Landmark CHAMBERS

Article 5 ECHR: An update

Hannah Gibbs
Landmark Chambers

With credit to Graham Denholm (Landmark Chambers) and Rory Dunlop, whose excellent book, Detention Under the Immigration Acts, provides a useful analysis of Article 5's relevance to detention.

Introduction: what is the role of Article 5 in detention cases?

- Article 5 of the European Convention on Human Rights protects the individual's liberty against arbitrary interreference by the state.
- When exercising her powers of immigration detention, the Secretary of State must act compatibly with the ECHR.
- Been called the "lex specialis" of immigration detention since Article 5 always engaged in detention cases (also particularly relevant are Article 3 and Article 8).
- Not always clear what Article 5 adds beyond the limitations on detention already protected by the common law but arguable that it adds substantially to those protections. First port of call – common law.

Introduction: overview of what this talk will cover

- An update of recent cases of interest (last few years), mostly at European level, concerning Article 5 rights in the context of detention
- Overview of Article 5 and how it works in the context of detention
- Some thoughts and takeaways from key recent cases:
  - Idira
  - JN
  - VM
  - SMM

Brief overview of Article 5

- Article 5(1) of ECHR provides:

1. *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law*

- Of the procedures prescribed by law, the most significant for detention case is Article 5(1)(f), which provides:

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Brief overview of Article 5

- Article 5(2):

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

- Article 5(4):

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

- Article 5(5):

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Brief overview of Article 5

- Essential components:
  - Detention has to be lawful – in accordance with a procedure prescribed by law (any detention unlawful at common law also violate Article 5, but adds something further – the law itself must be "certain")
  - Detention must be on one of the specified grounds, either:
    - To prevent a person effecting an unauthorised entry into the country; or
    - Of a person against whom action is being taken with a view to deportation or extradition (deportation proceedings must be in progress and pursued with due diligence, also must be "realistic prospect")
  - The detainee must be informed promptly, in a language which he or she understands, of the reasons for their detention.

Brief overview of Article 5

- Strasbourg (ECtHR) has interpreted lawfulness and specified grounds limitations as meaning detention cannot be "arbitrary" (Saadi v United Kingdom), meaning:
  - It must be carried out in good faith;
  - It must be closely connected to the ground of detention relied upon by the Government
  - The length of the detention should not exceed that reasonably required for the purpose pursued
  - The place and conditions of detention must be appropriate to the persons being detained. This requires account to be taken of whether the detainee is vulnerable, for example if they are a child or an asylum seeker, victim of torture etc.

- Some aspects above, either separately or combined, are broadly analogous to *Hardial Singh* principles – controversial Q is whether Article 5 goes further than common law? Even if appear broadly analogous as principles, domestic courts and ECtHR have diverged.

Idira v SSHD [2015] EWCA Civ 1187

- Claimant an Algerian national in UK illegally following expiry in 2004 of his leave to remain, committed a number of offences.
- SS made an order for his deportation on ground that presence not conducive to the public good.
- Jan 2013 at end of period of imprisonment was immediately detained under Immigration Act 1971 awaiting deportation.
- However, remained in prison rather than immigration removal centre as time-served convicted foreign national offender until March 2014, when moved to removal centre, and released on bail in July 2014.

Idira v SSHD [2015] EWCA Civ 1187

- Key question was whether breach of his Article 5 rights to be detained in prison, under immigration powers.
- About place and conditions of detention.
- He argued at first instance that the prison regime provided him significantly less freedom than an immigration removal centre and other disadvantages, particularly in relation to accessing legal advice and communication with outside world.
- Judge at first instance concluded that detention in prison was in principle contrary to article 5(1), but held that he was constrained by authority to find that a breach of Article 5(1) would only occur where the prison conditions were "unduly harsh".
- On these facts they were not – tantamount to a breach of article 3 or something slightly less serious
- Appealed to CofA essentially on basis that court had erred in approach to "undue harshness" test from *Krasniqi's* case

Idira v SSHD [2015] EWCA Civ 1187

- Court of Appeal dismissed his appeal
- No prima facie breach of Article 5 where immigration detention took place in prison
- Whether detention in a particular place contravened article 5 turned on narrow question of whether the place and conditions of detention were closely connected with the purpose for which person was being detained
- This required an evaluative exercise taking into account all material facts
- To constitute arbitrary detention a fundamental shortcoming had to be established
- And to contravene article 5.1(f) the place and conditions had to be "seriously inappropriate" in the sense of being "unduly harsh"
- Prison not seriously inappropriate for able-bodied man due to be removed on grounds of criminality when conducive to public good

JN v UK (application no 37289/12, 19 May 2016)

- Background, UK only country in Europe without maximum limit on detention period
- Strasbourg case about, inter alia, whether the general system of detention of individuals prior to deportation in the UK, which lacks specific maximum time limits, complies with Article 5
- JN, Iranian, arrived in UK early 2003 and unsuccessfully sought asylum.
- Feb 2004 convicted of indecent assault and sentenced to 12 months' imprisonment
- Following release failed to comply with conditions and SofS made order deporting to Iran.
- Detained pending deportation in 2005

JN v UK (application no 37289/12, 19 May 2016)

