THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of his family in connection with these proceedings.

Hilary Term
[2020] UKSC 7
On appeal from: [2018] EWCA Civ 273

JUDGMENT

R (on the application of DN (Rwanda)) (Appellant) *v* Secretary of State for the Home Department (Respondent)

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before

Lord Kerr
Lord Wilson
Lord Carnwath
Lady Black
Lord Kitchin

JUDGMENT GIVEN ON

26 February 2020

Heard on 7 and 8 October 2019

Appellant
Stephen Knafler QC
Gordon Lee
Yaaser Vanderman
(Instructed by Sutovic & Hartigan Solicitors)

Respondent
Robin Tam QC
Julie Anderson

(Instructed by The Government Legal Department)

Intervener
(Bail for Immigration Detainees)
(written submissions only)
Raza Husain QC
Laura Dubinsky
Eleanor Mitchell
(Instructed by Allen & Overy LLP)

LORD KERR: (with whom Lord Wilson, Lady Black and Lord Kitchin agree)

Introduction

1. The appellant was born in Rwanda. He came to the United Kingdom in August 2000 and sought refugee status because of what he claimed was a well-founded fear of persecution if he returned to his native land. His claim was accepted on 26 October 2000 on the basis that he was a member of a particular social group (Hutu). He was recognised as a refugee pursuant to the 1951 Refugee Convention and granted indefinite leave to remain.

2. Since he arrived in the United Kingdom DN has been convicted of a number of offences. He has also been cautioned twice. The most significant of his convictions occurred on 22 January 2007 when he pleaded guilty to assisting the unlawful entry of a non-EEA national to the United Kingdom contrary to section 25 of the Immigration Act 1971. The circumstances leading to the conviction were these: DN and his sister had travelled to the Netherlands where they met a niece. DN returned to the UK with his niece who used his sister's travel documents in an attempt to obtain entry to this country. Although this was a serious offence, it was accepted by the trial judge that DN had had no financial motivation for the crime.

3. At the same court before which he had pleaded guilty to the immigration offence, however, DN was convicted, again on his plea of guilty, of three offences of obtaining or attempting to obtain a pecuniary advantage by seeking or taking employment in another's name. He was sentenced to 12 months' imprisonment for the Immigration Act offence and two months consecutively for each of the three pecuniary advantage offences making a total sentence of 18 months' imprisonment.

4. On 2 July 2007 DN completed the custodial element of his sentence. On the same date the Home Secretary decided to deport him subject to a final decision on the issue of his refugee status. This was followed by a decision on 3 July that DN should be deported pursuant to article 33(2) of the Refugee Convention which allows the expulsion of refugees "whom there are reasonable grounds for regarding as a danger to the security of the country". It was said that DN had been convicted of a "particularly serious crime" and that he "constituted a danger to the community". The decision was based on section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002. He was notified of the decision to deport him, and detained on foot of that decision on 2 July 2007, pursuant to paragraph 2(2) of Schedule 3 to the Immigration Act 1971, which provides that where notice has been

given to a person of a decision to make a deportation order against him, he may be detained under the authority of the Secretary of State pending the making of the deportation order.

5. Pursuant to powers conferred by section 72(4)(a) of the 2002 Act, the Home Secretary had made the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004. This specified several offences which were said to be particularly serious crimes. Assisting unlawful immigration to a member state contrary to section 25 of the 1971 Act was included among them. On that basis, the appellant's conviction for the immigration offence was deemed to warrant his deportation. Section 72(4)(a) also provided that a person convicted of an offence specified in the 2004 Order was rebuttably presumed to have been guilty of a particularly serious crime and constituted a danger to the community.

6. DN appealed the Home Secretary's decision. His appeal was heard by the Asylum and Immigration Tribunal ("AIT") on 22 August 2007. On 29 August the tribunal dismissed the appeal. It found that the appellant constituted a danger to the community of the United Kingdom; that his attempt to circumvent the immigration law in itself amounted to a danger to the community; that he could now be expelled pursuant to article 33(2) of the Refugee Convention; and that he had failed to rebut the presumption created by the 2004 Order that a person convicted of an offence specified by the Order was deemed to have been convicted of a particularly serious crime and to constitute a danger to the community of the United Kingdom. DN sought reconsideration of the decision. On 18 September 2007 that was refused. An application for a statutory review by the High Court of the AIT's decision under section 103A of the 2002 Act was dismissed on 7 December 2007. On 31 January 2008 the Secretary of State signed the deportation order and made an order for DN's detention pending deportation. That order was made pursuant to paragraph 2(3) of Schedule 3 to the 1971 Act which, although subsequently amended, at the time provided that "Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise)." (Emphasis added)

7. Before the deportation order was signed, no suggestion had been made on DN's behalf that the 2004 Order was unlawful. After it was made, however, solicitors, who had replaced those who originally acted for DN, wrote to the Secretary of State making that precise case. On that account the Secretary of State was invited to revoke the deportation order. It was also claimed that DN's detention since 2 July 2007 was unlawful. On 29 February 2008 the appellant was released on

bail by order of an immigration judge. By that time, he had spent 242 days in immigration detention.

The proceedings

8. On 20 March 2008 DN sought judicial review. He claimed that the deportation order should be quashed and applied for a declaration that the 2004 Order was ultra vires the 2002 Act. He also claimed damages and declaratory relief in respect of what he said was his unlawful detention.

9. In two other cases appeals were made from decisions of the AIT in which the vires of the 2004 Order was challenged. These materialised into the decision of the Court of Appeal in *EN (Serbia) v Secretary of State for the Home Department; KC (South Africa) v Secretary of State for the Home Department* [2010] QB 633. Although permission to apply for judicial review had initially been denied the appellant, this was granted by Charles J on 28 November 2008 but stayed pending the decision in *EN*. That decision was duly delivered on 26 June 2009 and the Court of Appeal held that the 2004 Order was ultra vires the enabling power and was therefore unlawful.

