PRACTICE NOTE FOR CLAIMS IN IMMIGRATION DETENTION CASES

Unlawful Detention and False Imprisonment Seminar, 22 November 2018

Introduction

1. This paper covers some of the key issues that arise in immigration detention claims. It is not exhaustive but aims to provide an overview of the points that lawyers bringing claims will need to be aware of; specific advice must always be sought on individual cases.

2. The areas covered are:

    (i) Statutory Powers, Home Office Policy and recent caselaw;
    (ii) Vulnerable Groups;
    (iii) Remedies (including Bail, Judicial Review and Damages);
    (iv) Automatic Deportation;
    (v) Pre-Action Considerations;
    (vi) Practice and Procedure

Statutory Powers and Home Office Policy

3. The relevant legislation is found in four Acts:

    (i) Immigration Act 1971 ("1971 Act");
    (ii) Immigration and Asylum Act 1999 ("1999 Act");
    (iii) Nationality, Immigration and Asylum Act 2002 ("2002 Act"); and
    (iv) UK Borders Act 2007 ("2007 Act")

4. The 1971 Act sets out the basic Home Office ("HO") powers that allow individuals to be detained. The power to detain an illegal entrant, port removal of a person liable to administrative removal (or someone suspected to be such a person) is set out in paragraph 16(2) of Schedule 2 to the Immigration Act 1971 (as applied by section 10(7) of the Immigration and Asylum Act 1999). It states:

"*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*"

5. Section 62 of the Nationality, Immigration and Asylum Act 2002 introduced a free-standing power for the Secretary of State ("SoS" or "SSHD") to authorise detention in cases where the Secretary of State has the power to set removal directions.

6. The power to detain a person who is subject to deportation action is set out in paragraph 2 of Schedule 3 to the 1971 Act and section 36 of the 2007 Act (automatic deportation). This includes:

   (i) Those whose deportation has been recommended by a court pending the making of a deportation order;
   (ii) Those who have been served with a notice of intention to deport pending the making of a deportation order;
   (iii) Those who are being considered for automatic deportation or pending the making of a deportation order as required by the automatic deportation provisions; and
   (iv) Those who are the subject of a deportation order pending removal

7. There are a number of HO Policies which operate in tandem with the relevant legislation. Although they lack the legal status of statute, they nevertheless "flesh out the bones" of the legislation and provide the details for the practical implementation of the legislation. To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg caselaw but must also accord with stated policy.

8. The HO Policy is set out in the Enforcement Instructions and Guidance. This sets out what considerations the HO should abide by. The guidance states in Chapter 55.10 that:

   (i) Certain persons are normally considered <u>suitable for detention in only very exceptional circumstances</u>, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.
   (ii) In CCD (Criteria for Custody Detention) cases, the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.

9. The power to detain must be exercised in the interests of maintaining effective immigration control. However, there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used (Chapter 55.1.1).

10. On paper and therefore in theory, the HO powers are narrow and constrained. The presumption is always in favour of temporary admission, with detention being used as a 'last resort'. To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg caselaw but must also accord with stated policy.

Detention: recent caselaw

11. The recent case of *R (Medical Justice & Ors) v SSHD* [2017] EWHC 2461 (Admin) found that The Adults at Risk Statutory Guidance ('AARSG') (which excluded pain or suffering inflicted by non-state actors relying upon the UNCAT definition) 2016 was unlawful. Burnett J in *R (EO) v SSHD* [2013] EWHC 1236 (Admin) had previously given a definition for torture for the purpose of rule 35 of the Detention Centre Rules 2001 which did not exclude non-state actors. Ouseley J in *Medical Justice* so held that:

    (i) The meaning of torture in rule 35 had been authoritatively decided by the Court: *"It is not open to the SSHD by issuing policy statements to alter the meaning of a statutory instrument, whether expressly or by necessary implication. The AARSG is but guidance, so described by statute. It is not a form of delegated legislation, albeit issued pursuant to a statutory duty and with formal expression of Parliamentary approval. It is no more capable of altering delegated legislation, than delegated legislation is capable of altering primary legislation, without a specific primary legislative power to do so. The AARSG could no more expressly remove R35 itself than it could change the meaning of words used in it, whether expressly or by some necessary implication. Therefore, "torture" in R35 continues to mean what EO found it to mean."* §§126- 127;

