EWHC 2375 (Admin); *Draga v SSHD* [2012] EWCA Civ 842

(h) A failure to protect the claimant's common law right of access to justice: *R (Shaw) v SSHD* [2013] EWHC 42 (Admin)

55. It is equally well established that causation is relevant to quantum not to the lawfulness of detention. So even if the individual would have been detained in any event, had the public law error not been made, the detention is still unlawful. However, in such cases damages will generally only be nominal.

56. In order for damages to be nominal, it is necessary for the Home Office to show that:

(a) The claimant would have been detained in any event

(b) That detention would have been lawful in that:

(i) It would have been compatible with *Hardial Singh*

(ii) It would have been open to a reasonable decision maker correctly directing himself as to the published policy to detain.

57. It seems that this latter question is to be assessed on a conventional *Wednesbury* basis: *R (LE (Jamaica)) v SSHD* [2012] EWCA Civ 597, §29(viii); *R (O) v SSHD* [2015] 1 WLR 641, §38-40.[1]

[1] Note that *O* has been granted permission to appeal to the Supreme Court on this and a number of other important issues arising out of the application of the principle that a public law error renders detention unlawful.

58. Any question of the proper construction of the Home Office's policy is, however, a matter for the Court itself to decide, having regard to the language used, its context and purpose: *Das*, §45.

59. Where detention is begun or continued under paragraph 2(1) of Schedule 3 IA 1971 (i.e. in cases where the detainee has been recommended for detention and is detained pursuant to the recommendation following the end of any custodial sentence), the Court of Appeal has held that the *Lumba* principles do not apply and the only basis for awarding damages is *Hardial Singh*.

60. It is sometimes suggested that it is not permissible to raise public law issues in a private law claim. That this is wrong is clear from the judgment of the Court of Appeal in *D v Home Office* [2006] 1 WLR 1003, in which, rejecting an application to strike out private law actions inter alia on the ground that there could be no claim for damages in respect of public law wrongs in the absence of bad faith, Brooke LJ observed that:

> *"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 v Chief Constable of Humberside Police [2004] EWCA Civ 308 (see para 61 above) but also the judgment of Latham LJ in Cumming v Chief Constable of Northumbria Police [2003] EWCA Civ 1844 at [43]–[44] in which he held that article 5 of the Convention 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 [1999] 2 AC 143 , 172 (see para 56 above) in which Lord Steyn said:*
>
> > *"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.""*

<u>Damages claims and abuse of process</u>

61. Lawyers bringing JRs of immigration detention or considering civil claims need to be aware of the relationship between private and public law proceedings when it comes to claiming damages for unlawful detention. In summary, there is a risk that the failure to claim damages as part of a JR of a

person's detention will mean that any subsequent civil claim for damages arising out of that period of detention will be struck out as an abuse of process. This means that public lawyers need to think carefully about whether to include a damages claim in any JR and private lawyers need to be ready to explain why, if there was a previous JR, damages were not sought as part of the JR claim.

62. The case of *BA v Home Office* [2012] EWCA Civ 944 considered the situation where a family had brought judicial review proceedings challenging the decision to remove them from the UK and, tangentially, challenging their detention, and had also brought a civil claim for false imprisonment after their release from detention. The family were represented by one firm of solicitors for the JR and another for the civil claim. The letter before claim in the civil claim was sent a week before permission was refused in the judicial review claim and the civil claim was issued two months after permission had been refused in the JR.

63. The SSHD obtained an order from a Deputy Master striking out the family's false imprisonment claim on grounds of abuse. The family's appeal was allowed in the High Court and the SSHD's appeal was dismissed in the Court of Appeal. However, the case has important implications and provides useful guidance for immigration detention cases.