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10. On 15 March 2010 the Home Secretary wrote to DN informing him that article 33(2) of the Refugee Convention was no longer relied on as a basis for his deportation, but instead cited a material change of circumstances in Rwanda sufficient to trigger article 1(C)(5) of the Convention (the cessation clause) which, in material part, provides:

> "This Convention shall cease to apply to any person falling under the terms of section A if: …
>
> > (5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality ..."

11. On 15 and 16 May 2012, the Court of Appeal heard an appeal in the case of *R (Draga) v Secretary of State for the Home Department*. DN's application for judicial review was stayed pending the decision in *Draga*. Judgment was given on 21 June 2012 ([2012] EWCA Civ 842). At issue in that case was whether a distinction could be drawn between, on the one hand, a decision to make a deportation order and the making of the order, and, on the other, the decision to

detain. It was argued that a flaw in the decision to make a deportation order/the making of the order did not impact upon the lawfulness of the decision to detain. That argument was, in essence, accepted by the Court of Appeal.

12. Sullivan LJ (who delivered the leading judgment) considered the decision of this court in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245. At paras 65 and 66 of his judgment in that case, Lord Dyson had said:

> "65. … All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the defendant to show that there was lawful justification for doing so. As Lord Bridge of Harwich said in *R v Deputy Governor of Parkhurst Prison, Ex p Hague* [1992] 1 AC 58, 162C-D: 'The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it.'
>
> 66. The causation test shifts the focus of the tort on to the question of how the defendant *would* have acted on the hypothesis of a lawful self-direction, rather than on the claimant's right not *in fact* to be unlawfully detained. There is no warrant for this. A purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 established that both species of error render an executive act ultra vires, unlawful and a nullity. In the present context, there is in principle no difference between (i) a detention which is unlawful because there was no statutory power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law. For example, if the decision to detain is unreasonable in the *Wednesbury* sense, it is unlawful and a nullity. The importance of *Anisminic* is that it established that there was a single category of errors of law, all of which rendered a decision ultra vires: see *Boddington v British Transport Police* [1999] 2 AC 143, 158D-E."

13. At para 88 of Lord Dyson's judgment in *Lumba* a significant passage appears:

> "To summarise, therefore, in cases such as these, all that the claimant has to do is to prove that he was detained. The Secretary of State must prove that the detention was justified in law. She cannot do this by showing that, although the decision to detain was tainted by public law error … a decision to detain free from error could and would have been made."

14. Having reflected on *Lumba*, Sullivan LJ said this at paras 57 and 58 of his judgment:

> "57. Applying the approach in Lord Dyson JSC's judgment in *Lumba* … to the present case, both the deeming decision under section 3(5)(a) and the decision to make a deportation order under section 5(1), although authorised by statute, were made 'in breach of a rule of public law'. The sole basis for both decisions was the unlawful 2004 Order. This error was sufficient to render those decisions unlawful, but did it bear upon, and was it relevant to, the decision to detain under paragraph 2(2) of Schedule 3?
>
> 58. I have not found this an easy question to answer. As a matter of first impression, the answer to the question is obvious: the unlawful decisions under sections 3(5)(a) and 5(1) did bear upon and were relevant to the decision to detain: without the prior decisions there could have been no decision to detain. But this approach does not pay sufficient regard to the statutory scheme as a whole. Making a deportation order is a two-stage process. First the Secretary of State must serve notice of the decision to make a deportation order. The notice explains that there is a right of appeal under section 82(1) against the decision, and sets out of (*sic*) the grounds of appeal under section 84(1). Those grounds are not limited to the ground that removal in consequence of the decision would be unlawful under the Refugee Convention or the ECHR, they enable the person served with the notice to challenge the lawfulness of the notice on the basis of any breach of a rule of public law: 'that the decision is otherwise not in accordance with the law' … If there is an appeal the Secretary of State may not proceed to the second stage of the process - the making of the deportation order - until the appeal has been finally determined …"

And at para 62 Sullivan LJ said:

> "… It would frustrate the operation of the statutory scheme if the Secretary of State was not able to rely upon the tribunal's decision, dismissing an appeal, once time for applying for permission to appeal against the decision had expired, as a lawful basis for making a deportation order."

15. On 27 November 2014 the High Court (Collins J) dismissed the appellant's claim by consent, after both parties agreed that *Draga* was binding on him and that there was no need for a substantive hearing. The judge refused permission to appeal to the Court of Appeal. On 5 January 2015 DN applied to the Court of Appeal for permission to appeal and on 19 January 2016 Vos LJ granted the application.

16. The appeal was heard on 18 January 2018 by the Court of Appeal (Arden, Longmore and Lewison LJJ). On 22 February 2018, the Court of Appeal dismissed the appeal, holding that it was not open to it to depart from the decision in *Draga*: [2019] QB 71. Although permission to appeal to this court was refused on the conventional basis that it is customarily a matter for the Supreme Court to decide whether permission should be given, Arden LJ observed (in para 42 of her judgment) that the issues in the case were worthy of further consideration. Longmore and Lewison LJJ agreed. Permission to appeal was granted by this court on 26 November 2018.

Discussion

17. The reference in para 57 of Sullivan LJ's judgment in *Draga* to the question whether the unlawful decisions (founded on the ultra vires status of the 2004 Order) *bore upon* or were *relevant to* the decision to detain was prompted by a statement in para 68 of *Lumba*. There Lord Dyson had said that the breach of public law must bear on and be relevant to the decision to detain. But his observations there must be read in the light of his more important statements in paras 66 and 88 (cited above at paras 12 and 13). In the first of these passages Lord Dyson made it clear that there was no difference between a detention which is unlawful because there was no statutory power to detain and a detention which is unlawful because the decision to detain was made in breach of a rule of public law. Here, as in *Lumba*, there was no lawful statutory power to detain. The statutory power to which recourse had been had in deciding to make the deportation order, and in making it, was invalid. Detention in this instance was for the express purpose of facilitating the deportation. Without the existence of a deportation order, the occasion for (much less the validity of) detention would simply not arise. To divorce the detention from the deportation would be, in my view, artificial and unwarranted.