    (ii) The list of indicators of risk, albeit non-exhaustive, was based on unlawful Guidance, relying upon the more restrictive UNCAT definition instead of the *EO* definition §§131-145;

    (iii) The AARSG therefore fell short of meeting the statutory purpose which it is required to meet under s59 Immigration Act 2016 in setting out guidance on detention of vulnerable persons §152;

    (iv) The distinction between UNCAT and *EO* torture "affects the assessment of particular vulnerability to harm in detention: *"[…] The correct, albeit seemingly unintended, interpretation of the AARSG, limiting the specific indicator of "torture" to the UNCAT definition, with no comprehensive alternative coverage by other specific indicators or some more general provision, has no rational or evidence base."* (§153)

(v) It is not rational *"to require a doctor to carry out an investigation into or reach a judgement on the political background to the severe pain and suffering which is his focus."* (§§162-163)

12. In *R (Hemmati) v SSHD* [2018] EWCA Civ 2122 the Court of Appeal applied the CJEU case *Policie CR, Krajské, reditelstvi policie Ustecheho kraje, odbor cizinecké policie v Al Chodor and other* (C528/15). The CJEU ruled that being returned to another member state under the "Dublin process" does not provide sufficient justification for detention because Article 2(n) defines the risk of absconding as reasons in an individual cased based on objective criteria defined by law. The first and principal issue in *Hemmati* was whether "defined by law" includes the *Hardial Singh* principles (see below), and Chapter 55 of the Enforcement Instructions and Guidance. In relation to the *Hardial Singh* principles, the Court held that *"they are not criteria defined by law for the purposes of Article 2(n). They do not specify criteria for deprivation of liberty which have the clarity, predictability, accessibility and protection against arbitrariness "within a framework of certain predetermined limits" required by Al Chodor."* §169. Neither did the EIG at the relevant time as it *"contained no reference at all to Dublin III, [...] contained no direction that in an Article 28 case the sole ground for detention was the existence of a significant risk of absconding or that such a case was any different from any other asylum case. They gave no direction as to the need for proportionality in accordance with the requirement in Article 28(2)."* §170. There was also a failure to provide clarification as to what "significant risk of absconding" might be. In the circumstances the detention was unlawful.

13. The second issue in *Hemmati* was whether *Factortame* damages could be recovered. It was held that "the Factortame principle has no relevance because the individual right of each human being to liberty exists save insofar as it is legitimately "cut down by law". The right to liberty does not exist because of the EU and its Charter of Fundamental Rights any more than it is exists because of the Council of Europe and the Convention.

14. In *R (VC) v SSHD* [2018] EWCA Civ 57, there were effectively two questions before the court. The first concerned the consequences of failures from the SSHD in applying the policy governing the detention under the Immigration Act 1971 ("the 1971 Act") of persons who have a mental illness. The second concerns the adequacy at common law and under the Equality Act 2010 ("the Equality Act") of the procedures under which mentally ill detainees can make representations on matters relating to their detention.

15. The Court held in *R (VC)*:

(i) The SSHD's conclusion that VC's condition could be managed in detention was not rationally open to her to come to §85

(ii) *"The burden lies on the Secretary of State to demonstrate, on the balance of probabilities, that she "would" in any event have detained the appellant. [...] It may well be that it is very likely that the Secretary of State would have detained*

the appellant in any event. But in the light of the seriousness of the appellant's mental condition and her misinterpretation of what "satisfactory management" meant, on the evidence that is before the court on the point I do not consider that she would have done so." §§98-99

(iii) The failure to make reasonable adjustments to the decision-making processes amounted to a breach of sections 20 and 29 Equality Act 2010, which in turn amounted to discrimination against VC.

Clarification and subsequent caselaw

16. The judgment of *Hadial Singh* set out the following principles:

(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 that 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.