64. At [27] the President of the Queen's Bench Division (with whom Black and Davis LJJ agreed) gave guidance about the relationship between judicial review and civil claims. Among other things, he stated at [27(b)] that where a claim is brought on behalf of a person in detention pending removal, challenging removal directions by way of JR, then any claim in respect of detention said to be unlawful should also be brought in the judicial review proceedings, given the close relationship between the issues. The reason for this is set out at [27(c)]:

> *"…because it is important in the overall public interest that all the issues in relation to the lawfulness of the removal directions and the legality of the detention are determined by the Administrative Court in one set of proceedings having regard to the overall business of the courts. It is not permissible to circumvent these objectives: see Carter Commercial*

Developments Ltd v Bedford Borough Council [2001] EWHC 669 (Admin) at paragraphs 32 and following. Moreover, enabling the claimant to litigate the issues in two sets of proceedings would unnecessarily place a significant and unjust burden on the Secretary of State."

65. This was reiterated at [36] where the President concluded, "for the future a claimant in detention who challenges the legality of removal directions will be well advised to raise in the judicial review proceedings any claim in relation to the legality of the detention or run the real risk that, where there is no change of circumstances, a subsequent claim for damages for detention will fail as an abuse of process".

66. In finding in the claimants' favour on the facts of their case, the Court of Appeal held that the question of whether there was sufficient time for the Claimant to obtain the necessary evidence for a civil claim would be material in considering whether there is an abuse of process ([27(e)]).

67. At [30] the Court also accepted that the fact that the firm of solicitors instructed to bring the JR only had an immigration, and not a public law, legal aid contract, tended heavily in favour of the conclusion that there had been no abuse of process in this case. At [32] the fact that the JR had been "plainly directed at the question of removal" notwithstanding the reference to detention, was also held to be indicative of an absence of abuse, as was the absence of any culpability on the part of the claimants at [33]. It was also relevant that the claimants had not sought to orally renew the refusal of permission in the JR, and had instead pursued the civil claim. Davis LJ stated that he might have taken a different view if there had been an oral hearing in which all of the issues, including the legality of detention, had been ventilated and adjudicated upon.

68. The upshot of this is that lawyers bringing public law challenges to detention should think carefully about including a claim for damages. In the event that the JR is settled, the damages claim can be hived off and transferred to the QBD. Where a JR has already been brought and it did not include a damages claim, representatives should be ready to resist a strike out application by reference to the factors set out in *BA,* supported by the helpful comments of Brooke LJ in *D v Home Office* [2005] EWCA Civ 38 that emphasise the

importance of ensuring access to justice in false imprisonment claims:

> *"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 Pt 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 Pt 54 in a damages claim would in such circumstances amount to the antithesis of the overriding objective in CPR Pt 1.*" [106]
>
> *"Mr Gordon, 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 *1036 and damage to physical and mental health. Indeed, the claimants submit that this is such a case."* [120]

Damages in immigration detention claims

Heads of damages

(1) Nominal damages

(2) Basic but compensatory damages for unlawful detention

(3) Personal injury such as exacerbation of psychiatric injury

(4) Special damages

(5) Just satisfaction for breaches of the Human Rights Act 1998

(6) Aggravated damages

(7) Exemplary damages

Nominal damages

69. In *Lumba*, Lord Dyson JSC held in respect of damages that:

> *The question here is simply whether, on the hypothesis under consideration, the victims of the false imprisonment have suffered any loss which should be compensated in more than nominal damages. Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused. If the power to detain had been exercised by the application of lawful policies, and on the assumption that the Hardial Singh principles had been properly applied, it is inevitable that the appellants would have been detained. In short, they suffered no loss or damage as a result of the unlawful exercise*

of the power to detain. They should receive no more than nominal damages.

70. Where therefore the Court is satisfied that, despite a public law error which vitiates the authority for detention, the individual would and could (lawfully) have been detained in any event if the public law error had not been made, only nominal damages will be awarded. These are generally in the sum of £1 or so.