18. The making of a deportation order is, as Sullivan LJ said, a two-stage process, involving (a) notice of a decision to deport and (b) the making of the deportation order. Detention at both of these stages is entirely dependent on the decision to deport. Without that decision the question of detention could not arise, much less be legal. The detention was, therefore, inevitably, "tainted" (to borrow the expression from para 88 of Lord Dyson's judgment) by public law error. The principle in *Lumba* applies with full force and effect to the circumstances of this case. In this connection reference to the recent decision of this court in *R (Hemmati) v Secretary of State for the Home Department* [2019] UKSC 56; [2019] 3 WLR 1156 is pertinent. In his judgment in that case Lord Kitchin discussed the *Lumba* decision extensively - see, in particular, paras 49 and 50. I agree entirely with what Lord Kitchin had to say about the *Lumba* decision and *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23; [2011] 1 WLR 1299.

19. As Lord Carnwath has pointed out (in paras 37 *et seq* of his judgment) that principle can be displaced by a specific rule of law. For the reasons that he gives in para 38 there is no such specific rule in the present case. The existence of a right of appeal does not constitute such a rule. The respondent argued that the independent judicial decision made in statutory appeals (per section 82 of the 2002 Act) was a step "removing the legal error" in question. It had, the respondent said, the equivalent effect of a break in the chain of causation, so that the decision to detain became independent of the decision to deport. I do not accept that argument. The notice of a decision to deport/deportation order is a prerequisite to detention under paragraph 2(2)/2(3). The rubric "chain of causation" is inapposite in this context. Where the deportation order is invalid, the unlawfulness of a paragraph 2(2)/2(3) detention which is founded upon it is inevitable. This is not an instance of a series of successive steps, each having, potentially, an independent existence, capable of surviving a break in the "chain". To the contrary, the lawfulness of the detention is always referable back to the legality of the decision to deport. If that is successfully challenged, the edifice on which the detention is founded crumbles.

20. The need for finality in litigation likewise does not warrant displacement of the *Lumba* principle. As Lord Carnwath says (para 38 of his judgment), finality and legal certainty are desirable objectives. But they cannot extinguish a clear legal right. In this case DN was detained on foot of an intended, and then actual, deportation order which proved to be unlawful. His detention was uniquely linked to that deportation order. The unlawfulness of that detention is inescapable. The desiderata of finality and certainty cannot impinge on that inevitable result.

21. I agree with what Lord Carnwath has had to say (in paras 39 and 40) about the judgment of Pill LJ in *Draga* which gave somewhat different reasons from those of Sullivan LJ in dismissing the appeal. For the reasons given by Lord Carnwath, I consider that *Draga* was wrongly decided.

22. I also agree with his discussion about the status of *Ullah* (*Ullah v Secretary of State for the Home Department* [1995] Imm AR 166). Indeed, I would go further and express doubt as to whether that case was correctly decided. In *Ullah* notice of intention to make a deportation order was served on the claimant, who was then detained under the authority of the Secretary of State for 17 days before being released. His release was prompted by the Secretary of State having concluded that the decision to deport was not in accordance with the law. This was because full consideration had not been given to applications made by the claimant before the deportation notice was served. Both Kennedy LJ and Millett LJ considered that paragraph 2(2) of Schedule 3 to the 1971 Act supplied the answer to Mr Ullah's claim for damages for false imprisonment. At the material time, it provided:

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

Kennedy LJ said that "all that is required by paragraph 2(2) of Schedule 3 in order to make detention legitimate is the giving of a notice of intention to make a deportation order". Millett LJ similarly said that "[w]here the requirements of that paragraph are satisfied, the detention is lawful and no claim for false imprisonment can be maintained".

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23. *Ullah* was considered by the Court of Appeal in *D v Home Office* [2006] 1 WLR 1003. At para 120, Brooke LJ (who delivered the lead judgment) said that the court should not regard itself bound to follow *Ullah* and in that paragraph articulated a number of compelling reasons why this should be so. At para 121 he said:

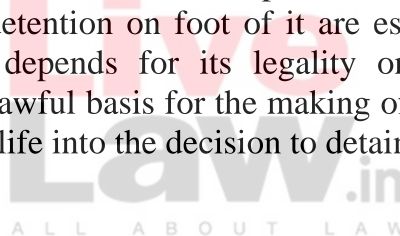
> "… we are at liberty, unconstrained by binding authority, to interpret Schedule 2 to the 1971 Act without any preconceived notions. If we do so, there is nothing there to suggest that Parliament intended to confer immunity from suit on immigration officers who asked themselves the wrong questions, so that their decision to deprive an immigrant of his liberty was a nullity and consequently unlawful."

In that case it had been alleged that immigration officers had made decisions in a manner which fell outside the jurisdiction conferred on them by the 1971 Act. The Court of Appeal held that, in the event that this was established, their decisions would be ultra vires and unlawful; that there was nothing peculiar about a private individual bringing a private law claim for damages against an executive official

who had unlawfully infringed that individual's private rights, and there was nothing in Schedule 2 to the 1971 Act to suggest that Parliament had intended to confer immunity from suit on immigration officers who asked themselves the wrong questions in such circumstances so that their decision to deprive an immigrant of his liberty was a nullity and consequently unlawful; and that, accordingly, immigration officers had no immunity from claims for damages for false imprisonment.

24. As with immigration officers, so with those who caused the appellant to be detained without lawful authority. What Lord Dyson said in *Lumba* about there being no difference between a detention which is unlawful because there was no statutory power to detain and a detention which is unlawful because the decision to detain was made in breach of a rule of public law is pertinent here (see paras 12 and 13 above).

25. If, and inasmuch as, *Ullah* suggests that paragraph 2(2) of Schedule 3 provides a stand-alone authority for lawful detention, no matter what has gone before, and irrespective of the fact that the decision to deport lacks a legal basis, I consider that the decision was wrong and should now be recognised as such. The giving of notice of the decision to make a deportation order, the making of the deportation order, and the detention on foot of it are essential steps in the same transaction. The detention depends for its legality on the lawfulness of the deportation itself. Absent a lawful basis for the making of a deportation order, it is not possible to breathe legal life into the decision to detain.