17. There has been a strong restatement of the principles of *Hardial Singh* in the last year. In *R (Ademiluyi) v Secretary of State for the Home Department* [2017] EWHC 935 (Admin), A served a custodial sentence. The question was whether A could have been deported from the UK prior to the expiry of a reasonable period of time. The Judge found at [71] that: '*there could not be a removal within a period of time that was reasonable in all the circumstances such as to justify ongoing immigration detention*'. This finding was made by reference to the circumstances of the case and, in particular, because it was known some time prior to the decision to detain that A had been present in the UK for 15 years, was married, was living with his wife, and had 5 children, all of whom were born in the UK and a number of whom were known to be British (at [74]); *"It was inevitable that there would be consequential challenges and, in my judgment, those could not properly have been characterised as unmeritorious. Quite the contrary."* It was 'crystal' clear that deportation would be resisted on Article 8 grounds (at [73]).

18. In *The Queen on the Application of A v The Secretary of State for the Home Department* [2007] EWCA Civ 804 A was administratively detained pending deportation following conviction for raping and indecently assaulting a 13-year-old girl and being sentenced to 8 years imprisonment. The CA accepted that detention should be with a view to deport within a reasonable time. The case was distinguished from *R (I)* (see below) as the danger posed to the public by A, was greater than that posed by I.

19. In *MI (Iraq) v Secretary of State for the Home Department* [2010] EWHC 764 (Admin), the Court held that there was no prospect of the removal of the claimants within a *reasonable time* and therefore it followed that their detention was unlawful.

20. Detention with a view to deportation has been construed strictly by the courts. In *HXA v The Home Office* [2010] EWHC 1177 (QB), it was held that the purpose of a deportation order was the enforced removal of the subject from the United Kingdom, and not his enforced surrender into the custody of the authorities operating in the receiving country.

21. In *The Queen on the Application of Mjemer v Secretary of State for the Home Department* [2011] EWHC 1514 (Admin), it was held that when assessing legality, it is necessary to weigh up the public good of detention and the risk of absconding in considering whether the deportation is the *genuine aim*.

22. Non-compliance of a detainee is often cited by the HO as a reason for a delayed deportation. In *The Queen on the Application of Davies v The Secretary of State for the Home Department* [2010] EWCA 2656 (Admin), D was 'non-compliant' throughout. Deportation was ordered. He was 'non-compliant' in ETD interviews. Conflicting information was given to the authorities. Finally, he was released on bail after 21 months on conditions including an electronic tag. On bail, he failed to comply with the conditions and was returned to detention for another 20 months. In detention, his behaviour was deemed aggressive. It was held that, *'subject to the exception that immigration detention cannot be used to motive a person to a voluntary return, non-cooperation by a person subject to removal or deportation in his return is an important, possibly a decisive, factor in assessing the legality of his continued detention. Just what bearing it has will depend on the circumstances of the case. But the legal policy is clear: a person cannot complain about the legality of immigration detention if, as Toulson LJ puts it in R (A) it is a product of his own making.'* On the facts of that case, it was held that detention was, and continued to be, legal.

23. However, the authorities do impose a number of obligations. In *The Queen (on the Application of MH) v Secretary of State for the Home Department* [2010] EWCA Civ 1112, MH was detained for 40 months, with the last two months of detention being held as unlawful. A memorandum of understanding had been signed with Somaliland effecting returns, however it had not proved possible to arrange documents for MH. The Administrative Court held that the HO should have realized in June 2007 that they were not going to be able to deport MH. At the point when there was "*no longer some prospect of removal that detention became unlawful."*

24. The HO must always act with due diligence, however, the Court in *Choy v Secretary of State for the Home Department* [2011] EWCA 3665 (Admin) found that a lack of due diligence did not *in itself* give rise to a cause of action; it is not for the court to examine

each day or week of a period on detention to decide whether the Secretary of State had acted at all times with due diligence.