Basic damages

71. Where compensatory damages are available, the leading authority remains *Thompson and Hsu v Commissioner of Police for the Metropolis* [1998] QB 498, adapted as appropriate to apply to immigration detention.

72. The principles were summarised by the Court of Appeal in *MK (Algeria) v SSHD* [2010] EWCA Civ 980*:*

8 ... There is now guidance in the cases as to appropriate levels of awards for false imprisonment. There are three general principles which should be born in mind: 1) the assessment of damages should be sensitive to the facts and the particular case and the degree of harm suffered by the particular claimant: see the leading case of Thompson v Commissioner of Police [1998] QB 498 at 515A and also the discussion at page 1060 in R v Governor of Brockhill Prison Ex Parte Evans [1999] QB 1043 ; 2) Damages should not be assessed mechanistically as by fixing a rigid figure to be awarded for each day of incarceration: see Thompson at 516A. A global approach should be taken: see Evans 1060 E; 3) While obviously the gravity of a false imprisonment is worsened by its length the amount broadly attributable to the increasing passage of time should be tapered or placed on a reducing scale. This is for two reasons: (i) to keep this class of damages in proportion with those payable in personal injury and perhaps other cases; and (ii) because the initial shock of being detained will generally attract a higher rate of compensation than the detention's continuance: Thompson 515 E-F.

9 In Thompson the court gave specific guidance (515 D-F) to the effect that in a "straightforward case of wrongful arrest and imprisonment" the starting point was likely to be about £500 for the first hour of loss of liberty and a claimant wrongly detained for 24 hours should for that alone normally be entitled to an award of about £3,000. That case was of course decided more than ten years ago and, while not forgetting the imperative that damages should not be assessed mechanistically, some uplift to these starting points would plainly be appropriate to take account of inflation. Mr Singh for the respondent Secretary of State before us commends in particular the decision of Mr Kenneth Parker QC, as he then was, in Beecroft v SSHD [2008] EWHC Admin 3189 . That is a helpful

decision. It is very different on the facts from the case before us and it is right to say, as indeed Thompson itself makes clear, all these case are fact-sensitive.

73. The fact-sensitive nature of the exercise and the relatively small number of reported cases makes the estimation of basic damages an inherently difficult exercise. The table attached sets out the amounts awarded in the reported cases and the key facts that seem to have been taken into account. You should read the judgments in full to identify points which may help you distinguish the case you are referring to, or suggest that the analogy is a close one, so as to argue for a higher or lower amount. In addition the following points should be borne in mind:
    a. Awards made in earlier cases should be increased to reflect the effect of inflation;
    b. Damages for unlawful detention/false imprisonment are general damages in tort and so attract an additional 10% uplift where the award was made before April 2013, following *Simmons v Castle* [2012] EWCA Civ 1288 (see *AS v SSHD* [2015] EWHC 1331 (QB), para 5);
    c. It is not permissible to adopt a mechanistic approach, and there must be a degree of tapering for longer periods of detention, so a person detained twice as long will not be likely to recover twice as much in damages;
    d. Where detention is initially lawful and only subsequently becomes unlawful it is likely that damages will be lower because there is no need to reflect the initial shock of arrest.

74. The Home Office will often refer to *R v Governor of Brockhill Prison Ex Parte Evans* [1999] QB 1043, in which £5000 was awarded to the claimant who had, through an innocent mistake of sentence calculation, spent about two months longer in prison than she should have. A number of judges have said that cases of immigration detention are generally more akin to the cases of false arrest considered in *Thompson* then to *Evans*: see e.g. *R (E) v SSHD* [2006] EWHC 2500 (Admin) (Mitting J) and *R (B) v SSHD* [2008] EWHC 3189 (Admin) (Kenneth Parker QC).