- Long period where JN detained, dispute over signing a disclaimer saying he consented to his return in order to get necessary travel documents
- Eventually his solicitors in late 2009 began domestic proceedings challenging lawfulness of detention
- Domestic proceedings – judge concluded authorities acted with "woeful lack of impetus"
- Failed to bring prosecution under relevant legislation, which could have brought things to an end
- Breach of Hardial Singh principle 4 (reasonable diligence and expedition to effect removal) from 14 September 2009

JN v UK (application no 37289/12, 19 May 2016)

- In Strasbourg, focus was on the lacuna in UK legislation meaning no maximum time limits for detention pending deportation, thus violation of Article 5(1), as well as lack of automatic judicial scrutiny.
- Was NOT a violation of Article 5 to not have max time limits – ECtHR noted that UK had opted out of the EU Returns Directive, which mandated maximum time limit of 18 months pending deportation
- UK had sufficient procedures to allow lawfulness to be tested. Other sufficient safeguards against arbitrariness (on this point no need for automatic review – could JR for example)
- HOWEVER – did also find that UK had failed to act with due diligence, and for longer than the courts had considered breach of 4th HS principle. From mid 2008.
- Interesting: refusal to cooperate not a trump card capable of justifying any period of detention

VM v UK (application number 49734/2012, 1 September 2016)

- Shortly after, another Strasbourg case finding due diligence failure by UK
- Applicant, VM, Nigerian, entered UK illegally on 18 November 2003 with her son.
- Son became subject of interim care order and VM was charged with child cruelty
- Following unsuccessful application for asylum due to fears for her life back in Nigeria, she pleaded guilty to child cruelty in August 2004. Following granting of bail pending next hearing in Feb 2005, absconded for over 2 years.
- September 2007 – arrested again – possession of false documentation with intent to commit fraud.
- Sentenced to months in prison
- Eventually convicted and sentenced of child cruelty charges in April 2008 as well.

VM v UK (application number 49734/2012, 1 September 2016)

- Before that latter sentencing, psychological report indicated she suffered from depressive and psychotic symptoms, although being adequately managed through therapy and medication
- No need to consider specialised treatment in hospital or prison healthcare wing
- Sentenced to 12 months' imprisonment with additional 3 months for failure to surrender to bail and judge recommended deportation
- Remained in detention following completion of sentence. Appealed against decision to deport and also made further reps saying her deportation would be contrary to Article 3 and 8 ECHR – requested for these to be treated as fresh asylum claim (refused)
- During this period mental health deteriorating – some expert reports said needed to be treated in hospital (suicide attempts and self harm) but other experts said hospital admission not necessary.

VM v UK (application number 49734/2012, 1 September 2016)

- Domestic proceedings – CofA, SofS conceded that detention unlawful 8 August 2008-28 April 2010 due to failure to consider guidance with published policy on immigration of mentally ill persons (post *Lumba*). However, CofA said even if had considered, would still have been detained so failure not causative of the damage. Only nominal damages awarded.
- Strasbourg- VM complained detention in violation of Article 5.
- Findings of interest:
  - That conditions of detention *were* appropriate – court said that due to the fact she was being detained with a view to deportation and not due to her mental health issues, conditions of detention appropriate
  - There WAS a "lengthy delay" in refusing request to have reps treated as fresh asylum claim. 19 June 2009 to 14 December 2009 violated article 5 – hadn't acted with due diligence.

ANOTHER due diligence case from Strasbourg: SMM v UK

- SMM Zimbabwean national who lives in London.
- claimed that he had been detained unlawfully between November 2008 and September 2011. Detained during that time on the basis that he was awaiting deportation from the UK. In September 2011, he was released on bail and one year later he was granted asylum in the country.
- He argued that the authorities had detained him unlawfully, by failing to apply regulations requiring the release of persons detained under immigration rules who had been victims of torture or who had been suffering from a serious mental illness.
- He also claimed that it had been unlawful to detain him on the grounds that he had been awaiting deportation, given that there had been a moratorium on enforced removals to Zimbabwe imposed by the Secretary of State up until October 2010.
- Finally, S.M.M. argued that his detention had been arbitrary and disproportionate, due to its excessive length.

ANOTHER due diligence case from Strasbourg: SMM v UK

- A violation of article 5(1) was found – failure to act with due diligence by UK
- the Secretary of State should have taken more decisive steps to bring the decision making process swiftly to a close, particularly given his acknowledged vulnerability (he had serious mental health problems)
- that there was a heightened need for the government to process and, ultimately, decide the claim diligently and speedily given the amount of time that the applicant had been in detention,
- emphasising that there was an additional necessity to ensure the effectiveness of the available procedural safeguards and a particular need for the authorities to act with appropriate due diligence in managing the decision making process in a system with no fixed time limits on detention (82-84).

Takeaway?

- DUE DILIGENCE becoming increasingly important
- While JN established no max time limit not breach of Article 5 in itself, this CONTEXT is important when thinking about due diligence in pursuing deportation. SMM, court noting: *where the applicant is subject to indeterminate period of detention, the necessity of procedural safeguards becomes decisive*
- Even more important if clients are vulnerable – are there mental health issues for example?
- Even if you have uncooperative clients, or actions contradictory, responsibility ultimately lies with the SofS to ensure detention remains lawful.

Landmark CHAMBERS

Article 5 ECHR: An update

Hannah Gibbs
Landmark Chambers
hgibbs@landmarkchambers.co.uk