R (Robert Kajuga) v SSHD [2017] EWCA Civ

25. RK's asylum claim was rejected in 2004 as the HO did not believe he was from Burundi as he claimed. RK was not deported but was arrested in 2006 for attempting to board a plane to Canada with a false Canadian passport. He was convicted and given a two-month prison sentence. Upon release from prison he was detained, then granted bail and then absconded. He was again detained on 1 February 2010 and released on 22 March 2012. The matter before the court was to determine if the final 4.5 months of his detention were illegal. On 10 November 2011 a Burundi liaison officer interviewed RK and concluded that he was not from Burundi. On 15 February 2012 at the regular monthly detention review it was noted that there was no reasonable prospect of RK's removal within a reasonable time.

26. Submissions were made on behalf of RK made in reliance on the third *Hardial Singh* principle and asserted that the Judge was in error in failing to adopt the judgment of *R (Sino) v SSHD* [2011] EWHC 2249 (Admin) at [65]: "*…in my judgment his conduct cannot be regarded as providing a trump card justifying his detention indefinitely*". The first ground of appeal was dismissed at paragraph 49 of the judgment in *Kajuga*, distinguishing paragraph 56 of *Sino* on the facts: "*the conduct of this Appellant meets each of the aggravating factors that are listed there which would, it is said, justify a 'longer' and 'still longer' period in custody."*

27. The second ground of appeal centred on the monthly 'Detention Review' where it was accepted by the reviewer that there was not a realistic prospect of removal within a reasonable timescale. It was therefore argued that RK should have been released. However, the Judge at first instance held that the reviewer's entry on the form did not materially alter the situation as the entry is qualified by a request for the process under s 35 of the 2004 Act to be pursued as part of the Secretary of State's continuing effort to achieve sufficient information to effect the Appellant's deportation. The second ground therefore argued that the trial Judge's analysis on this point amounted to an error of law on the basis that, in the context of the third *Hardial Singh* principle, at any one time there will be both a *subjective* state of mind (by the Secretary of State) on the question of whether deportation can be effected within a reasonable period, and an *objective* evaluation (by the court) of the justification for detention on the same material. It was argued that the third principle will apply if, at any time, either the SofS forms the subjective view that deportation will not be able to be effected within a reasonable time, or that state of affairs becomes objectively 'apparent' when later reviewed by a court. This ground of appeal was dismissed at paragraph 54 of the judgment.

Vulnerable Groups

28. The HO should consider that some individuals, due to vulnerability, are only suitable for detention in very exceptional circumstances. These include (as per the Guidance):

    (i) Unaccompanied children and young persons under the age of 18;
    (ii) The elderly, especially where significant or constant supervision is required which cannot be satisfactorily managed within detention;
    (iii) Pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this;
    (iv) Those suffering from serious medical conditions which cannot be satisfactorily managed within detention;
    (v) Those suffering serious mental illness which cannot be satisfactorily managed within detention. In exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act;
    (vi) Those where there is independent evidence that they have been tortured;
    (vii) People with serious disabilities which cannot be satisfactorily managed within detention;
    (viii) Enforcement Instructions and Guidance persons identified by the Competent Authorities as victims of trafficking.

Remedies

29. Despite the guidance and statute there are many cases where this is ignored and/or improperly executed. In those circumstances, there are three remedies:

    (i) Bail;
    (ii) Judicial Review ("JR") and
    (iii) Damages.

Bail

30. Bail may be the first action to consider before proceeding with a substantive claim; there being a lower threshold to engage (i.e. bail may be justified before the expiry of any 'reasonable period') and the potential of bail to be a reasonable alternative to detention.

31. There is a right to bail in international and domestic law. Guidelines on detention issued by the United Nations High Commissioner for Refugees state that detention should be used for very specific reasons and should only exceptionally be resorted to. In an individual case the reasons include:

    (i) There are strong grounds for believing that an asylum seeker is likely to abscond or refuse to cooperate with authorities;
    (ii) For initial identity/security verification;

(iii) In connection with accelerated procedures for manifestly unfounded or abusive claims.

32. HO Guidance states that detention is usually appropriate on similar grounds to the first two points above, but also to effect removal. Cases where the HO believes that another country should be responsible for dealing with the asylum claim often result in detention.