Conclusion

26. I would allow the appeal and confirm that the appellant is entitled to pursue a claim for damages for false imprisonment. The prospects of success in that claim are not, of course, a matter for this court, particularly because lines of possible defence to the claimant's case, not pursued (or, at least, not pursued with any vigour), might be canvassed on the hearing of the claim.

27. Lord Carnwath has discussed (in paras 44 to 63) the questions of res judicata and issue estoppel. He has said that, despite the parties' reluctance to espouse these as possible ripostes to the appellant's claim, he regarded them as "potentially providing a straightforward answer to the questions raised by this case". So it may be. But this is an area which is distinctly one which is not free from controversy and it seems to me that it is also one where much further diligent thought may be needed.

28. In any event, as Lord Carnwath says, "[s]ince the Secretary of State has not hitherto relied on the principle of res judicata or issue estoppel, it would clearly be

unfair to DN for the court to introduce it at this stage as a possible reason for determining the appeal against him" (para 65). For that reason, as well as what I consider to be the considerable debate that may have to be had concerning whether these issues are relevant to a case such as the appellant's, I have concluded that it would be unwise to express even a tentative view as to their possible relevance.

LORD CARNWATH:

Introduction

29. I agree generally with Lord Kerr's judgment allowing the appeal on the arguments as presented to us. However, since we are disagreeing with a carefully reasoned decision of the Court of Appeal of *R (Draga) v Secretary of State for the Home Department*, given on 21 June 2012 ([2012] EWCA Civ 842) which has stood for some years, it may be helpful to add my own thoughts. I also take the opportunity to raise a topic - res judicata or issue estoppel - which was not discussed in argument, but which to my mind could provide a complete answer in similar cases in the future. I gratefully adopt Lord Kerr's statement of the background law and facts.

Draga

30. In *Draga* the court held that there was no right of action for damages. In the leading judgment (paras 58-62) Sullivan LJ distinguished *Lumba*. Although he thought it obvious, as a matter of first impression, that the unlawful decisions relating to deportation did "bear on" the decision to detain, in the words of Lord Dyson in that case, it was necessary to take account of the different statutory scheme governing detention pending deportation. That provided for a "two-stage process", for an opportunity (under section 84) to challenge the deportation decision on a wide range of grounds including any breach of a rule of public law, and precluding the making of the deportation order until the appeal had been finally determined.

31. It had been accepted by counsel for Mr Draga that in most cases the mere fact that an appeal had been allowed under section 82(1) would not mean that the deportation decision was unlawful in a way relevant to the decision to detain. Sullivan LJ continued:

> "60. … There will, however, be some cases where appeals are allowed by the tribunal on the basis that there was a breach of a rule of public law in the process of making the decision to make the order, where the nature of the breach will have been such as to render the detention unlawful … It must, however,

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be acknowledged that it is difficult to identify any principled basis for distinguishing between those public law errors which will render the decision to detain unlawful and those which will not. Errors of law are many and various and, as Lord Dyson said in para 66 of *Lumba*:

> 'The importance of *Anisminic* is that it established that there was a single category of errors of law, all of which rendered a decision ultra vires …'

61. The statutory scheme does not provide any mechanism for challenging the lawfulness of the kind of decision that was in issue in *Lumba*: an (unlawful) decision to detain where there had been a (lawful) decision to make a deportation order/the making of a (lawful) deportation order. The lawfulness of such a decision can be challenged only by way of judicial review. In sharp contrast, Parliament has established a comprehensive statutory scheme for determining the lawfulness of a decision by the Secretary of State to make a deportation order. The Secretary of State may not make the order until an appeal against the decision to make it has been 'finally determined'…"

There was, he thought, a "very strong case" for treating the tribunal's decision under section 82(1) (subject to appeal to the Court of Appeal) as determinative of the issues as between the parties, "in order to ensure finality in litigation and legal certainty", and so as not to "frustrate the operation of the statutory scheme" (paras 61 and 62).

32. Pill LJ agreed that the detention was lawful because it was -

> "… pursuant to the apparently lawful 2004 Order made by the Secretary of State following the procedure specified in section 72 of the 2002 Act, including placing the Order before Parliament …
>
> … I do not consider that the analysis is invalidated because the same actor, the Secretary of State, made both the 2004 Order and the deportation order. In making both orders, the Secretary of State was acting under statutory powers but the power to make the 2004 Order was distinct from the power that then arose to make a deportation order in reliance on it." (paras 81 and 82)

He distinguished *R v Governor of Brockhill Prison, Ex p Evans (No 2)* [2001] 2 AC 19, in which the prison governor had sought to justify detention by reference to views expressed by the Divisional Court subsequently held to be erroneous:

> "That is distinguishable from a deportation order based on the apparently lawful 2004 Order, lawfully made and also, in this case, upheld by the decision of the tribunal promulgated on 15 February 2007. Lord Hope, at p 35A to C in *Evans*, distinguished the case from one where the governor was acting 'within the four corners of an order which had been made by the court.'" (para 83)

33. Permission to appeal from the Court of Appeal in *Draga* was refused by this court.

The arguments in the present appeal

34. Mr Knafler QC for DN submits that this case falls clearly within the principle established in *Lumba*. Whichever of the tests enunciated in the various judgments applies, the illegality of the deportation order bore directly on the decision to detain and rendered it ultra vires so as to preclude the Secretary of State from relying on it as justification for the detention. He submits that *Draga* was wrongly decided. For this purpose he submits that a distinction must be drawn between different categories of error which found an appeal against a deportation order. Where the dispute is not simply about the merits of the decision, but, as here, goes to its legal validity, the decision of the tribunal cannot be relied on in subsequent proceedings. By way of illustration, he contrasts a case where the tribunal disagrees with the Secretary of State on the application of article 8 of the European Convention on Human Rights ("ECHR") in a particular case, with one where the Secretary of State has simply ignored the Convention altogether. The latter error, unlike the former, would render the earlier decision ultra vires, and so of no effect in subsequent proceedings.

