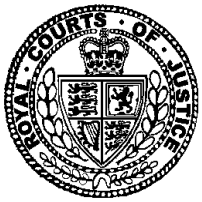

Neutral Citation Number: [2018] EWCA Civ 273

Case No: C4/2015/0034

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
HIGH COURT, QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE COLLINS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2018

Before :

LADY JUSTICE ARDEN
LORD JUSTICE LONGMORE
and
LORD JUSTICE LEWISON

- -

Between :

DN (Rwanda)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -
- -

Stephen Knafler QC and Gordon Lee (instructed by **Sutovic & Hartigan Solicitors**) for the **Appellant**
Julie Anderson (instructed by **The Government Legal Department**) for the **Respondent**

Hearing dates : 18 January 2018

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Approved Judgment

LADY JUSTICE ARDEN :

1. ISSUE FOR DETERMINATION AND SUMMARY OF CONCLUSION

1. As Lord Bridge held in R*(Khawaja) v Secretary of State for the Home Department* [1984] AC 74, 122, we should regard "with extreme jealousy" the power of the Executive to detain a person without trial. In addition, where a person is detained with a view to expulsion (or any other form of removal), there is an even stronger case "for a robust exercise of the judicial function of safeguarding a person's rights." (loc.cit.). In this case, the appellant is no longer detained but he seeks compensation for detention. That detention was for the purposes of deportation pursuant to an order made by the Secretary of State which, as a result of a later decision of this Court, is now appreciated to have been wrongly made.

2. The appellant is a Rwandan national who had been granted refugee status but who had subsequently been convicted in the UK of serious offences. At the conclusion of his term of imprisonment, the Secretary of State informed him that she proposed to deport him. She made a deportation order using powers conferred by the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 ("the 2004 Order"), made pursuant to s.72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). These powers deemed the appellant's offences automatically to constitute "particularly serious offences" for the purpose of Article 33(2) of the Refugee Convention. The aim of the powers was to enable the Secretary of State to deport a person even if he had previously been granted refugee status.

3. The appellant appealed against the Secretary of State's decision to make a deportation order but his appeal was unsuccessful. By the end of 2007, he had exhausted all avenues of appeal. On 31 January 2008, the Secretary of State, using her powers of administrative detention conferred by the Immigration Act 1971 ("the 1971 Act"), schedule 3 paragraph 2(3) made an order for the appellant's detention pending deportation. Paragraph 2(3) contains a broad power to detain:

> 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).

4. The appellant thereupon brought a claim for judicial review of the deportation order, seeking to quash the order, to obtain a declaration that the operation of s.72 of the 2002 Act was incompatible with Directive 2004/83/EC and Article 6 of the European Convention on Human Rights ("the Convention"), and to seek declaratory relief and damages for unlawful detention. Those proceedings were, however, stayed to enable the question of the legality of the powers under which the deportation order had been made to be resolved in other proceedings. Those other proceedings led to the judgment of this Court in *EN (Serbia) v Secretary of State for the Home Department* [2010] QB 633, where this Court (Laws, Hooper and Stanley Burnton LJJ) held that the 2004 Order was *ultra vires* and consequently unlawful. In particular this Court

held that, for the purpose of removing international protection, the Refugee Convention did not permit there to be an automatic presumption as to what was a serious offence and the person in question had to constitute a danger to the community.

5. Before the judgment in *EN Serbia* was delivered, the appellant was released from detention. However, he had spent 242 days in detention pending deportation.

6. The appellant's proceedings were, however, once more brought to a halt, this time potentially on a permanent basis, by another decision of this Court: *R(o/a Draga) v Secretary of State for the Home Department* [2012] EWCA Civ 842. In that case, the respondent was a Kosovan national who had refugee status. The facts were complex, and I will refer to the material facts necessary to understand the relevant parts of this Court's decision. The appellant had been convicted of a serious offence. The Secretary of State made a deportation order against him again using her powers in the 2004 Order. The time for appealing against that order expired. Mr Draga was then detained and he appealed unsuccessfully against his deportation.

7. Mr Draga also began judicial review proceedings which were stayed pending the decision in *EN Serbia*. After that decision, the Secretary of State stated that he had lost his refugee status due to a change in the circumstances in Kosovo. The First-tier Tribunal (FTT) held that the cessation order was a device to deport him and therefore unlawful and that the deportation order was unlawful. Mr Draga was released from detention. Nonetheless, this Court (Pill, Sullivan and Kitchin LJJ) (reversing the judge in part) held that the detention was lawful up to the point in time when the Secretary of State issued the cessation order. After that time, it was unlawful.