33. The sources of immigration bail are as follows:

(i) Schedule 10, Immigration Act 2016;
(ii) Presidential Guidance Note No 1 of 2018 (Guidance for FTT judges);
(iii) Home Office Guidance, 'Immigration bail' v3.0 (10 August 2018)

34. Schedule 10 [1(1, 2)] of the Immigration Act 2016 applies where the SSHD has exercised the power to detain. The relevant matters to consider, set out at [3(2)] are:

(i) Risk of absconding;
(ii) Risk of re-offending;
(iii) Risk of harm

35. Though the SSHD may accept, or a Tribunal order, conditional bail (see [4-8] for potential conditions of bail), the SSHD has within its gift powers to enable an individual to meet conditions such as accommodation (at [9(2)]) and travelling expenses (at [9(4)]), in exceptional circumstances, where (as per paragraph 9 of Schedule 10):

(i) The individual is not able to support themselves;
(ii) SIAC cases (national security);
(iii) Where there is a high risk of harm

36. In practice, bail accommodation is rarely being offered (FOI figures show a 98% drop in offers of accommodation). Given the practical difficulties in a failure to offer and make available accommodation for individuals, consideration may be given to whether that failure should be made subject to a claim for Judicial Review in its own right (see: *Sathanantham* [2016] EWHC 1781 (Edis J); *Baraka* [2018] EWHC 1549; and *Diop* [2018] EWHC 1934).

Judicial Review

37. A large amount of caselaw exists in this area and legal principles are applied on a case-by-case basis. Though there is no fixed statutory limit on the length of time an individual may be detained and the length of the detention does not undermine the power to detain, the length of detention may affect whether, as a matter of discretion, the detention should continue (*Khadir v SSHD* [2005] UKHL 39). If the purpose for

which detention is authorised ceases to apply then the detention cannot be considered authorised (*R v Special Adjudicator and SSHD ex p. B* [1998] INLR 315).

38. The well-known matter of *Hardial Singh* established the principle of an implied limitation of a reasonable time to achieve the purpose sought by detention. Woolf LJ set out the following principles at paragraph 200 of his judgment:

'Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained pending his removal. It cannot be used for any other purpose. Secondly, as 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.' (at 200)

39. The above principles themselves have been subject to judicial clarification and application.

40. As to what is to be regarded as a reasonable time and reasonable steps, it was stated in *Tan Te Lam and others v Superintendent of Tai A Chai Detention Centre and others* [1996] 4 All ER 256 (Privy Council Case, HK):

"First, the power can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal. Secondly, if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorized. Thirdly, the person seeking to exercise the power of detention must take all reasonable steps within his power to ensure the removal within a reasonable time."

41. In *R (on the Application of I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, removal was not practically possible due to the lack of flights between the UK and Afghanistan. The HO harboured hopes that they could come to an arrangement with neighbouring states to Afghanistan to arrange return. Browne-Wilkinson LJ (as he then was) held that the HO 'hope' that negotiations with neighbouring countries would bear fruit was not sufficient, given the time that "I" had already been detained (16 months). Release was ordered on that basis.

Damages

42. The heads of damage, explanation and the method of calculation are set out in the Annex.

Automatic Deportation

43. The relevant legislation regarding Automatic Deportation is the 2007 Act.

44. The automatic deportation regime imposes a duty on the SoS to make a deportation order against a "foreign criminal" unless any of the statutory exceptions apply (s.32 (5) and section 33 of the 2007 Act respectively). The principal exceptions are where removal would breach the UK's obligations under the UN Refugee Convention or the Human Rights Act 1998. Section 36 sets out the interaction between deportation and detention.

