Exploring the Utility of the Tort of False Imprisonment in Addressing Arbitrary Immigrant Detention

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Abstract—This article considers the ability of the tort of false imprisonment to address immigrant detention that becomes arbitrary due to its unreasonable duration or unacceptable conditions. It argues that, in light of the lack of temporal limit on detention and the risk of poor conditions, the *Hardial Singh* principles play a key role in protecting detainees. In particular, they simultaneously provide recourse to those detained beyond a reasonable period and indirectly incentivise the compliance of public authorities with their human rights obligations. Although the operation of the *Hardial Singh* principles in this context is threatened by the Illegal Migration Act 2023, this article argues that this threat can and must be overcome in order to guard against arbitrariness.

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1. Introduction

The tort of false imprisonment is often considered to have faded into obscurity, whereas the issue of immigrant detention has perhaps never been more relevant. The objective of this article is to examine the relationship between these 'strange bedfellows'.[1] In particular, whether in the contemporary legal environment false imprisonment has a place in addressing immigrant detention that becomes arbitrary due to its unacceptable duration or conditions. False imprisonment is the direct and intentional confinement of an individual without lawful justification.[2] The *Hardial Singh*[3] principles are used to assess the lawfulness of imprisonment by examining whether its duration is reasonable. This article proposes that utilising conditions of detention as a factor in this assessment of reasonableness can both provide recourse for those detained beyond a reasonable period and incentivise compliance with human rights obligations. False imprisonment thus has significant potential to address arbitrary immigrant detention. Its ability to do so, however, is threatened by the recent introduction of the Illegal Migration Act 2023, which purports to curtail the power of courts in assessing the reasonableness of detention. If the *Hardial Singh* principles can overcome this attempted curtailment, false imprisonment can

[1] 'Strange bedfellows' is a phrase from Act 2, Scene 2 of Shakespeare's *The Tempest* which refers to when a desperate situation brings together individuals who otherwise would not have met. This article argues that the heightened risk of arbitrariness in the context of immigrant detention will necessarily strengthen the relationship between this form of detention and the tort of false imprisonment.

[2] *Walumba Lumba (Congo) 1 and 2 v Secretary of State for the Home Department* [2011] UKSC 12 [65].

[3] *R (Hardial Singh) v Governor of Durham Prison* [1984] 1 All ER 983.

operate alongside public law mechanisms in regulating detention, and even make relevant those conditions which human rights law ignores. The interaction of false imprisonment and human rights is justified by the fact that an inherent objective of tort law is the regulation of public authorities and that tort law and human rights are fundamentally compatible. It will ultimately be concluded that the tort of false imprisonment has incrementally developed into an effective accountability mechanism in the context of immigrant detention and must not be suppressed by the pro-deference agenda contained in the Illegal Migration Act.

2. Immigrant Detention in the United Kingdom

The UN Human Rights Committee defines the term 'arbitrary' as 'inappropriate, unjust, unpredictable, and inconsistent with legality'.[4] The use of immigrant detention in the UK is widespread and large-scale, generating the opportunity for arbitrariness. The Illegal Migration Bill became an Act of Parliament on 20th of July 2023, as part of Rishi Sunak's pledge to 'stop the boats'. Section 2(c) of the Act provides for immigrant detention as an administrative procedure through which an individual is deprived of their liberty in order to facilitate their removal from the UK. The Act promotes such detention as a method of deterring irregular and unlawful migration.[5] There are two types of detention centres in the UK: (1) Immigration Removal Centres, such as Harmondsworth and Brook House, and (2) Short-Term Holding Facilities, such as Tinsley House. In 2019, 24,443 non-

[4] *Mukong v Cameroon* CCPR/C/51/D/458/1991 [9.8].
[5] Illegal Migration Act 2023, s 1(1).

citizens were detained in the UK.[6] The number of detainees decreased dramatically during the COVID-19 pandemic, but has since spiked, with an intake of 24,500 in 2021.[7]

These figures are especially concerning in light of the fact that immigrant detention, an administrative procedure, is subject to different standards and arguably fewer safeguards than criminal procedure. The thresholds for immigrant detention and criminal arrest are similar – requiring 'suspicion' of the immigration officer that the individual has entered the UK illegally and 'reasonable suspicion' of the constable that the individual has committed an offence, respectively.[8] However, the fundamental difference between these two powers is the existence of temporal limits on detention. In the context of criminal arrest, an individual cannot be detained for over 24 hours without being charged.[9] The only possible extensions on this period are related to the seriousness of the intended charge, in which case 36-hour detention is permissible.[10] By contrast, there is no definitive time limit for immigrant detention. Whilst the majority of individuals are held for less than two months, the longest reported detention in recent years was 732 days.[11]