35. On the other side Mr Tam QC for the Secretary of State submits that *Draga* was correctly decided. He accepts that, on a "strict application" of the ultra vires doctrine, any public law error underlying the decision to detain could be said to render it a nullity and in theory could give rise to a claim for damages. However, he argues against a "strict doctrinal approach", relying (inter alia) on the caution expressed by Lord Walker of Gestingthorpe in *Lumba* about translating judicial review principles too readily to other forms of private law action, such as false imprisonment (*Lumba*, para 193; see also *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22; [2019] 2 WLR 1219, paras 57-58). He submits that, taking any of the tests proposed in *Lumba*, the legal error must be one relating

to the decision to detain itself. A decision made "two or more steps back", in this case in the secondary legislation relating to the decision to deport, is too remote to satisfy the *Lumba* test. He suggests that this approach is consistent with the "empirical approach" taken by the courts to issues of invalidity, fashioning in each legal context "a solution that is practical and pragmatic".

36. Mr Tam further submits that the power to detain is dependent simply on the giving of the relevant notice as a matter of fact, regardless of any issue as to its legality (following *Ullah v Secretary of State for the Home Department* [1995] Imm AR 166). More generally he follows Sullivan LJ's reliance on the specific statutory appeal process available in respect of the decision to deport, and on the importance of "finality and legal certainty" in this area of the law.

Discussion

37. I start from the position that the decision to detain in this case was directly dependent on the deportation decision. Without it there would have been no detention, nor any legal basis for detention. Even if the illegality was "two steps back" as Mr Tam submits, that step was the foundation of what followed. I agree therefore with Mr Knafler that DN's claim for damages comes clearly within the *Lumba* principle, unless excluded by some specific rule of law, statutory or otherwise.

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38. No such rule, in my view, emerges from the reasons of the Court of Appeal in *Draga* nor from the submissions for the Secretary of State before us. Sullivan LJ referred to the existence of a statutory right of appeal against deportation; the risk of "frustrating" that statutory scheme; the difficulty of distinguishing between different grounds of appeal; and, the need to ensure "finality in litigation and legal certainty". I do not, with respect, see how the mere existence of a right of appeal can be read as taking away what would otherwise be a clear common law right, absent a specific statutory exclusion; nor why the existence of such a right can be said to frustrate or impede the working of the appeal process. Similarly, the wide scope of the statutory grounds of appeal under section 84, extending to issues of law as well as of policy or fact, does not, expressly or implicitly, detract from the clear conceptual distinction between the two in the context of a common law claim for false imprisonment. Similarly, finality in litigation and legal certainty are of course desirable objectives, but that in itself cannot convert them into legal rules in the context of a common law claim, except to the extent that they are reflected in recognised defences such as res judicata and issue estoppel (to which I will return below).

39. In his concurring judgment in *Draga* Pill LJ made two additional points, not in terms adopted by Sullivan LJ nor by Mr Tam before us. With respect I find neither

persuasive. First, his suggested grounds for distinguishing the *Brockhill* case are not supported by the full passage in the judgment of Lord Hope of Craighead to which he referred. Lord Hope said of the prison governor:

> "His position would have been different if he had been able to show that he was acting throughout within the four corners of an order which had been made by the court for the applicant's detention. The justification for the continued detention would then have been that he was doing what the court had ordered him to do." (*R v Governor of Brockhill Prison, Ex p Evans (No 2)* [2001] 2 AC 19, 35)

Here there was no comparable order made by the court "for the applicant's detention", nor could the Secretary of State claim in that respect to be doing what any court or tribunal had "ordered" him to do. The decision of the tribunal, confirmed by the High Court, related only to deportation.

40. Secondly, I note Pill LJ's observation that Sullivan LJ's analysis was not invalidated because "the same actor" (the Secretary of State) made both orders. This I take to be a reference to the so-called "Theory of the second actor", developed by Professor Forsyth among others "to explain how an unlawful and void administrative act may none the less have legal effect":

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> "It is built on the perception that while unlawful administrative acts (the first acts) do not exist in law, they clearly exist in fact. Those unaware of their invalidity (the second actors) may take decisions and act on the assumption that these (first) acts are valid …" (Wade and Forsyth *Administrative Law* 11th ed, pp 251-252; see also footnote 145 for a list of judicial citations.)

The best known example (though not at the time explained in those terms) is *Percy v Hall* [1997] QB 924, in which the Court of Appeal rejected a claim against police officers for wrongful arrest, where the byelaws on which they had relied were later found to have been invalid. Counsel for Mr Draga had sought to distinguish that case on the grounds that here "there was … only one decision-maker throughout the process … the Secretary of State" (para 53). Whatever the precise scope of the "second actor" theory, that distinction seems to me in principle correct. Where the government, through the Secretary of State, was directly responsible for the order later found to be unlawful, it would be odd if it could rely on it to support the validity of later actions based on it.

41. I note also that neither Lord Justice placed reliance on the decision of the Court of Appeal in *Ullah*. In my view they were right not to do so. Mr Tam mentions that case somewhat tentatively in support of his argument that it is enough that a notice of the decision to deport has been served in fact, regardless of its basis in law. In setting out the arguments before him (paras 44-45, 52) Sullivan LJ had referred in some detail to the reasoning of the Court of Appeal in *Ullah* as then relied on by counsel for the Secretary of State, but he noted also the reasons given by Brooke LJ in *D v Home Office* [2005] EWCA Civ 38; [2006] 1 WLR 1003, paras 120-121, for regarding the decision as no longer binding on the court in the light of subsequent case law, including the *Brockhill* case. I take, from the lack of any mention of *Ullah* in the discussion section of his judgment, that Sullivan LJ shared Brooke LJ's view. If so, I would respectfully agree.

42. More generally, Mr Tam relies on the case law as supporting what he calls an "empirical approach", leading the court to fashion solutions that are "practical and pragmatic", and he asks us to do the same. Whether or not that is a fair interpretation of the cases to which he refers, it is not in my view an acceptable approach in considering the available defences to a common law tort as well-established and fundamental as that of false imprisonment. Indeed it contradicts the strict approach taken in that context by the House of Lords in the *Brockhill* case, where "practicality and pragmatism" might well have been thought to lend strong support to the prison governor's position.