Automatic Deportation: caselaw

45. The Court in *R (Hussein) v SSHD* [2009] EWHC 2492 (Admin), [2010] Imm AR 320 was tasked with several issues. The first was a matter of statutory interpretation. It was argued that the Act did not have retroactive effect to apply to those convicted before the Act entered into force, save for the specific category of prisoners caught by the commencement provisions. H had been convicted and sentenced after the Act was enacted but before it entered into force. It was argued that the Act did not purport to have retroactive effect and did not purport to include those who *had* been previously convicted of an offence when the Act entered into force and therefore the SoS had no lawful basis for detention. The Court rejected this argument. Nicol J's reasoning included the following reasoning:

"20. The statute does use the present tense in the sections to which Mr Husain drew attention, but in my judgment this will not bear the significance which he attributes to it. Section 59(4)(d) uses the past tense - 'persons convicted before the passing of this Act.'… [B]ut section 59 is dealing with the mechanics of commencement. It empowered (but did not oblige) the Secretary of State to make certain transitional provisions. It did not itself set the parameters of automatic deportation. That was done by s.32. Thus section 32, read in the light of s.59(4)(d), must have been intended to cover those who had in the past been convicted as well as those who were convicted after commencement"

46. The Court of Appeal confirmed in *R v Kluxen, R v Roastas* [2010] EWCA Crim 1081 that where the automatic deportation provisions apply, it is not appropriate for a criminal court, having a convicted a defendant, to make a recommendation for deportation. In cases where the automatic deportation provisions did not apply, because the sentence was less than 12 months' imprisonment, it would rarely be appropriate to recommend the deportation of the offender concerned, whether or not s/he is a citizen of the EU.

47. The recent case of *Assad v Secretary of State for the Home Department* [2017] EWCA Civ 10 stated this of the importance of the public interest in deportation:

"As the judge noted, the tribunal referred to 'exceptional circumstances' and the public interest in deportation. Yet, in my opinion, it is clear that the tribunal did not appreciate the great weight that must be attributed to the public interest in deportation in cases of

this sort. In paragraph 95 of its determination, quoted above, the tribunal refers only to the public interest in the prevention of disorder and crime without any reference of the great weight to be attached to removal in the public interest. That is a dimension which stretches far beyond narrow questions of deterrence and future risk. It is the moral dimension referred to by Laws LJ in SS (Nigeria). It captures the public revulsion at serious offending by those who are, in one sense, guests in this country. There is no reference to the test it should have been applying, namely that the public interest in deportation would require very compelling reasons to be displaced by article 8 considerations."

Pre-action Considerations

48. An analysis of an individual's detention and a conclusion as to what period of detention is said to be unlawful is a vital pre-action consideration. By way of such analysis, representatives may appropriately consider heads of damage(s) and the likely quantum. Further, consideration as to the identity of Defendant(s) is key. Though the HO may have made the decision to detain, a detention centre (run by a private company) may have caused maltreatment. Consideration should also be given to the principles of vicarious liability and whether an employee had acted on a "frolic of their own" such as to absolve the employer of liability.

49. The first step to effect before commencing a claim will usually be the making of a Subject Access Request, which will yield information pertaining to the detention history, detention reviews, monthly progress reports and GCID (the Home Office database) reports. Further evidence may also need to be obtained, for example, medical evidence relating to pre-existing conditions and how they have been affected by detention.

50. An advice from counsel will give a clear indication of the strength of the claim, possible heads of damage(s), quantum, limitation, potential defendants, whether the claimant should be anonymised and any further evidence which may need to be gathered. If the matter proceeds by way of public funding, the advice from counsel may be used to justify funding the claim. If the matter proceeds by way of private funding, counsel should be contacted to discuss various funding options (such as CFA if the merits are considered strong).

51. Once the relevant evidence and advice has been obtained, consideration should be given to any pre-action protocol which applies (for example, the pre-action protocol for Part 8 claims and/or the Personal Injury Protocol is such a claim is advanced). A letter before claim should identify the following:

(i) The factual (including procedural) background of the individual, the circumstances of detention and other factors relevant to liability and quantum of damages;

(ii) The period of detention said to be unlawful;

(iii) The relevant legal framework;

(iv) Submissions as to the applicability of the law in its factual context;

(v) The type and level of damages sought;

(vi) Any actions the Defendant is expected to take (for example, acceptance of liability and payment of the damages sought);

(vii) Consideration of any ADR proposals;

(viii) Request for any further information and any request for documents which the Secretary of State considers justifies the detention;

(ix) A deadline for reply (note: the CPR suggests 14 days to 3 months; however, this will depend on the complexity of the matter).