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[6] Stephanie J Silverman, Melanie Griffiths, Peter William Walsh, 'Immigration Detention in the UK' (Oxford Migration Observatory, 2022) <https://migrationobservatory.ox.ac.uk/resources/briefings/immigration-detention-in-the-uk/> accessed 10 November 2023.
[7] ibid.
[8] Illegal Migration Act 2023, s 11(2); Police and Criminal Evidence Act 1984, s 24(2).
[9] Police and Criminal Evidence Act 1984, s 41(1).
[10] ibid s 42(2).
[11] British Red Cross, 'Scared, confused, alone: the stark truth behind immigration detention' (British Red Cross, 20 September 2023)

The impact of the lack of temporal limit is even more evident when comparing immigrant detention to imprisonment of an individual after they have been convicted of an offence. As highlighted by former detainees, in prison 'you know you have committed an offence, but you know you will get out' whereas in detention 'you don't have certainty, you don't know what's going to happen'.[12] Individuals in immigrant detention thus have less certainty than convicted criminals. Further, approximately 70% of those detained are ultimately released back into the community, with their detention having failed to serve the purpose of facilitating deportation.[13]

The most obvious risk of arbitrariness therefore emanates from the scale of detention coupled with the lack of procedural safeguards for its duration and conditions. This has been identified by the British Red Cross in its campaign for the introduction of a twenty-eight-day limit on detention and the improvement of conditions of detention. The core objective of the campaign is to ensure that in the event that immigrant detention has to be used, it should be as short, certain, and humane as possible.[14] It is thus not necessarily to eradicate

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<https://www.redcross.org.uk/stories/migration-and-displacement/refugees-and-asylum-seekers/scared-confused-alone-the-dark-truths-of-immigration-detention> accessed 10 November 2023.

[12] A statement from Emmanuel in Catherine Blanchard, 'Never Truly Free: The humanitarian impact of the UK immigrant detention system' (British Red Cross, 2018) [28].

[13] Avid Detention 'Immigration Detention' (Avid Detention, Copyright 2023) <https://aviddetention.org.uk/> accessed 11 November 2023.

[14] Catherine Blanchard, 'Never Truly Free: The humanitarian impact of the UK immigrant detention system' (British Red Cross, 2018) 40.

immigrant detention, but to reduce the possibility of arbitrariness in the form of unreasonable length and unacceptable conditions. Recent developments in Australia also reflect such an objective. For instance, the High Court held in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* that indefinite immigrant detention was unlawful, overturning a 20-year-old precedent.[15] At the same time, the government operates a large-scale detention programme with the objective of halving migrant intake.[16] The simultaneity of such developments reflects the recognition that immigrant detention is, prima facie, a lawful practice, but must be carried out in a manner that respects individual rights in order to avoid arbitrariness.

There are, nevertheless, alternatives to immigrant detention. For instance, during the COVID-19 pandemic, the Spanish Ministry of Inclusion, Social Security, and Migration funded programmes provided by institutions such as Fundación Cepaim that assisted with housing, sustenance and legal advice for those who would have otherwise been detained.[17] In Canada, a voice reporting system is employed whereby individuals are required to call in on a designated day and repeat a pre-recorded phrase three

[15] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.
[16] Tiffanie Turnball, 'Australia to halve immigration intake, tougher English test for students' (BBC News Sydney, Copyright 2023) <https://www.bbc.com/news/world-australia-67609963> accessed 20 February 2024.
[17] Human Rights Watch (2021), 'Dismantling Detention: International Alternatives to Detaining Immigrants' 64 <https://www.hrw.org/report/2021/11/03/dismantling-detention/international-alternatives-detaining-immigrants> accessed 11 January 2024.

times.[18] In 2018, the UK Home Office, with the support of the UNHCR, designed a Community Engagement Pilot. This involves collaboration with non-governmental entities such as Action Foundation in order to provide case-worker support, access to legal aid, and referral to other services for individuals who would have otherwise been detained[19]. Despite the existence of such alternatives, the UK continues to be one of the most prolific users of immigrant detention in the international community.[20] As a result, the question of how to avoid and penalise arbitrariness in the form of unreasonable duration and unacceptable conditions arises.

3. The Tort of False Imprisonment

A. Contemporary development

The tort of false imprisonment has two elements, the first being the fact of imprisonment and the second being the absence of lawful authority to justify it.[21] In the context of immigrant detention, the fact of imprisonment is usually uncontroversial. Once established, the burden shifts to the detaining authority to demonstrate legal justification for the imprisonment.[22] Such lawful authority stems from the Immigration Act 1971 and the recently passed Illegal Migration Act. An important decision as to

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[18] ibid 4.
[19] ibid 76.
[20] Detention Action, 'Harmondsworth' (Detention Action, Copyright 2024) <https://detentionaction.org.uk/about-detention/harmondsworth/> accessed 12 February 2024.
[21] *Walumba Lumba* (n 2) [239].
[22] ibid [65].

the justiciability of immigrant detention in the context of false imprisonment is *D and others v Home Office (Bail for Immigration Detainees and another intervening)*.[23] This case concerned the detention of a family with two children in three different centres, pending assessment of the mother's claim and her subsequent deportation. The claimants contended that their detention was an unlawful exercise of power under the Immigration Act 1971 and that the state had failed to safeguard the interests of their children.