8. Applying that reasoning here would mean that the appellant too was lawfully detained even if the deportation order was unlawful. On 27 November 2014, Collins J accordingly dismissed his claim by consent because *Draga* was binding on him. The Chancellor, Sir Geoffrey Vos, has, however, given permission to appeal to this Court against that order. On this appeal the appellant contends that *Draga* was (a) wrongly decided and (b) decided *per incuriam*, and that this Court should revisit the arguments on which it was based.

9. I propose to summarise my conclusion at this point. After careful consideration of the parties' submissions, I have concluded that *Draga* is binding in this Court and that none of the routes put forward for taking a different course is open to us. In particular, as I will explain, *Draga* is a decision of this Court applying the recent decision of the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2012] AC 245. It is directly binding on us and there is no basis for holding that it was decided *per incuriam*. Any departure from *Draga* is now a matter for the Supreme Court.

10. I need to examine the reasoning of this Court in *Draga* in a little more detail. As it turns on the decision of the Supreme Court in *Lumba* I need first to consider the relevant reasoning in *Lumba*. I will then summarise the relevant principles from the doctrine of precedent, the parties' submissions and (under the heading *Discussion*, below) the full reasons for my conclusions.

2. R (LUMBA) V SECRETARY OF STATE FOR THE HOME DEPARTMENT

11. *Lumba* resolves a dispute that had developed in the lower courts as to whether detention of a foreign national prisoner, who was subject to a deportation order, could result in liability for false imprisonment where the Secretary of State made a public law error. The answer given by the Supreme Court was that there is no distinction between detention where there was no authority to detain and detention where the authority stemmed from a public law error. There was a public law error in that case because the detention was ordered under an unpublished policy which provided for a blanket detention of all foreign national prisoners on release from prison.

12. The Supreme Court then considered when the detention resulting from the public law error could result in a liability for substantial damages.

13. The Supreme Court held by a majority that false imprisonment was actionable regardless of whether the victim suffered harm. Moreover, a breach of the principles of public law could in an appropriate case found an action at common law for damages of false imprisonment although not every breach of public law was sufficient to give rise to such a cause of action. However, the breach had to "bear on and be relevant to" the decision to detain. Lord Dyson, giving the majority judgment, held:

> 68. I do not consider that these arguments undermine what I have referred to as the correct and principled approach. As regards Mr. Beloff's first point, the error must be one which is material in public law terms. It is not every breach of public law that is sufficient to give rise to a cause of action in false imprisonment. In the present context, the breach of public law must bear on and be relevant to the decision to detain. Thus, for example, a decision to detain made by an official of a different grade from that specified in a detention policy would not found a claim in false imprisonment. Nor too would a decision to detain a person under conditions different from those described in the policy. Errors of this kind do not bear on the decision to detain. They are not capable of affecting the decision to detain or not to detain.

14. The Secretary of State was liable for the tort of false imprisonment. She had the burden of showing that the detention was justified in law. She could not do this because it was tainted by public law error. The fact that some of the claimants could have been detained lawfully did not render their detention lawful.

15. On the other hand, if it was shown that a claimant would have been lawfully detained in any event, he suffered no loss or damage as a result of the unlawful exercise of the power to detain and would be entitled to no more than nominal damages for the tort of false imprisonment. Exemplary or vindicatory damages would not be awarded.

16. Critically, to give rise to a liability in damages, the public law error made by the Secretary of State had to be relevant to and bear on the detention.

3. THIS COURT'S REASONING IN *DRAGA*

17. In *Draga*, this Court applied the decision in *Lumba*. It held that the unlawful decision to deport did not bear on the decision to detain. The latter only arose after the tribunal

had been satisfied that the appeal against the deportation order should be dismissed. This Court accepted the submission of the Secretary of State that there were two separate orders, one for deportation and one for detention. They were exercisable for different reasons and the Secretary of State did not have to order detention simply because she made a deportation order. Thus, the public law error which lead to the making of the former did not bear on the order for detention.