75. The decision in *R (NAB) v SSHD* [2011] EWHC 1191 (Admin) needs to be borne in mind as a much lower award was made than might have been expected. The facts as found by Irwin J in his earlier judgment on liability were summarised by him at the beginning of his judgment on quantum:

> *The Claimant needs to be compensated for false imprisonment derived from a breach of statutory duty on the part of the Secretary of State, leading to unlawful continuation of immigration detention from 14 September 2009 to 4 December 2009. This is a period of 82 days additional detention. It is relevant to note that this period of unlawful detention followed two successive longer periods, when I have found that detention was lawful. The Claimant was a man who should have been deported to Iran, but who persistently and in a determined fashion refused to sign documents which the Iranian Authorities held to be necessary, before they would accept his return. As I set out in the earlier judgment, this refusal for a very long period justified the Claimant's detention. However, by the beginning of the period identified, the inactivity of the Secretary of State rendered the remainder of his period in detention unlawful, since there was no realistic prospect of removal and the Defendants had no longer any feasible or practicable plan to achieve the Claimant's removal.*

76. Irwin J rejected the arguments advanced by the SSHD that the Claimant's refusal to sign the documents constituted either (a) contributory negligence (paras 9-11) or (b) a failure to mitigate his loss (paras 12-13). However, he considered that it was appropriate to take into account, when assessing the level of general damages to be awarded in accordance with the principles in *Thompson,* of all the factual circumstances including the fact that the claimant had effectively chosen detention in the UK over liberty in Iran, and was already well used to being in detention by the time that it had become unlawful (para 18). He considered the facts to be closer to *Evans* (para 17) and awarded the claimant £75 per day, a total of £6,150 for 82 days of unlawful detention.

<u>Aggravated damages</u>

77. A claim for aggravated damages must be specifically pleaded in private law proceedings if such damages are to be claimed: CPR 16.4(1)(c). It was accepted by the Court of Appeal in *MK (Algeria)* that this requirement does not strictly apply to judicial review proceedings although it is better to expressly include a claim in the interests of clarity and fairness to the Defendant (para 12).

78. In *Thompson*, the Court of Appeal gave the following guidance about the circumstances in which aggravated damages may be awarded:

> *If the case is one in which aggravated damages are claimed and could be appropriately awarded, the nature of aggravated damages should be explained to the jury. Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted.*

79. As to the quantum of aggravated damages:

> *(10) We consider that where it is appropriate to award aggravated damages the figure is unlikely to be less than a £1,000. We do not think it is possible to indicate a precise arithmetical relationship between basic damages and aggravated damages because the circumstances will vary from case to case. In the ordinary way, however, we would not expect the aggravated damages to be as much as twice the basic damages except perhaps where, on the particular facts, the basic damages are modest.*
>
> *(11) It should be strongly emphasised to the jury that the total figure for basic and aggravated damages should not exceed what they consider is fair compensation for the injury which the plaintiff has suffered. It should also be explained that if aggravated damages are awarded such damages, though compensatory are not intended as a punishment, will in fact contain a penal element as far as the defendant is concerned.*

80. Aggravated damages are not uncommonly awarded in cases of immigration detention. The following are some examples (as with basic damages, the amounts need to be increased to reflect inflation):

- *B* (2008): £6,000 – failure to comply with Detention Centre Rules and policies on detention of victims of torture and the maintenance of an unjustified defence up to the eve of the hearing;
- *Muuse v SSHD* [2010] EWCA Civ 453*:* £7,500
- *MK (Algeria*): £5,000 awarded to reflect the "blinkered and high-handed" manner in which the immigration officers had acted;
- *R (J) v SSHD* [2011] EWHC 1073 (Admin): £2,500 to reflect use of handcuffs on arrest. Notably the fact that he was detained as an adult not as a child was reflected in basic damages and therefore not in aggravated damages.

- *R (Lamari) v SSHD* [2013] EWHC 3130 (QB): £5,000 to reflect the severe impact on the claimant's mental health when the SSHD failed to comply with an undertaking to release him within 14 days of the hearing of his judicial review, her conduct in then releasing him late at night and without proper arrangements such that he had to sleep outside the bail hostel, and her conduct as a litigant (which had been found to be in contempt of court).