The Court of Appeal held that although immigration officers have the ability to lawfully detain individuals, there is nothing in the Immigration Act evidencing Parliamentary intention to confer immunity on those officers who have 'asked themselves the wrong questions' and detained a non-citizen unlawfully.[24] The Home Office also applied for a striking out order or summary judgment in the case, arguing that the claimant's initiation of false imprisonment proceedings in a county court was an abuse of process. The Court rejected the application, reasoning that claimants are entitled to simultaneously bring claims under the Human Rights Act and the tort of false imprisonment. Given that Administrative Courts cannot hear actions for damages alone, claimants can permissibly bring the false imprisonment claims in a county court. *D v Home Office* primes false imprisonment to apply in the context of immigrant detention, even when the claimant simultaneously brings human rights claims. The likelihood of such simultaneity was presaged by *R (Jalloh) v Secretary of State for the Home Department*, in which the Supreme Court unanimously refused to align the concept of false

[23] [2005] EWCA Civ 38.
[24] ibid [121].

imprisonment with that of deprivation of liberty contained under Article 5 ECHR.[25]

B. The *Hardial Singh* principles as a check on lawfulness

The lawful authority to justify detention has long been subject to two key limitations. The first is the common law *Hardial Singh* principles (applicable to both false imprisonment and judicial review) and the second is principles of public law, as identified in *Walumba Lumba v Secretary of State for the Home Department*.[26] The latter refers to the fact that 'a purported lawful authority may be impugned either because the defendant acted in excess of jurisdiction or because such jurisdiction was wrongfully exercised'.[27] It relies on an error of law in order to demonstrate the lack of lawful authority for detention. The *Hardial Singh* principles are much narrower, assessing the lawfulness of detention based on the reasonableness of its duration. They were first enumerated by Lord Justice Woolf in *R (Hardial Singh) v Governor of Durham Prison*[28] and authoritatively restated in *Lumba* as follows.[29] First, the Secretary of State must intend to deport the person. Secondly, the deportee may only be detained for a period that is reasonable in all circumstances. Thirdly, if before the expiry of the reasonable period, it becomes apparent that deportation will not be effected in the reasonable period, the power of detention should not be exercised. Fourthly, the

[25] [2020] UKSC 4.
[26] [2011] UKSC 12.
[27] ibid [66].
[28] [1984] 1 All ER 983.
[29] [2011] UKSC 12 [22].

Secretary of State will act with reasonable diligence and expedition to effect removal. Unlike in the typical operation of public law, the Court itself examines reasonableness, rather than reviewing the decision-making of the Secretary of State. The Court has also been reluctant to allow appeals challenging the way in which it has applied the principles.[30] The *Hardial Singh* principles consequently form a robust check on the lawfulness of detention.

The most recent application of the *Hardial Singh* principles was in *Oluponle v Home Office*, in which the claimant brought an action for false imprisonment after he was detained under a deportation order for the possession and use of a counterfeit passport.[31] The relevant lawful authority here was paragraph 2(3) of Schedule 3 Immigration Act, which stipulates 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 UK. The detention lasted from the 4th of May 2016 until the 2nd of November 2016. The Court structured its analysis chronologically, with reference to every point at which the detention was reviewed. At each of these review points, in order to determine whether detention was still reasonable, the Court balanced 'risk factors' (in support of the Home Office) against 'claimant factors'.[32]

The Court found that the initial decision to detain, as well as the period of detention up until the review on the 27th of July, were

[30] *Muqtaar v Secretary of State for the Home Department* [2012] EWCA Civ 1270 [46].
[31] [2023] EWHA 3188.
[32] ibid [125].

justified. During this period, it seemed unlikely that the deportation process would exceed three months. This was subject to extension when the claimant made a 'last-minute' asylum claim requiring examination. Such extension was deemed reasonable in light of the claimant's history of absconding, which constituted a 'paramount consideration'.[33] However, for the Court, the review on the 27th of July was the first sign of 'alarm bells' that the asylum claim would not be dealt with within six months. The next review was found to be 'window dressing', having failed to consider any recent development.[34] It 'simply kicked the can of the decision further down the road, holding a Nelsonian telescope to that which was revealed by the recent facts'.[35] Essentially, the uncertainty injected into the proceedings by the 'last-minute' asylum claim generated the potential for a detention period that could not be justified in light of the 'claimant factors', which included the change in his family circumstances and the 'upsetting conditions' in Brook House.[36]

This application of the *Hardial Singh* principles underscores the utility of the tort of false imprisonment in addressing detention that extends beyond a reasonable period. Given the absence of a time limit on detention, these principles act as a safety net for individuals who are over-exposed to the 'mental torture' of detention.[37] In addition to this, *Oluponle* demonstrates that conditions of detention and the family circumstances of the claimant are significant factors in

[33] ibid [99].
[34] ibid [141].
[35] ibid [142].
[36] ibid [125].
[37] Blanchard (n 14) 27.