43. Accordingly, on the arguments as presented to the court, I would hold that *Draga* was wrongly decided, and allow the present appeal.

Finality, res judicata and issue estoppel

44. During the course of argument I invited both parties to consider whether the Secretary of State's position could have been supported by reference to the principle of res judicata or issue estoppel. Mr Tam did not take up the implicit invitation to adopt that as part of his case, but both parties produced helpful notes on the subject. The general theme of their submissions was that res judicata as such was of limited or at most doubtful application in the context of judicial review or public law. Since this aspect may arise in other similar cases which may come before the courts, I feel it desirable to explain why I find those doubts to be unjustified, and why, subject to further argument, I regard res judicata or issue estoppel as potentially providing a straightforward answer to the questions raised by this case.

The authorities

45. By way of introduction, I refer to the speech of Lord Bridge of Harwich, agreed by the other members of the House in *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273. This was a planning case. In 1982 the owner had appealed under section 88 of the Town and Country Planning Act 1971 against enforcement notices issued by the local planning authority alleging a material change of use of certain properties to use as a hotel or to use as a hostel. On appeal the inspector quashed the notices, finding that the use was correctly characterised as hotel use, not as hostel use, and that the hotel use had been carried on since 1960. In 1985 the council issued further enforcement notices alleging a material change of use of the properties to use as hostels. It was common ground that there had been no change of use since 1982. The Court of Appeal held that in these circumstances an issue estoppel arose which prevented the council on the appeals against the 1985 notices from contending that the use of either property was as a hostel, so contradicting the finding made by the 1982 inspector. The authority's appeal to the House of Lords was dismissed.

46. The sole reasoned speech was given by Lord Bridge, agreed by his colleagues. He made clear that for these purposes there was no distinction between public and private law:

> "It is well established that a statutory body cannot by contract fetter its own freedom to perform its statutory duties or exercise its statutory powers and by parity of reasoning it has been held that no such fetter can arise from an estoppel by representation … But the rationale which underlies the doctrine of res judicata is so different from that which underlies the doctrine of estoppel by representation that I do not think these authorities have any relevance for present purposes.
>
> The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims 'interest reipublicae ut sit finis litium' and 'nemo debet bis vexari pro una et eadem causa'. These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a

> legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions." (p 289)

He distinguished between issues of law or fact, such as, in that case, whether there had been a material change of use, and issues of planning judgement which would arise under other grounds of appeal, in respect of which members of the public would have the right to attend any public inquiry and to be heard as objectors against the grant of planning permission.

47. It is clear from the passage quoted above that the case did not rest on any peculiarity of planning law, but was based on a principle of "fundamental importance" in both private and public law, unless excluded by the particular statutory scheme. Nor is there anything to suggest that the principle is one-sided, in public law any more than in private law. It may be invoked by either party, public or private. Indeed the two Latin maxims quoted by Lord Bridge make clear that it is a principle of general public concern, quite apart from the particular interests of the parties, public or private. It is true that the passage refers to an issue which establishes the existence of "a legal right", but that phrase is applicable, not only to the legal right of a private owner in respect of his property, but equally to the legal right of the authority to bring enforcement proceedings in the public interest.

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48. Later in the speech he explained the difference in this context between two categories - "estoppel per rem judicatam" and "issue estoppel" - by reference to the classic description of Diplock LJ in *Thoday v Thoday* [1964] P 181. Of the latter Diplock LJ said:

> "The second species, which I will call 'issue estoppel', is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical

> condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was." (p 198)

49. A useful illustration of the strength of the principle in a quasi-public context, again at the highest level, is *Watt v Ahsan* [2007] UKHL 51; [2008] AC 696. A Labour Party councillor, of Pakistani origin, had brought a claim against the Labour Party in the employment tribunal for unlawful discrimination on racial grounds (contrary to section 12 of the Race Relations Act 1976) in failing to select him as an election candidate. A preliminary issue as to whether the Labour Party was a qualifying body for the purposes of section 12 was determined by the tribunal in his favour, and an appeal to the Employment Appeal Tribunal was dismissed. Before the final determination of the claim on the merits, it was held by the Court of Appeal in unrelated proceedings that a political party was not acting as a qualifying body when selecting candidates for public office. However, the tribunal regarded itself as bound by its original decision, and upheld the claim. Its decision was upheld by the House of Lords (disagreeing with the majority of the Court of Appeal).

50. In his dissenting judgment in the Court of Appeal ([2005] EWCA Civ 990; [2005] ICR 1817), Sedley LJ explained that public and private law "march together on jurisdictional issues":

> "In neither field may a jurisdictional challenge to the decision of an inferior court or tribunal act as proxy for an appeal. This is fundamental to the functioning of the legal system." (para 29)

He added:

> "33. These interlocking principles of precedent, appeal and finality cannot coexist with a separate doctrine, founded on a catholic meaning of jurisdiction, which undercuts them. In agreement with the Employment Appeal Tribunal, I consider that the effect of [counsel's] argument is to erect such a doctrine. It is, in effect, an argument that an error of law on the part of a tribunal, although standing uncorrected by any superior court, invalidates all its subsequent proceedings not simply by exposing them to a successful appeal but by allowing them and their outcome to be disregarded or collaterally challenged. Such a proposition is serious enough when applied to an excess of a tribunal's constitutive jurisdiction, but there it

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is generally irresistible because the courts cannot ordinarily equip a nullity with the force of law. To apply it to an excess of a tribunal's adjudicative jurisdiction, by contrast, would be to supplant the entire edifice of finality and appeal by (to use a deliberate oxymoron) a retroactive system of precedent."