Exemplary damages

81. Exemplary damages are also required to be specifically pleaded: CPR 16.4(1)(c).

82. Guidance was also given in *Thompson* as to the circumstances in which an award of exemplary damages should be made:

> *(12) Finally the jury should be told in a case where exemplary damages are claimed and the judge considers that there is evidence to support such a claim, that though it is not normally possible to award damages with the object of punishing the defendant, exceptionally this is possible where there has been conduct, including oppressive or arbitrary behaviour, by police officers which deserves the exceptional remedy of exemplary damages. It should be explained to the jury: (a) that if the jury are awarding aggravated damages these damages will have already provided compensation for the injury suffered by the plaintiff as a result of the oppressive and insulting behaviour of the police officer and, inevitably, a measure of punishment from the defendant's point of view; (b) that exemplary damages should be awarded if, but only if, they consider that the compensation awarded by way of basic and aggravated damages is in the circumstances an inadequate punishment for the defendants; (c) that an award of exemplary damages is in effect a windfall for the plaintiff and, where damages will be payable out of police funds, the sum awarded may not be available to be expended by the police in a way which would benefit the public (this guidance would not be appropriate if the claim were to be met by insurers); (d) that the sum awarded by way of exemplary damages should be sufficient to mark the jury's disapproval of the oppressive or arbitrary behaviour but should be no more than is required for this purpose"*

83. Exemplary damages are less common in immigration detention cases than aggravated damages, at least in the reported cases. They were awarded in *Muuse, Lamari* and in the county court case of *E v Home Office*, which involved the detention of a victim of torture for a period of around a month.

84. In *Muuse,* in which the SSHD appealed unsuccessfully against the decision to award exemplary damages, it was common ground that it was not necessary for there to be a finding of misfeasance in public office in order for an award of exemplary damages to be made and that "it was "oppressive, arbitrary or unconstitutional action by servants of the government" which were the conditions for such an award, as made clear by Lord Devlin in Rookes v Barnard [1964] 1 AC 1129 at 1226" (para 67).

85. In *AB v South West Water* [1993] QB 507, Sir Thomas Bingham MR had said that Lord Devlin was talking about "... gross misuse of power, involving tortious conduct by agents of the government". In *Muuse*, it was observed that "the conduct had to be "outrageous" and to be such that it called for exemplary damages to mark disapproval, to deter and to vindicate the strength of the law", but it was not necessary to look in addition for "malice, fraud, insolence cruelty or similar specific conduct" (paras 70-71), although note that in *Lumba*, Lord Dyson JSC considered that it was "material that there is no suggestion that officials acted for ulterior motives or out of malice towards the appellants" (para 166).

86. In upholding the award of exemplary damages made by the judge, the Court in *Muuse* observed that:

> *Given the absence of Parliamentary accountability for the arbitrary and unlawful detention of Mr Muuse, the lack of any enquiry and the paucity of the measures taken by the Home Office to prevent a recurrence, it is difficult to see how such arbitrary conduct can be deterred in the future and the Home Office made to improve the way in which the power to imprison is exercised other than by the court making an award of exemplary damages. The making of such an award, as Lord Hutton observed in Kuddus , also serves to vindicate the strength of the law. It further demonstrates that the award of punitive damages under the common law has a real role in restraining the arbitrary use of executive power and buttressing civil liberties, given the way the United Kingdom's Parliamentary democracy in fact operates.*

87. Exemplary damages should not be used to mark the Court's disapproval of the conduct of litigation: *Lumba,* para 165.