determining whether confinement for a certain period is lawful. As Penovic highlights, such factors have in the past been completely excluded from the tort of false imprisonment, for instance in *R v Deputy Governor of Parkhurst Prison; Ex parte Hague, Weldon v Home Office*.[38] This case concerned the transfer of a prisoner to a facility in which he lost many of the privileges that he had previously held, such as association with other prisoners. The Court rejected the dictum of Justice Ackner in *Middleweek v Chief Constable of Merseyside* that 'it must be possible to conceive of hypothetical cases in which the conditions of detention are so intolerable as to render the detention unlawful' for two reasons. First, that the question of conditions relates to the nature of the confinement rather than the fact of confinement itself.[39] The nature of confinement is not the subject of a false imprisonment claim and, if it were to be, authorities would be obligated to release detainees once the conditions deteriorated to a point of intolerability.[40] The House of Lords found that negligence would be a better fit for addressing claims based on the nature of confinement.

The key issue with this approach is that the tort of negligence requires proof of actionable damage. A claimant subject to arbitrary immigrant detention would therefore be required to have obtained either physical injury or a recognised psychiatric illness caused by the conditions of detention. False imprisonment,

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[38] [1990] EWCA Civ JO525-3; Tania Penovic, 'Testing the boundaries of administrative detention through the tort of false imprisonment' [2008] 16 TLJ 156, 165.
[39] *R v Deputy Governor of Parkhurst Prison; Ex parte Hague, Weldon v Home Office* [1990] EWCA Civ JO525-3 [166].
[40] ibid [177].

on the other hand, is a trespassory tort and so a claimant would be entitled to damages merely by virtue of their confinement without lawful justification. In *Murray v Ministry of Defence,* Lord Griffiths found that 'the law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable, even without proof of special damage'.[41] By rejecting the use of the tort of false imprisonment, the House of Lords thus undermined the value of liberty and attempted to force negligence into an area in which it is not fully effective. The second reason adduced by the Court was that prisoners do not retain residual liberty once they are within the prison environment. Effectively, there is no sub-liberty within the prison system that a prisoner can be deprived of; the original confinement is the only relevant incursion upon liberty and once complete, a person cannot be deprived of their liberty for the purposes of establishing false imprisonment. The only exceptions to this are if (a) another prisoner unlawfully restrains the claimant, or (b) a prison officer restrains the claimant without lawful authority to do so.[42]

C. False imprisonment and human rights obligations

Despite the limitations on the role of false imprisonment in addressing many aspects of detention, *Oluponle* reflects the essential recognition that conditions of detention are relevant to the assessment of the reasonableness, and thus the lawfulness of immigrant detention. Indeed, the Court has clearly reaffirmed its view that risks of absconding or reoffending are not 'trump cards' in support of detention, and that weight must be given to more

[41] [1998] 1 WLR 692 [703].
[42] ibid [167].

personal factors.[43] The relevant detention conditions in *Oluponle* included the endemic nature of drugs, violence, low-quality food and constant noise. The claimant also witnessed suicide attempts and was manhandled, subjected to physical and verbal abuse, and 'treated like an animal'.[44] These conditions, experienced by the claimant in 2016, were exposed as systemic by the Brook House Inquiry, announced in November 2019. This investigation was centred on poor detention conditions and mistreatment of detainees in Brook House between the 1st of April and the 31st of August 2017. It concluded that several incidents in 2017 could certainly amount to inhuman and degrading treatment contrary to Article 3 ECHR upon judicial examination.[45]

The notion of degrading treatment is that which debases or humiliates an individual and is capable of breaking their physical or psychological will.[46] This treatment becomes inhuman when it is of a higher severity such that it causes actual bodily harm.[47] The European Court found in *M.S.S. v Belgium and Greece* that asylum seekers are in a particularly vulnerable position due to their legal status and so deserve special protection.[48] The practical effect of such protection is that it often lowers the threshold for establishing violations of the prohibition on inhuman and degrading treatment. Regarding detention conditions, the European Court has developed its jurisprudence in finding that

[43] [2023] EWCA 3188 [46].
[44] ibid [44]-[45].
[45] Brook House Inquiry, 'The Brook House Inquiry Report' (Crown Copyright, September 2023).
[46] *Bouyid v Belgium*, App no 23380/09 (ECtHR, 28 September 2015) [90].
[47] *Labita v Italy*, App no 26772/95 (ECtHR, 6 April 2000) [120].
[48] App no 30696/09 (ECtHR, 21 January 2011) [251].

confinement in a space less than three-metre-squared will create a strong presumption in favour of a violation.[49] Additionally, exposure to passive smoking in detention constitutes a violation for a detainee with underlying health issues.[50] For treatment of lesser severity, detainees may bring a claim under Article 8 relating to private and family life.