18. Sullivan LJ referred to the practical difficulties that could result if the decision of the tribunal to allow an appeal were to result in detention pursuant to the decision with which the appeal concerned being rendered unlawful:

> 59. If the Tribunal allows an appeal under section 82(1) against a decision to make a deportation order because it concludes that the decision is "not in accordance with the law", does it follow, applying the approach in *Lumba*, that the detention under paragraph 2(2) of Schedule 3 of the person served with notice of the decision was unlawful? In answer to a question from Kitchin LJ, Mr. Gill initially submitted that a finding by the Tribunal that the decision to make the deportation order was unlawful on any of the grounds set out in section 84(1) would render the appellant's detention unlawful. On further consideration (realising, no doubt, the grave practical difficulties that would result from such an approach) he modified his answer to the question, and submitted that while there would be some cases in which the error of law in making the decision to deport would mean that the decision would be a "nullity", with the result that the appellant's detention would be unlawful, in most cases, eg those where the Tribunal merely considered that a discretion should have been exercised in a different manner, a decision to allow an appeal under section 82(1) would not mean that the appellant's detention under paragraph 2(2) of Schedule 3 was unlawful.
>
> 60. In the great majority of cases, the mere fact that an appeal has been allowed under section 82(1) will not mean that the decision to make the deportation order was unlawful in a way which was relevant to the decision to detain. An appeal may be allowed because, eg the Tribunal takes a different view as to the proportionality of an interference with an appellant's rights under article 8 of the ECHR, or because, with the benefit of further evidence, the Tribunal reaches a different conclusion as to the risk of persecution on removal, the application of a particular immigration rule, or the manner in which a discretion should have been exercised under the rules. 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. Examples of such breaches are mentioned in Ullah: where the Tribunal concludes that the

> appellant was not a person liable to deportation, or the decision to make a deportation order was made in bad faith (see paragraphs 44 and 45 above). It must, however, 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 paragraph 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" (see paragraph 33 above). In order to give effect to the statutory scheme there is a very strong case for treating the Tribunal's decision on an appeal under section 82(1) as determinative (subject to any appeal to the Court of Appeal) of the issues as between the parties to the appeal in order to ensure finality in litigation and legal certainty.
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> 62. The law, particularly in this field, is constantly evolving, as shown by the number of reported cases. The fact that a decision by the Court of Appeal or the Supreme Court in a later case, perhaps many years later, may, with the benefit of hindsight, make it clear that a Tribunal's decision in an earlier case to allow or dismiss an appeal against a decision to make a deportation order was made on an erroneous legal basis is not a ground for re-opening the earlier decision by the Tribunal. 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.

19. Although in that final sentence Sullivan LJ refers to a deportation order, it is clear that he considered that there was in consequence a lawful detention order. He summed the position up at the end of paragraph 67 of his judgment as follows:

> If the Secretary of State is unable to rely upon a Tribunal's decision in a case where the Court of Appeal has refused an

> application for permission to appeal out of time against that decision, it is difficult to see how there could ever be any firm basis for a decision to detain under paragraph 2(2) or (3) of Schedule 3.

20. Kitchin LJ agreed with the judgment of Sullivan LJ. Pill LJ agreed with Sullivan LJ's conclusions and added a further point about the decision of the House of Lords in *R (Evans) v Governor of HMP Brockhill (No 2)* [2001] 2 AC 19. In that case, the governor of a prison was liable for false imprisonment as a result of detaining a prisoner in error for a longer period than she was bound to serve. The appellant relies on that decision. Pill LJ distinguished it from *Draga* because the governor had not acted in accordance with an order of the court. Pill LJ held:

> 83. In my judgment, the case is distinguishable from *R v Governor of HMP Brockhill ex parte Evans (No.2)* [2001] 2 AC 19. In seeking unsuccessfully to justify detention in that case, reliance was placed by the prison governor on Home Office guidance based on 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 page 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."

21. The Supreme Court in *Lumba* also applied *Evans*. As Lady Hale put it at [210]:

> The prison governor in *R v Governor of Brockhill Prison, Ex p Evans (No 2)* [2001] 2 AC 19 had no power to detain the prisoner beyond the properly calculated term of her imprisonment: the fact that he was acting in compliance with the law as it had previously been thought to be was neither here nor there.