88. It will not be appropriate to award exemplary damages where there are a large number of victims of the conduct which may be said to merit the award, not all of whom are before the court. The purpose of exemplary damages is to

punish the defendant and it would not be right that, for example, those selected as lead claimants should benefit from an award being made to punish a defendant for its outrageous behaviour which affected a far larger group: *Lumba,* para 167, approving the reasons given by the Court of Appeal at para 123 of its judgment.

89. In *Lamari,* the Court rejected the submission that a finding of contempt was a sufficient punishment and exemplary damages should not be awarded. It was particularly influenced by the failure of the Defendant to file any evidence since the contempt finding explaining her conduct or what steps had been taken in light of the finding of contempt to ensure that its seriousness had been acknowledged and that the conduct would not be repeated. In *Lamari*, the Defendant had had ample opportunity to file evidence and the claim had been transferred to the QBD to assess quantum. By contrast, in *Lumba*, a further reason given by Lord Dyson JSC for not awarding exemplary damages was that the relevant officials had not been given the opportunity to defend their actions (para 168).

Personal injury

90. There are important procedural requirements for a claim for personal injuries in a private law claim. In particular:
    - The limitation period for claims which include an element of personal injury is 3 years (subject to the provisions of ss. 11 and 33 Limitation Act 1980) rather than the usual 6 years for a claim for false imprisonment. If the claimant is a child or a protected party time does not run against them for this purpose.
    - It is good practice to comply with the requirements of the Pre-Action Protocol for Personal Injury Claims even where the claim is not likely to proceed in the fast track. This includes seeking to agree the selection of a mutually acceptable expert on quantum.
    - The statement of value in the claim form must include a statement as to whether the claimant expects to recover more or less than £1000 in general damages for pain, suffering and loss of amenity;
    - Practice Direction 16 sets out the requirements for Particulars of Claim in a personal injury claim:

4.1 The particulars of claim must contain:
(1) the claimant's date of birth, and
(2) brief details of the claimant's personal injuries.
4.2 The claimant must attach to his particulars of claim a schedule of details of any past and future expenses and losses which he claims.
4.3 Where the claimant is relying on the evidence of a medical practitioner the claimant must attach to or serve with his particulars of claim a report from a medical practitioner about the personal injuries which he alleges in his claim.

91. It is frequently the case that detainees suffer from pre-existing conditions which are then exacerbated by detention. It is important that medical reports address the extent to which any condition has deteriorated as a result of detention and the extent to which the detention has caused or contributed to that detention. It is not necessary to show that detention was the sole cause of the deterioration, provided it has made a material contribution.

Just satisfaction for breaches of the Human Rights Act 1998

92. Section 8 HRA provides that:

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—
(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
(b) the consequences of any decision (of that or any other court) in respect of that act,
the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—
(a) whether to award damages, or
(b) the amount of an award,
the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

93. It will be unusual for any additional damages to be awarded under Article 5(1) ECHR where damages for false imprisonment are available at common law. Article 5 awards tend to be lower than common law false imprisonment damages.

94. There may however be breaches of other Convention rights which will not be adequately compensated by the award of damages for false imprisonment.

For example there have been a number of cases in which the High Court has found that the detention of mentally ill individuals in immigration detention has amounted to inhuman and degrading treatment in breach of Article 3 ECHR. The unjustified separation of a family may involve a violation of Article 8 ECHR.

95. It will be necessary to show a range of judgments from the Strasbourg and, where available, domestic courts in order to indicate the range of damages that are likely in cases of breaches of the HRA.

96. Be aware of the risk of double-counting with awards under other heads such as for psychiatric injury or aggravated damages.