The Human Rights Act provides effective recourse for direct and identifiable victims of violations of Articles 3 and 8 in the context of immigrant detention. Joseph and Kyriakakis highlight that this regime is unique in the international community because it provides directly incorporated human rights protection.[51] It may therefore be questioned whether the operation of the tort of false imprisonment is necessary to incentivise the compliance of authorities with human rights law and standards. However, as Malkin argues, tort law has the inherent ability to 'set higher standards of behaviour' – and this ability should not be disregarded simply because another remedy exists.[52] Malkin focuses on the utility of the tort of negligence in addressing the lack of available clean needles and condoms in Australian prisons, which facilitates the spread of HIV. He identifies a core issue in the application of negligence to these circumstances as the need to prove physical damage. Nevertheless, he argues that even if prisoners were to fail in their litigation, the expenses involved for prison authorities in

[49] *Muršić v Croatia*, App no 7334/13 (ECtHR, 20 October 2016) [75].
[50] *Florea v Romania*, App no 37186/03 (ECtHR 14 September 2010).
[51] Sarah Joseph and Joanna Kyriakakis, 'Australia: Tort Law Filling a Human Rights Void' in Ekaterina Aristova, *Civil Remedies and Human Rights in Flux* (Bloomsbury Publishing, 2022).
[52] Ian Malkin, 'Tort Law's Role in Preventing Prisoners' Exposure to HIV Infection while in Her Majesty's Custody' [1995] 20 MULR 423.

responding to a claim would incentivise the implementation of policies that would prevent such harms. Similarly, even if a false imprisonment claim cannot be entirely based on poor conditions of detention due to the limitations set out in *Deputy Governor of Parkhurst Prison*[53], the possibility of claims with poor conditions of detention as a key factor in assessing lawfulness can incentivise change. Specifically, it can reduce the arbitrariness of immigrant detention by promoting the improvement of conditions of detention. This speaks to the nature of public authorities and their responsiveness to claims that involve an obligation to pay damages. Accordingly, false imprisonment can act in tandem with the HRA in addressing poor conditions of detention.

In fact, false imprisonment has a wider scope than the HRA in this context, and can even make relevant those conditions that do not obtain the minimum level of severity for a degrading treatment claim yet are still unacceptable given the context. For instance, the Court in *Oluponle* affirmed the relevance of conditions that the claimant found "upsetting".[54] This constitutes a lower threshold than degrading treatment which must at least have a directly debasing or humiliating effect, even when the flexibility from *M.S.S. v Belgium and Greece*[55] is applied. Contextually, it is important to recall that the individuals exposed to "upsetting" conditions are not detained as part of a criminal sentence – they are the subjects of an administrative procedure, and have often arrived in the UK with the original objective of seeking asylum. For many of these detainees, the mere fact of

[53] [1990] EWCA Civ JO525-3.
[54] *Oluponle v Home Office* [2023] EWCA 3188 [125].
[55] App no 30696/09 (ECtHR, 21 January 2011) [251].

detention can lead to "re-traumatisation".[56] Indeed, according to the Royal College of Psychiatrists, immigrant detention is 'likely to precipitate a significant deterioration of mental health' – a phenomenon evidenced by incidents such as the attempted mass suicide at Harmondsworth.[57] Moreover, the Illegal Migration Act purports to amend the Immigration Act 2014 to allow for the extended detention of especially vulnerable individuals, including minors and persons with mental health conditions. This is predicted to result in the detention of as many as 45,000 children whose asylum claims are deemed inadmissible.[58] For such individuals, their over-exposure to conditions that are 'upsetting', even if not debasing, should not be ignored – and false imprisonment makes them relevant.

Indeed, the need for the tort of false imprisonment in the context of immigrant detention is bolstered by the curtailment of

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[56] Zachary Steel, Derrek M Silove, 'The mental health implications of detaining asylum seekers' [2001] 127 Medical Journal of Australia 596, 596.

[57]Royal College of Psychiatrists, 'Position statement on detention of people with mental disorders in immigration removal centres' (Royal College of Psychiatrists, 2015) <https://www.rcpsych.ac.uk/pdf/Satisfactory%20Treatment%20in%20Detention%20document%20December%202015%20edit.pdf> accessed 11 February 2024 in Blanchard (n 14) 25; Aaron Walawalkar, 'The full horrors of what security officers termed an "attempted mass suicide" are laid bare in internal documents' (Liberty Investigates, 14 September 2023) <https://libertyinvestigates.org.uk/articles/revealed-mass-suicide-attempt-at-immigration-centre-after-detainee-death/> accessed 12 November 2023.