Practice and Procedure

52. The ultimate destination of the Claim is of paramount importance. If the individual is still in detention, Judicial Review is the appropriate action to challenge the public law decision to detain, in tandem with a claim for damages. Where the individual has already been released, there is no longer a public law decision to challenge by way of Judicial Review, thus a civil claim for false imprisonment is the appropriate route for damages. A claim for false imprisonment nonetheless requires the Claimant to satisfy the Court of the same issues as would have needed to be proven in a claim for Judicial Review, namely, that the period of detention was unlawful and that damages are an appropriate remedy. Of course, in a claim for Judicial Review, an order quashing the decision to detain and a mandatory order for release will also be pleaded. Matters may be transferred to the Civil Courts (to the Queen's Bench Division for example) from the Administrative Court in order to determine quantum; claims for damages alone may not be brought in the Administrative Court (CPR r54.3(2)).

53. If detention has caused or exacerbated pre-existing medical conditions, a claim may also be made for Personal Injury.

54. It is important to be aware of the different limitation periods that apply:

- *Judicial Review*: promptly and in any event not later than 3 months after the claim arose;

- *False Imprisonment*: 6 years;
- *Human rights claims*: 1 year;
- *Personal Injury*: where this is also claimed, 3 years from the date the action accrued, being the date of knowledge

55. Claims in excess of £100,000 may be brought in the High Court, with claims falling below this sum usually being brought in the County Court (PD 7.A. para 2.1). However, pursuant to PD29 para 2.2 (c) and 2.6, a claim may be pursued in the High Court where the value is less than £100,000 if the complexity of the matter warrants (an application would usually be heard before a Master at a Costs and Case Management Review Hearing to determine the forum).

56. The Claim Form must include a statement of value; however, this statement does not bind the award of damages if the Court is satisfied that a higher award should be made (CPR r16.3 (7)). If a personal injury claim is made in tandem, the Claim Form should state whether the individual expects to recover in excess of £100,000 for general damages. Different levels of claims attract separate Court fees which should be checked prior to commencement. Post-issue by the Court, the Claim Form must be served on the Defendant(s) within 4 months (CPR r7.5(1)).

57. The Particulars of Claim should be served along with the Claim Form or within 14 days after service of the same (CPR r7.4(1)) and, in any event, no later than expiration of the Claim Form (CPR r7.4(2)). Particulars of Claim should be compliant with CPR r16.4 and include, *inter alia*:

    (i) A concise statement of the facts which is said to amount to a civil tort;
    (ii) The damage(s) claimed (including a Schedule of Special Damages if so claimed);
    (iii) Whether the Claimant is seeking aggravated damages or exemplary damages and a statement of the grounds for claiming them;
    (iv) Whether the Claimant is claiming interest on damages and the basis of that claim;
    (v) If a claim for Personal Injury is made in tandem with a claim for false imprisonment, the Particulars of Claim should also be compliant with CPR PD16.4 (including serving any expert evidence with the Particulars of Claim (CPR PD16.4.3);
    (vi) A claim for costs

58. A Defence is required to be served within 28 days (CPR r15.4). The Claimant may, if the Defence is ambiguous in any way, make a Part 18 request for further information. The Claimant may then, if so advised, file and serve a Reply to Defence to answer matters raised by the Defendant.

59. The parties are required to complete an Allocation Questionnaire prior to the matter being listed for a Costs and Case Management Conference ("CCMC") (claims for false imprisonment usually being allocated to the multi-track). The parties should seek to agree Draft Directions, outlining the steps in the case which will need to be taken from the CCMC to trial, including:

    (i) Disclosure;
    (ii) Permission to rely on expert evidence (CPR r35.4), mechanism of instruction of an expert, Part 35 Questions and ultimate delivery if a report;
    (iii) Exchange of Witness Statements;
    (iv) The listing of a Pre-Trial Review and directions for Pre-Trial Checklists (if so required);
    (v) Compilation of bundles and an agreed index;
    (vi) Listing of the trial

60. The Court may also require Costs Budgeting at the CCMC. Costs Budget reports should be filed by each party setting out their incurred and estimated costs in accordance with CPR r3.13. It is vital that parties comply with this requirement, else the consequences of CPR r3.14, being that the party shall be treated as filing a budget comprising only of the applicable Court fees, shall bite. The parties are also required to file and serve Budget Discussion Reports, which record any party's disapproval of the other's budget, in accordance with CPR 13.3(2). Both the Costs Budget Report and the Budget Discussion Report should not be taken lightly and should be prepared well in advance of any deadline to avoid an application for relief from sanctions.

