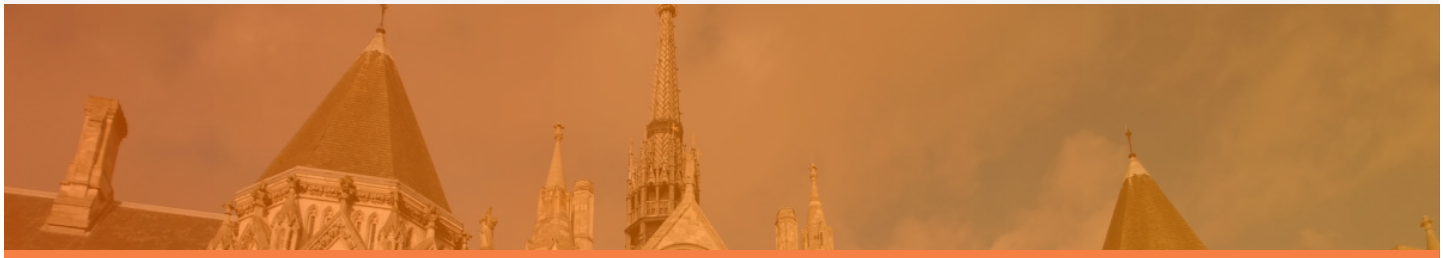

7TH NOVEMBER 2017 *BY JAMES PACKER*

Prosecutions for telling the truth: part deux, with added Hardial Singh

Last year the High Court in *JM (Zimbabwe) v Secretary of State for the Home Department* [2016] EWHC 1773 (Admin) made a declaration that "the Defendant may not lawfully require the Claimant, under section 35 of the [Asylum and Immigration (Treatment of Claimants) Act 2004], to tell Zimbabwean officials that he agrees to return voluntarily", and held that JM had been unlawfully detained. The Secretary of State's appeal on both issues has now been dismissed by the Court of Appeal.

Construction of section 35

The court dealt first with a preliminary issue: whether Jay J had erred in constructing a "criminal statute" without informing himself of the position of the Crown Prosecution Service, or having regard to Hansard.

This was a curious ground of appeal. No *Pepper v Hart* application had even been made. Likewise there was the inconvenient fact that despite criticising the judge for not "informing himself" of its position, the Secretary of State had taken no steps to join the CPS as an interested party, nor did it seek permission to intervene.

In similar fashion, as the court stated, the "alternative submission that the judge should have taken account of the CPS [policy on] prosecutions under section 35 was equally unmeritorious". It also pointed out that, in any event, the Court of Appeal criminal division had already held that the CPS's guidance was wrong [paragraphs 49-52].

With that ground cleared, the court then went on to construe section 35.

Although the court disagreed with Jay J's analysis that section 35(2) was an exhaustive list of the Secretary of State's powers under section 35(1), it held that his declaration was unaffected. The express provision at section 35(2)(g) – to "attend an interview and

answer questions accurately and completely" – precluded the Secretary of State from requiring JM to tell a falsehood under the general power at section 35(1) to require him to "take a specified action … [that] … will or may enable a travel document to be obtained" [paragraphs 53-82].

Unlawful detention: Some *Hardial Singh* foxes shot

The Secretary of State was also appealed on the basis that Jay J had erred in his approach to *Hardial Singh* ("*HS*"). The *HS* principles were enunciated by Lord Dyson in *R (Lumba) v SSHD* [2011] UKSC 12:

> *(i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose.*
>
> *(ii) the deportee may only be detained for a period that is reasonable in all the circumstances.*
>
> *(iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention.*
>
> *(iv) the Secretary of State should act with reasonable diligence and expedition to effect removal.*

Julie Anderson, for the Secretary of State, contended that the judge below had erred in failing to first find what the "reasonable period" in *HS* (ii) would be before concluding that detention had become unlawful under *HS* (iii). This is an argument that the Secretary of State raises from time to time, so it is worth noting the Court of Appeal's clear ruling having considered *Lumba* and *R (Khalid) v SSHD* [2012] EWCA Civ 1656:

> *That submission is simply misconceived [paragraph 91].*

Hopefully that is the last time the Secretary of State will attempt to persuade a judge otherwise.

We can also hope that other familiar tropes in unlawful detention cases have been ushered towards retirement. The Secretary of State frequently seeks to persuade the court that a claimant cannot succeed under HS (iii) if there is any uncertainty as to when deportation may be effected. In this case she relied on *R (Muqtaar) v SSHD* [2012] EWCA Civ 1270.

It was to no avail. The court stated

> *this point is unmeritorious. That paragraph of the judgment of Richards LJ was saying no more than "mere uncertainty" would not found a claim for unlawful detention under Hardial Singh principle (iii) [paragraph 92].*

Finally, in respect of *HS* (iv) it was argued that even though there had been unnecessary delay by the Secretary of State, damages should be merely nominal. This delay, counsel

claimed, had not "caused" JM's detention, which he could have brought to an end himself by voluntarily departing from the United Kingdom. Variations on this theme are sometimes argued to defend unlawful detention claims, but hopefully the Court of Appeal has now laid them to rest:

> ***This … misunderstands the issue of causation. The question for the Court was not whether JM would have consented to removal seven months earlier if the Secretary of State had acted with reasonable expedition and diligence, as [64] of Ms Anderson's Skeleton Argument appears to assume. The correct question was whether, if the Secretary of State had acted with reasonable expedition and diligence and had presented JM with the disclaimer seven months earlier, it would have become apparent seven months earlier that removal would not be possible within a reasonable period of time [paragraph 93].***

To round off a bad day at the office for the Secretary of State, the preparation for the appeal was so shambolic that the court required the head of the Government Legal Department to write personally to the lead judge accepting that the failures were inexcusable and giving an assurance that there would be no repeat. We shall see.

James Packer and Kate Newman of the Public Law Department at Duncan Lewis represented JM with Rory Dunlop of 39 Essex Chambers.

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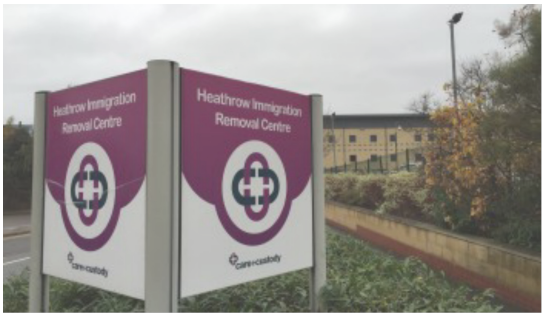

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