Table of reported cases and damages awards

Title & citation of case	**Date of quantum judgment**	**Damages awarded**	**Length of detention and key facts**	**Shock of arrest award?**
R-v-Special Adjudicator and SSHD ex parte Bouazza [1998] INLR 315	Liability: 17.12.1997 (settled)	£10000 basic + £8,000 for exacerbation of psychiatric injury	63 days following period of 313 days lawful detention. Told he would be removed to Algeria where he was at risk of torture/death.	No.
R (Johnson) v SSHD [2004] EWHC 1550	Liability: 08.07.2004 (settled)	£15,000	53 days unlawful detention at Oakington following 6 days lawful detention	No
R (E) v SSHD [2006] EWHC 2500 (Admin)	25.07.2006	Interim award of £4000 on basis likely to recover £5-6000 at trial.	2-3 days detention and unlawful removal to Iran.	Yes.
R (B) v SSHD [2008] EWHC 3189 (Admin)	04.12.2008	£32,000 basic + £6000 aggravated	6 months following a short period of lawful detention where there was evidence B was a victim of torture	No (?)
Muuse v SSHD [2009]	13.07.2009	£25,000 basic + £7,500	Dutch national detained for 128	No: M had substantial

EWHC 1886 (QB); [2010] EWCA Civ 453		aggravated +£27,500 exemplary	days pending deportation to Somalia despite evidence of his Dutch nationality being available	prior experience of imprisonment
R (Mehari) v SSHD [2010] EWHC 636 (Admin)	22.02.2010	£4000 basic damages	7 days (followed by a period of lawful detention for just over 2 months)	Yes: her prior good character referred to
MK (Algeria) v SSHD [2010] EWCA Civ 980	29.04.2010	£12,500 basic + £5,000 aggravated	24 days. Algerian national married to EEA national detained on basis that wife no longer exercising Treaty rights without proper enquiries being made.	Yes.
R (J) v SSHD [2011] EWHC 3073 (Admin)	24.11.2011	£7,500 basic + £2,500 aggravated	4 days. Unaccompanied child detained as if he were an adult.	Yes.
R (M) v SSHD [2011] EWHC 3667 (Admin)	06.12.2011	Basic: £2,500 awarded to father and son; £3,000 to mother and daughters. Aggravated: £2,500 to father & son; £3,000 to mother and daughters. £10,000 for loss of property.	Family unlawfully removed without notice to Germany. Court ordered their return to the UK as well as damages and in setting the amount of damages took account of the fact that the primary remedy had been an order for return to the UK.	Yes
R (Bent) v SSHD [2012] EWHC 4036 (Admin)	28.09.2012	£12,500 basic	23 days. Detention became unlawful once Defendant decided to reconsider decision to remove and to grant an in-country appeal right if refused.	No. Detained lawfully for 14 days.

R (Shaw) v SSHD [2013] EWHC 42 (Admin)	18.01.2013	£2000 each to mother and son	10 hours detention during unlawful removal from the UK (including time spent on flight).	
S v SSHD [2013] CSOH 139, [2014] CSIH 91	21.08.2013	£30,000 basic + £6000 interest	12 months. Found to have chosen detention in UK over liberty in Palestine	No; detained lawfully for 7 months
R (Lamari) v SSHD [2013] EWHC 3130 QB	16.10.2013	£10,000 basic +£5000 aggravated +£10,000 exemplary	23 days following lengthy period of lawful detention. SSHD gave an undertaking to release within 14 days of hearing of JR but then, in contempt of court, failed to release for further 6 days.	Yes from the point at which he should have been released.
R (Supawan) v SSHD [2014] EWHC 3224 (Admin)	05.06.2014	£9000 basic	14 days. Should have been taken into account that he had a pending judicial review claim.	No; detained lawfully for first 4 days
Palisetty v Home Office [2014] EWHC 2473 (QB)	21.07.2014	£3,509.48 basic + £624.93 special damages	17.5 hours on arrival in UK & pending removal. Special damages: cost of flight back to India and return to home area from airport.	Unclear
AS v SSHD 2015 EWHC 1331 (QB)	13.05.2015	£23,000 basic + £5000 aggravated +£3500 PI	61 days. Age disputed child detained on basis of flawed assessment of age. PTSD and anxiety disorder aggravated by detention as to 25-50%.	Yes.