61. A Part 36 offer is a vital tactical consideration which can be made at any time (including prior to commencement) and should be made on the proscribed form (or otherwise in accordance with CPR r36.5) The consequences of a Part 36 offers are as follows:

    (i) If made and accepted more than 21 days before trial, the Defendant shall be liable for the Claimant's costs (CPR r36.5 and 36.13);
    (ii) If the Claimant's offer is rejected and the Claimant is successful at trial with an award of damages more than the offered amount, costs shall be awarded on the indemnity basis and an additional amount of 10% of the damages awarded (CPR r36.17);
    (iii) If the Defendant's offer is rejected and the Claimant fails to beat the offer at trial, the Claimant will be ordered to pay the Defendant's costs from 21 days after the offer was made (CPR 36.17)

62. Careful consideration of the making, refusal or acceptance of a Part 36 offer should be undertaken, including: litigation risk; ability of the client to pursue the matter; and any duty to a legal aid provider.

November 2018

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ANNEX

Head of Damage	Explanation	Calculation/Example(s)
Nominal Damages	Where the Court finds 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.	Damages to reflect the impropriety of the decision, taking into account that the Claimant suffered no resulting loss (typically £1) (*Lumba (WL) v SSHD* [2011] UKSC 12).
Basic Damages	Where the Court finds that the Claimant would not have otherwise been detained but for the relevant decision which has been found to have been vitiated by way of a public law error.	The assessment is not made by way of a mechanical calculation (i.e. a daily rate) but rather assessed on a case-by-case basis (*R (on the application of Evans) v Governor HM Prison Brockhill [1998] EWCA Civ 1042, [1999] 1 QB 1043 at 1060).* The "global approach" used in calculation focusses on two elements (*R (on the application of Evans) v Governor of Her Majesty's Prison Brockhill [2000] UKHL 48)*: (i) Compensation for loss of liberty; and (ii) Damage to reputation, humiliation, shock, injury

		to feelings, and so on, which result from the former
Aggravated Damages	*"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."* (*Thompson and Hsu v Commission of Police for the Metropolis [1998] QB 498).*	*R (B) v SSHD [2008] EWHC 3189 (Admin)*: 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. *R (J) v SSHD [2011] EWHC 1073 (Admin)*: use of handcuffs on arrest. Notably the fact that J 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)*: 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, the conduct in then releasing him late at night and without proper arrangements such that he had to sleep outside the bail hostel, and the conduct as a litigant (which had been found to be in contempt of court).
Exemplary Damages	*"[T]hough 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"* (*Thompson and Hsu v Commission of Police for the Metropolis [1998] QB 498))*	*"[T]he 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… There is no need for malice, fraud, insolence cruelty or similar specific conduct".* (*Muuse v Secretary of State for the Home Department [2010] EWCA Civ 453).*
Personal Injury Damages	Damages for pain, suffering and loss of amenity in causing or	Calculated by reference to the JSC Guides and any relevant precedent(s).

	contributing/exacerbating a medical condition.	
Special Damages	Damages arising from, for example, loss of earnings, medical costs etc.	Calculation by way of reference to the evidence.
Just Satisfaction	Provided for by section 7 of the Human Rights Act 1998 where there have been breaches of Convention rights.	It is important to avoid double-counting when assessing damages for under section 7. Article 5 damages are very likely to overlap with false imprisonment, however, other Convention rights may apply, for example: *Article 3:* detention of individuals with mental health conditions. *Article 8:* for unjustified separation of a family.