[58] Refugee Council, 'What is the Illegal Migration Act?' (Refugee Council, Copyright 2023) <https://www.refugeecouncil.org.uk/information/what-is-the-illegal-migration-act/> accessed 12 November 2023.

judicial review in the Illegal Migration Act. Section 13(4) contains a significant ouster clause, which states 'in relation to detention during the relevant period, the decision is final and is not liable to be questioned or set aside in any court or tribunal'. This is a wide ranging exclusion of judicial review of an executive decision. With detainees unable to question the reason for their detention and the absence of an explicit time limit on detention, false imprisonment provides an alternative mechanism for holding the detaining authority accountable. Further, the ability of false imprisonment to address such issues is enhanced by the fact that it is a trespassory tort in that it is actionable regardless of whether the claimant suffered any harm.[59] Ultimately, false imprisonment can both promote compliance with human rights standards and make relevant those conditions of detention that do not meet the threshold of a violation. Twenty-six years ago, Trindade hypothesised that the tort of false imprisonment could be capable of ensuring Australia's compliance with international human rights obligations, including Article 9 ICCPR (freedom of movement).[60] Fifteen years ago, Penovic commented on how this compliance-inspiring relationship still had not materialised across common law systems.[61] In 2024, the tort of false imprisonment shows great potential to finally perform this function in the context of immigrant detention, specifically in relation to conditions of detention.

[59] *Walumba Lumba* (n 2) [64].
[60] Francis A Trindade, 'The Modern Tort of False Imprisonment' in Nicholas Mullany, *Torts in the Nineties* (Sydney: LBC Information Series, 1997).
[61] Penovic (n 38) 158.

4. The Illegal Migration Act

Regrettably, s 12 of the Illegal Migration Act attempts to reduce the *Hardial Singh* principles to insignificance. It amends the Immigration Act 1971 to stipulate that 'a person liable to be detained … may be detained for such period as, in the opinion of the Secretary of State, is reasonably necessary to enable the deportation order to be made, or the removal to be carried out'. The use of the phrase 'in the opinion of the Secretary of State' purports to shift the power of interpretation of reasonableness from the courts to the executive. Effectively, s 12 confines the role of the courts to simply reviewing the decision-making of the Secretary of State. This sits alongside significant ouster clauses contained in the Act, such as s 13(4). The Act as a whole thus purports to increase the insularity of administrative detention. Individuals are placed in detention under the delegated powers of the Secretary of State and it is the Secretary of State who then decides the lawfulness of this detention. Montesquieu once warned that 'if joined to executive power, the judge could have the force of an oppressor'.[62] In the same sense, allowing the Secretary of State to become the arbiter of reasonableness in the context of immigrant detention would facilitate arbitrariness, rather than guard against it.

The role of the courts is one of accountability, which is guaranteed by the independence and impartiality of the

[62] Charles-Louis de Secondat (Baron of Montesquieu), *The Spirit of the Laws* (London: T Evans, 1777) Book 11, ch 6.

judiciary.[63] Conversely, the Secretary of State, rather than being isolated from the politics of immigrant detention, is at the centre. This centre is currently defined by the planned relocation of non-citizens to Rwanda. The most recent development in such policies has been the passage of the Safety of Rwanda (Asylum and Immigration) Bill through Parliament.[64] The proposed scheme would rely heavily on pre-deportation immigrant detention.[65] For the Secretary of State, the key role played by detention in the context of the new policies would incentivise the finding that it is reasonable, for instance by viewing the risks of absconding and reoffending as 'trump cards' whilst conditions of detention and family circumstances are sidelined. The utility of the tort of false imprisonment in improving the current state of immigrant detention is consequently threatened.

The full impact of the Illegal Migration Act has, however, yet to be seen. Schymyck has proposed several reasons as to how courts may interpret s 12 to preserve their status as primary decision-makers on the reasonableness of detention, and thus the

[63] Shivaraj S Huchhavanar, 'Conceptualising judicial independence and accountability from a regulatory perspective' [2023] Oslo Law Review 9(2) 110, 121.
[64] Approved on 22 April 2024; Home Office and The Rt Hon James Cleverly MP, 'Rwanda bill to become law in major illegal migration milestone' (Home Office, 23 April 2024) <https://www.gov.uk/government/news/rwanda-bill-to-become-law-in-major-illegal-migration-milestone> accessed 25 April 2024.
[65] Home Office, Immigration Enforcement and The Rt Hon James Cleverly MP, 'First phase of detentions underway for Rwanda Relocations' (Home Office, 1 May 2024) <https://www.gov.uk/government/news/first-phase-of-detentions-underway-for-rwanda-relocations> accessed 3 May 2024.

operation of the *Hardial Singh* principles.[66] The first reason concerns the fact that, in accepting the lack of a time limit on detention in the UK as lawful, the European Court relied on the application of the *Hardial Singh* principles as a safeguard against arbitrary detention.[67] If the determination of reasonableness is placed in the hands of the Secretary of State, and the ability of the courts to regulate detention is thus undermined, the probability of claims for arbitrary detention under Article 5 ECHR will increase. This connects to the possibility for simultaneous tortious and human rights claims as set out in *D v Home Office* and *Jalloh*. Effectively, if the scope of false imprisonment is diminished, the number of human rights claims based on lack of safeguards against arbitrary detention will rise. In this sense, all that s.12 would do is shift the use of false imprisonment claims (and also judicial review under common law principles) to human rights claims.