51. Agreeing with that approach, in the leading speech in the House of Lords, Lord Hoffmann said:

> "30. Although it is well established that the parties cannot by agreement or conduct confer upon a tribunal a jurisdiction which it does not otherwise have, the question in this case is whether an actual decision by a tribunal that it has jurisdiction can estop the parties per rem judicatam from asserting the contrary. Neither Buxton LJ nor Rimer J cited any authority which decides that it cannot. The law on this point is not at all trite. Although estoppel in pais and estoppel per rem judicatam share the word estoppel, they share very little else. The former is based upon a policy of giving a limited effect to non-contractual representations and promises while the latter is based upon the altogether different policy of avoiding relitigation of the same issues. It is easy to see why parties should not be able to agree to confer upon a tribunal a jurisdiction which Parliament has not given it. And if they cannot do this by contract, it would be illogical if they could do it by non-contractual representations or promises. But when the tribunal has decided that it does have jurisdiction, the question of whether this decision is binding at a later stage of the same litigation, or in subsequent litigation, involves, as Sedley LJ explained in his dissenting judgment, quite different issues about fairness and economy in the administration of justice.
>
> 31. Issue estoppel arises when a court of competent jurisdiction has determined some question of fact or law, either in the course of the same litigation (for example, as a preliminary point) or in other litigation which raises the same point between the same parties: see *Thoday v Thoday* [1964] P 181, 198. The question is therefore whether the appeal tribunal was a court of competent jurisdiction to determine whether the Labour Party was a qualifying body within the meaning of section 12."

52. Having answered that question in the affirmative, he noted the possibility of departing from the rule in "special circumstances", but held that such circumstances did not exist on the facts of that case:

> "34. … It is true that the severity of this rule is tempered by a discretion to allow the issue to be reopened in subsequent proceedings when there are special circumstances in which it would cause injustice not to do so: see *Arnold v National Westminster Bank plc* [1991] 2 AC 93. As Lord Keith of Kinkel said, at p 109, the purpose of the estoppel is to work justice between the parties …"

In the instant case he thought it would be unjust not to apply the rule, against the background that the claimant had been involved in a lengthy and expensive hearing, during which the merits had been fully examined, and that it would be quite unfair for him to have to start again in the County Court.

53. Although that passage might suggest that the court has a broad discretion to disapply the principle in the interests of "justice", reference to the *Arnold* case itself shows the limits of that approach. That case related to the construction of a lease providing for rent reviews at five-yearly intervals, such reviews to be carried out by reference to a hypothetical lease for the residue of the term. In the context of the first rent review, an issue arose as to whether the hypothetical lease was to be construed as itself containing a rent review clause. Walton J held, on an appeal from an arbitrator, that it was not to be so construed, and refused a certificate (under the Arbitration Act 1979) allowing an appeal against his decision. In subsequent cases between other parties, it was held by the Court of Appeal that his decision on this point was wrong. Before the date of the second five-year review the tenants sought a declaration as to the basis of review, relying on the later decisions. The landlord applied to strike out the claim as barred by issue estoppel. It was held by the House of Lords, agreeing with the lower courts, that the action was not barred.

54. In the leading speech in *Arnold*, Lord Keith affirmed the general principles governing res judicata and issue estoppel. He emphasised that there was no logical difference between "a point which was previously raised and decided and one which might have been but was not" (p 108); nor should there be "a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success" (p 109). However, he recognised the existence of an exception for "special circumstances" as he defined them:

> "In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special

> circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result …" (p 109)

55. He went on to consider the extent to which the special circumstance could involve a decision on a point of law, posing the question thus:

> "If a judge has made a mistake, perhaps a very egregious mistake, as is said of Walton J's judgment here, and a later judgment of a higher court overrules his decision in another case, do considerations of justice require that the party who suffered from the mistake should be shut out, when the same issue arises in later proceedings with a different subject matter, from reopening that issue?" (p 109)

He concluded that justice required an exception to the rule, against the background of Walton J's erroneous decision and refusal of a certificate allowing an appeal:

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> "I consider that anyone not possessed of a strictly legalistic turn of mind would think it most unjust that a tenant should be faced with a succession of rent reviews over a period of over 20 years all proceeding upon a construction of his lease which is highly unfavourable to him and is generally regarded as erroneous …" (p 110)

56. It is important to note that there was no suggestion that the decision on the first rent review could be reopened. The potential unfairness arose when the same issue arose in later proceedings "with a different subject matter". In the context of a lease with 20 years to run it was unfair that all future reviews should be governed by the erroneous decision on the first review.

57. Finally, for completeness I should refer to the most recent discussion of the topic in this court: *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160. For present purposes, it is sufficient to cite Lord Sumption's summary of the effect of *Arnold*:

"22. *Arnold* … is accordingly authority for the following propositions.

(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.

(2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.

(3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

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Issue estoppel in the present case

58. Applying the thinking of those authorities to the present case, and subject to any argument in a future case, the answer seems to me relatively clear. DN's private law claim for damages depended on the fact of detention and the absence of lawful justification. The former is not in doubt. But its lawfulness depended on the lawfulness of the deportation decision at the time it was made. That issue was conclusively determined by the decision of the tribunal in August 2007 and the decision of the High Court rejecting the application for review. There is no unfairness in treating that decision as precluding a claim for damages based on the alleged illegality of the original deportation decision, given that DN had had the opportunity to challenge it by reference to the invalidity of the 2004 Order, and failed to take it. In that respect *Arnold* is arguably a stronger case for an exception, since the tenant had taken the relevant point, but was precluded by the statute from challenging Walton J's decision.

59. On the other hand, as in that case, it would be unfair to treat the decision as binding as respects the future conduct of the Secretary of State, once it had been shown to be erroneous by the higher courts. It could not be relied on to justify DN's continuing detention following the decision in *EN (Serbia)*. It matters not whether that is treated as an application of the *Arnold* "special circumstances" exception, or of the Secretary of State's duty in public law to keep the proposed deportation and detention under continuing review in the light of changing circumstances. As it happens DN had by then been released in any event.