22. On 27 November 2012, the Supreme Court refused permission to appeal in *Draga*.

4. THE DOCTRINE OF PRECEDENT

23. The doctrine of precedent means that this Court cannot depart from any of its own decisions, which would include *Draga*, unless one of the exceptions to the Rule in *Young v Bristol Aeroplane Company, Limited* [1944] KB 418 applies. This Court held in *Young* that the exceptions were:

> (1). The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2.) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3.) The court is not bound to

> follow a decision of its own if it is satisfied that the decision was given *per incuriam*.(per Lord Greene MR at 729-730)

24. The boundaries of the *per incuriam* rule cannot be precisely defined but it is clear that this Court must be able to say that, because of some statutory provision or principle that was overlooked, the earlier decision was demonstrably wrong. This is clear from the following passage from the judgment of Lord Evershed MR giving the judgment of the Court in *Morelle v Wakeling* [1955] 2 QB 379 at 406:

> As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene M.R., of the rarest occurrence.

5. SUBMISSIONS

(A) Appellant

25. Mr Stephen Knafler QC, for the appellant, submits that this Court in *Draga* was not referred to certain lines of authority and is, therefore, *per incuriam*, and that the decision leads to an unjust result. The appellant has no remedy for his detention, even though the deportation order on which it was based was unlawful. The detention which was based on it ought therefore also to have been treated as unlawful.

26. Mr Knafler developed his submissions as follows.

27. First, he submits that the decision in *Draga* is contrary to several fundamental principles. It is a fundamental principle that it is for the courts to determine the legality of detention unless the legislation clearly states otherwise. Schedule 3, paragraph 2(3) of the 1971 Act does not so state. In any event, the Court should not interpret legislation as determining otherwise unless it clearly does so. For both these propositions he relies on *Khawaja*, above. It is also on his submission a fundamental principle that, if the state detains a person, it has the burden of showing that the detention was justified.

28. Mr Knafler submits that in this case the Secretary of State knew that there was a problem about the legality of the 2004 order. He also submits that while the appellant could have challenged that legality by taking out judicial review proceedings at the same time as he appealed against the deportation order, it was unreasonable to have expected him to do so.

29. Second, Mr Knafler submits that *Draga* is inconsistent with the fundamental principle that liability for false imprisonment is strict: see *Evans* and *Lumba.* Relevant to *Lumba,* Mr Knafler submits that the dismissal of the appeals against the deportation order did not break the chain of causation because the tribunal simply proceeded under the unlawful legislation. Mr Knafler submits that the decision of the tribunal should not have been treated as justifying the actions of the Secretary of State because it was not a decision on the authority to make the deportation order or the detention: see *Austin v Dowling* (1869-1870) LR 5 CP 534. This was affirmed by the decision of this Court in *Zenati v Commissioner of Police of the Metropolis* [2015] QB 758 at [53], but in that case also the decision of the court was about whether to detain the claimant, not about some other issue.

30. Third, Mr Knafler submits that there is an exception to the doctrine of precedent where a decision is unjust. Mr Knafler relies on several authorities, but it is sufficient for me to refer to *R (o/a Wilson) v Parole Board* [1992] QB 740 at 754F to 754D. In this case the Court held that where the liberty of the subject was involved and the result was unjust, the Court of Appeal could depart from binding authority.

31. Mr Knafler does not pursue any argument under Article 5 of the Convention on this appeal, but he seeks permission to appeal to the Supreme Court if he is unsuccessful.

(B) Respondent

32. Ms Julie Anderson, for the Secretary of State, submits that, following *Draga,* the detention was lawful because the appeal was dismissed and the Secretary of State had relied on that fact before exercising the power to detain. The exception for *per incuriam* decisions is not available. No case law or statute was overlooked and there is no inconsistent statute or case law. Moreover, as matter of legal certainty, court orders stand until quashed (*R (TN Vietnam) v Secretary of State for the Home Department* [2017] 1 WLR 2595).

33. Ms Anderson submits that this Court in *Draga* accepted that on an orthodox approach to *Lumba* the detention was unlawful. The Secretary of State's submissions were accepted in *Draga*. Detention and deportation had to be treated separately. It could not be said that there was retrospective unlawfulness: the lawfulness of the detention had to be tested by what the Secretary of State knew at the time: compare *R (o/a Fardous) v Secretary of State for the Home Department* [2015] EWCA Civ 931 at [42].

5. DISCUSSION

34. As I have explained this Court's decision in *Draga* followed the law as explained by the Supreme Court in *Lumba*. This Court concluded that the claim for damages did not bear on and was not relevant to the public law error which lead to the making of the 2004 Order because the appeal from the detention order had failed.