Another reason Schymyck proposes as to how the courts may preserve their jurisdiction is that the *Hardial Singh* principles are implied into the Illegal Migration Act by the principle of legality. This enables the courts to recognise the *Hardial* Singh principles as implicit limits on the power of detention. If this is the case, it is the courts that must objectively assess the application of the principles, therefore bypassing the need to defer to the decision-

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[66] Alex Schymyck, 'The expansion of immigration detention in the Illegal Migration Act 2023' (Garden Court Immigration Blog, 1 November 2023) <https://www.gardencourtchambers.co.uk/news/immigration-blog-the-expansion-of-immigration-detention-in-the-illegal-migration-act-2023> accessed 12 November 2023.

[67] *J.N. v United Kingdom*, App no. 37289/12 (ECtHR, 19 August 2016) [97].

making of the Secretary of State. Although an 'unduly court-centred view of the universe' is, as Daly argues, to be guarded against, maintaining the presence of a non-executive body in the process of immigrant detention is valuable in order to promote a fair balance between risk factors and claimant factors.[68] This is arguably the most effective method of preserving accountability given that the judiciary is unaffected by the success or failure of new immigration policies that require detention as a central element. Essentially, there are ways in which the *Hardial Singh* principles will continue to thrive as a limit on the lawful authority of detention for the purpose of establishing false imprisonment. If they do persist, despite governmental attempts to suppress them, the tort of false imprisonment will retain its potential to address arbitrary immigrant detention.

5. Tort Law and Human Rights – A Philosophical Discussion

The tort of false imprisonment is justified in both promoting the accountability of public authorities and indirectly incentivising compliance with human rights standards. This is not simply an additional function of tort law, but is a fundamental facet of its nature. Du Bois, criticising the interaction of tort law with public bodies, argues that human rights give rise to a 'special normative relationship between states and their citizens'.[69] That is, a relationship in which the human rights of citizens impose on

[68] Paul Daly, 'Deference on Questions of Law' [2011] The Modern Law Review 74(5) 720.
[69] Francois du Bois, 'Human Rights and the Tort Liability of Public Authorities' [2011] Law Quarterly Review 127, 595.

public authorities obligations which are more onerous than could be imposed on a private agent. The implication of such a relationship is that claims concerning immigrant detention should only be dealt with by public law mechanisms such as judicial review and the HRA, even if their efficacy is limited. However, as Cane observes, du Bois' objection to the interaction of tort law and human rights is premised on the fact that tort law is constructed around juridically equal relationships – that is, relationships between private agents.[70] In order to account for the fact that tort law can apply to juridically unequal relationships (those between private individuals and agents performing public functions), Cane suggests a recalibration in the way tort law is structured. For instrumentalists, this would require altering the orthodox understanding of the core aim of tort law – rather than ensuring that private agents respect one another in the pursuit of their own interests, it generates accountability for both public and private agents.[71] This aligns with the way in which false imprisonment can promote the compliance of state authorities with their human rights obligations. Namely, how the use of conditions of detention in assessing lawfulness can promote compliance with Articles 3, 5, and 8 ECHR.

Conceptualising tort law as capable of addressing juridically unequal relationships should not be considered a 'recalibration' as such – it is in fact a rediscovery of the true nature and purpose of tort law. This is because tort law does not have a general liability policy per se; it instead consists of several islands

[70] Peter Cane, 'Tort Law and Public Functions' in John Oberdiek, *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 157.
[71] ibid 168.

of liability that each have their own standards. In relation to the structure of these standards, Hohfeld observes that a right (or a 'claim' as he refers to it) is the correlative of a duty.[72] There are torts in which the content of this duty, and thus the correlative right, must refer to public law standards. For instance, the essential requirement for the tort of misfeasance in public office is that the loss to the claimant is caused by the improper exercise of *public* power by a *public* agent. Although the tort of false imprisonment does not require that the deprivation of liberty be committed by a public authority, the context around the tort suggests that public standards must be taken into account. The primary focus of false imprisonment is no longer coal miners and ferry swindlers entrapped by private entities.[73] In the modern day, large-scale deprivation of liberty is most likely to be carried out by public authorities. This is evidenced by the mere existence of the *Hardial Singh* principles which are built around the examination of the decision-making of public authorities. The tort of false imprisonment will therefore necessarily imply a relationship with public law obligations – be it as part of a criminal or administrative process. 'Rights-based fundamentalism' defines the substantive content of private law rights as aligned with the protection of individual autonomy rather than social interests.[74] In reality, the correlative right to the duty to refrain from unlawfully depriving individuals of their liberty must be based on both individual autonomy and social interests rooted in human

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[72] WN Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning* (D Campbell and P Thomas eds, Aldershot, Ashgate, Dartmouth, 2001).