The parties' submissions on res judicata

60. Mr Knafler relied on cases which say, as he puts it, that "res judicata and issue estoppel, as those terms are understood in private law, either have no application in judicial review or do not apply in the ordinary way". They include at Court of Appeal level: *R v Secretary of State for the Environment, Ex p Hackney London Borough Council* [1984] 1 WLR 592, *R (Munjaz) v Mersey Care NHS Trust* [2003] EWCA Civ 1036; [2004] QB 395, *Ocampo v Secretary of State for the Home Department* [2006] EWCA Civ 1276. He submits that *Thrasyvoulou* should be seen as "a particular decision in a particular context with a specific and self-contained statutory code". Alternatively he argues that Lord Bridge had focused on the statutory construction of the particular statutory code there in issue. His words could not be applied to the special protection afforded to personal liberty, which could be diluted by only "the plainest statutory language", citing *Khawaja v Secretary of State for Home Department* [1984] AC 74, 122F per Lord Bridge.

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61. He also referred to a case in which *Thrasyvoulou* was cited, but an exception made. This was another planning case, this time at High Court level: *R (East Hertfordshire District Council) v First Secretary of State* [2007] EWHC 834 (Admin). On appeal against an enforcement notice alleging erection of a building without complying with the approved plans, the inspector had felt bound to allow the appeal and quash the notice because of the inadequacy of the plans with which he had been supplied, but he purported to do so "without prejudice" to the service of a further enforcement notice by the council if they thought it expedient to do so. In response to a further enforcement notice, the owner pleaded issue estoppel. Sullivan J accepted that Lord Bridge's statement of principle in *Thrasyvoulou* remained authoritative, and unaffected by Lord Hoffmann's comments on the limited role of estoppel in modern public law in *R (Reprotech) v East Sussex County Council* [2002] UKHL 8; [2003] 1 WLR 348. However he considered that the circumstances of the instant case were so unusual as to amount to "special circumstances" justifying a departure from the estoppel rule.

62. Mr Tam also referred to the cases in which doubts have been expressed as to the relevance of these principles in judicial review, the reasons for which appeared to stem from a number of factors, mentioned by different courts at different times:-

i) A lack of formal pleadings in judicial review proceedings;

ii) There being no *lis* between the named parties in the judicial review proceedings that is being determined;

iii) The lack of finality in the determination of the judicial review proceedings, as in many cases the relief leaves the redetermination of the underlying dispute to the original decision-maker;

iv) The discretionary nature of judicial review relief;

v) The fact that, in judicial review, there is always a third party who is not present: the wider public or public interest, which should not be prejudiced if the court on the first occasion does not have all of the relevant material and argument before it when deciding the first judicial review application;

vi) The interaction between the acceptance and rejection of separate grounds in judicial review proceedings and the result of the application, with the consequent limitation on the ability of a successful party in judicial review to appeal in relation to grounds on which it was unsuccessful.

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63. Mr Tam observed that most of these considerations apply with limited force to an immigration appeal, which does generally decide the issues between two parties and in which an identifiable *lis* can be formulated. He suggested that the most relevant "judicial finding" in this context would be the finding that DN had been convicted of "a particularly serious crime", and discusses what he sees as the potential "analytical" difficulties in seeking to prevent DN from reopening this issue in subsequent proceedings.

64. It is not necessary, or indeed appropriate, in the context of the present appeal to reach a concluded view on these points. I would however make the following observations:

i) None of the judgments referred to by Mr Knafler went further than to express "doubts" on the question. More importantly in none of them was reference made to *Thrasyvoulou*, or in particular to Lord Bridge's emphasis on the fundamental importance of the principle in both public and private law. I note, for example, Hale LJ's statement in *Munjaz* (para 79) that "… issue estoppel is a doctrine appropriate to proceedings in private law" and contrasting judicial review where "there is always a third party who is not present: the wider public or public interest …". It is very unlikely that she would have spoken in these terms if Lord Bridge's words had been drawn to her attention.

ii) Wade and Forsyth *Administrative Law* 11th ed (2014), p 201, in a section headed "Res Judicata", states that res judicata plays -

> "… a restricted role in administrative law, since it must yield to two fundamental principles of public law: that jurisdiction cannot be exceeded; and that statutory powers and duties cannot be fettered."

However, it is accepted that within those limits the principle can extend to "a wide variety of statutory tribunals", of which examples are given, including *Thrasyvoulou*. In the present context those principles do not pose an impediment; the tribunal had full jurisdiction to determine the legality of the detention, and there is no fetter on the Secretary of State's exercise of powers in the future.

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iii) In any event, it is misleading to consider cases on judicial review generally. Although the present proceedings were brought by judicial review, the issues are the same as would have arisen in an ordinary common law action for damages for false imprisonment.

iv) Mr Knafler's suggestion as to the narrow scope of *Thrasyvoulou* is impossible to reconcile with the clarity and generality of Lord Bridge's statement of the principle, with the support of the whole House. There is no reason why it should not apply in the present context where the statutory immigration appeal process is equally specialised and self-contained.

v) Lord Bridge's words in *Khawaja* about the special protection for personal liberty were directed to imprisonment without trial. The issue here is not about DN's personal liberty, but about the ordinary disciplines applicable to a common law claim for damages.

vi) As regards the *East Hertfordshire* case, while I agree with Sullivan J that nothing said in *Reprotech* detracts from the authority of Lord Bridge's statement of principle, the decision turned on its very special facts and gives no further assistance in the present context.

vii) I agree with Mr Tam that the considerations which have led to doubts about the application of the principle in judicial review generally do not apply with the same force in the present context. However he seems to miss the point as to its potential application in this case. The relevant issue is not the seriousness of the crime, but the lawfulness of the decision to deport DN, and hence his detention, at the relevant time. That is the issue on which there was a definitive and "final" ruling in 2007, and which arises directly in his claim for false imprisonment.

Conclusion

65. Since the Secretary of State has not hitherto relied on the principle of res judicata or issue estoppel, it would clearly be unfair to DN for the court to introduce it at this stage as a possible reason for determining the appeal against him, whatever the position may be in future cases. On the arguments as presented to us, for the reasons set out earlier in this judgment, I would allow the appeal.

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