35. The argument that *Draga* conflicts with fundamental principle is a way of saying that in interpreting *Lumba* this Court should have interpreted Lord Dyson's test more widely in the light of the authorities establishing those fundamental principles.

36. In my judgment, it is not open to this Court to refuse to follow an earlier decision simply because it overlooks (if it did) relevant authority. The doctrine of precedent forms part of law because it ensures consistency and certainty and enables the law to develop in a structured and disciplined way. As Lord Bingham reminded us in *Kay v Lambeth LBC* [2006] 2 AC 465:

> 42 While adherence to precedent has been derided by some, at any rate since the time of Bentham, as a recipe for the perpetuation of error, it has been a cornerstone of our legal system. Even when, in 1966, the House modified, in relation to its own practice, the rule laid down in *London Street Tramways Co Ltd v London County Council* [1898] AC 375, it described the use of precedent as:
>
> > "an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules." *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.
>
> The House made plain that this modification was not intended to affect the use of precedent elsewhere than in the House, and the infrequency with which the House has exercised its freedom to depart from its own decisions testifies to the importance its attaches to the principle. The strictures of Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Ltd* [1972] AC 1027, 1053-1055, are too well known to call for repetition. They remain highly pertinent.

37. One of the points made by Lord Hailsham was this:

> in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v. Bristol Aeroplane Co. Ltd*. [1944] K.B. 718 offers guidance to each tier in matters affecting its own decisions.

38. That leads me to the *per incuriam* rule. As Lord Hailsham states, that is only available where there are conflicting decisions within the same tier. That must mean conflicting decisions on the same point, and there are none here. The decisions relied on are essentially *Khawaja* and *Evans* which establish strict liability for false imprisonment and the principle that the state must justify detention. These are important principles which were not considered or were distinguished in *Draga*. However, they are not directly in point for the purposes of the *per incuriam* rule because this Court in *Draga* was applying *Lumba*. It therefore cannot be said that the decision was “demonstrably wrong”. The question whether this Court was wrong to take that course is a matter for appeal, not a ground on which the *per incuriam* exception can be invoked.

39. Mr Knafler also relies on the fact that in *Evans* compensation was awarded even though the prison governor had relied on observations of the Divisional Court. *Draga* goes the other way: the Secretary of State had no liability precisely because the tribunal, also discharging functions in public law had heard an appeal and dismissed it. There seems to be no clear principle here but again, in my judgment, there is also no sufficient inconsistency to engage the *per incuriam* rule.

40. Can this Court depart from one of its own decisions because its application would result in an injustice in a new situation? This Court in *R(Al-Sadoon) v Defence Secretary* [2010] QB 486 was not prepared to hold that there was such an exception in the absence of a ruling by a five-member court convened for that purpose (see [48] per Laws LJ, with whom Waller and Jacob LJJ agreed). But that constitution of this Court did not have as full a citation of authority as we have had.

41. I am prepared to assume for the purposes of argument that there is an exception to the doctrine of precedent where the application of a prior decision of this Court was unjust. However, if it exists, it must in my judgment be interpreted narrowly in the light of *Young* and be applicable only where the decision affects the liberty of the subject. Moreover, the liberty of the subject must be directly involved, and so the exception does not apply where the appellant is seeking a remedy after the event for a past deprivation of liberty.

42. Lord Hailsham also made the point that it was always open to the Court of Appeal to say in its judgments if it thought that the House of Lords should look again at one of its own decisions. The same must apply to the Supreme Court. I can appreciate that the Supreme Court might well have considered it inappropriate to hear an appeal in *Draga* so soon after *Lumba*, but Mr Knafler's argument in this case raises issues under both *Draga* and *Lumba*. The issues are in my judgment worthy of further consideration if that were possible. Detention would not have taken place in this case if the Secretary of State had not made an executive order which was tainted by public law error. That public law error was not and could not have been tested before the FTT in appeal proceedings. The right to freedom from wrongful detention at the hands of the state reflects a fundamental value of our society. There can be no distinction between citizens and others so far as this right is concerned. The right to a declaration as to the unlawfulness of the detention and (where appropriate) to compensation is but a way of vindicating that right and demonstrating its importance.

43. For these reasons I would dismiss this appeal. I would, however, refuse permission to appeal because the decision whether to take another look at *Lumba* and *Draga* must be a matter for the Supreme Court.

LORD JUSTICE LONGMORE

44. I agree.

LORD JUSTICE LEWISON

45. I also agree.