[73] See *Herd v Weardale Steel, Coal, and Coke Co Ltd* [1915] AC 67; *Robinson v Balmain New Ferry Co. Ltd* [1910] AC 295

[74] Peter Cane, "Rights in Private Law" in Andrew Robertson and Donal Nolan, *Rights and Private Law* (Bloomsbury Publishing, 2011) 62.

rights. Indeed, the correctness of the interaction between tort law and human rights is affirmed by Penovic's observation that the two sectors share fundamental characteristics.[75]

One shared characteristic of tort law and human rights law is universality. Both tort law and human rights law apply to everyone within the state's jurisdiction, regardless of their legal status.[76] For human rights law, this stems from the jurisdictional clauses in international and regional instruments, for instance Article 1 ECHR, which imposes an obligation on contracting states to respect the human rights of all those within their jurisdiction. For tort law, as a species of private law, direct victims of a wrong are entitled to bring a claim against the tortfeasor regardless of their legal status. This lack of discrimination is particularly important in the context of immigrant detention, which inherently targets non-citizens. Another shared characteristic is the need for the wrong to directly affect an individual. Article 34 ECHR imposes a requirement for direct victimhood in order to bring a claim before the Court – *actio popularis* claims are not permitted. Although a claim may be made on behalf of an individual in certain circumstances, for instance if the direct victim is incapacitated, Article 34 speaks to the individualistic nature of human rights claims.[77] Similarly, the claimant in a tortious action must be the physical or legal person that has suffered the wrong caused by the defendant. Therefore, whilst any individual within the jurisdiction of the state can claim in the context of tort and human rights, this individual must be

[75] Penovic (n 38) 167.
[76] ibid 167.
[77] *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania* [2014] ECtHR App no 47848/08 [112].

the victim of the relevant wrong. In this sense, the common objective of both sectors becomes the specific accountability of public authorities for the wrongs affecting individuals. By encouraging universality in the form of equality of access to judicial remedy as well as individual recourse, tort law and human rights law promote both corrective and distributive justice. Penovic explains the origin of such shared characteristics as the influence of common law on the development of international norms, for instance the way in which the UK's draft of an International Bill of Rights influenced the substantive elements of the ECHR.[78]

Tort law and human rights therefore share characteristics at the most basic, mechanical level. The tort of false imprisonment is a key juncture at which these two sectors interact. This interaction is particularly important in light of both the risk of arbitrariness in immigrant detention and the general precarity of human rights in the UK. Brexit saw both the elimination of the EU Charter of Fundamental Rights, which promotes a minimum standard of human rights protection, and the vindication of an anti-immigrant sentiment deeply ingrained into the socio-political fabric of the UK.[79] As Galimberti notes, the elimination of the Charter has significantly reduced the ability of victims to make complaints against Acts of Parliament that violate their human rights.[80] Whilst EU law contains a mechanism to disapply

[78] ibid [167].
[79] Matthew J Creighton and Amaney A Jamal, 'An overstated welcome: Brexit and intentionally masked anti-immigrant sentiment in the UK' [2022] Journal of Ethnic and Migration Studies 48 1051.
[80] Marco Galimberti, 'Farewell to the EU Charter: Brexit and Fundamental Rights Protection' [2021] Nordic Journal of European Law 4(1) 51.

legislation in contravention with the Charter, the HRA only offers a declaration of incompatibility, a comparatively weaker remedy.[81] This reduction in protection contributes to a notion of British isolationism in the context of human rights, characterised by a reduction in international accountability and an insular conception of state obligations. This in turn bolsters the importance of the tort of false imprisonment, both in its capabilities as an alternative form of recourse to public law mechanisms and in its ability to incentivise compliance with human rights obligations. Despite academic reluctance to accept that tort law can have such an impact, its inextricable connection to human rights, and thus the comportment of public authorities, demonstrate that the interaction of tort law and human rights law is completely justified.

6. Conclusion

Lord Brown once said that 'freedom from executive detention is arguably the most fundamental right of all'.[82] At a time when the UK Government is actively expanding powers of detention, it is necessary to use every possible mechanism to address the risk of arbitrariness. The tort of false imprisonment, utilising the *Hardial Singh* principles as a check on the lawfulness of confinement, does not simply provide direct relief to victims of arbitrary detention. It also has the potential to incentivise the compliance of public authorities with their human rights obligations, and to address conditions of detention that human rights law ignores. The Illegal Migration Act simultaneously reinforces the need for false

[81] ibid 51.
[82] *Walumba Lumba* (n 2) [341].

imprisonment to address arbitrary detention and attempts to curtail its operation in this context. Yet, it is both feasible and essential that the courts preserve their status as primary decision-makers on the reasonableness of detention. There are two reasons why this preservation is so necessary. The first is the increasingly damaging state of immigrant detention. The number of detainees is increasing, there is no explicit time limit on detention, and incredibly vulnerable individuals such as minors and victims of sex trafficking may be detained. The second is the diminution of remedies for arbitrariness in the context of immigrant detention. Judicial review has been significantly ousted and human rights law is restricted by its high thresholds. Now, more than ever, the utility of the tort of false imprisonment in addressing arbitrary immigrant detention is to ensure that public authorities comply with the simple request of a former detainee – 'to look at people [in detention] as human beings'.[83]

[83] Blanchard (n 14) 36.