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R (DN (Rwanda)) v SSHD [2020] UKSC 7

1 Background to the case and *Draga* – Stephen Knafler QC (Landmark)

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BACKGROUND

By Stephen Knafler QC

The statutory scheme

- Ss3(5) & 5 of the Immigration Act 1971 – not a BC/*“conducive”*;
- There may be a notice of intention to deport, a decision to deport and then a deportation order;
- A decision to deport (and a refusal to revoke a deportation order) were “*immigration decisions”* with a right of appeal under s82 of the Nationality, Immigration and Asylum Act 2002;
- There is power to detain under paras 2(2)(after the notice of intention) and 2(3)(after the deportation order) of Schedule 3 to the 1971 Act.

Refugees

- Refugees are in general immune to deportation;
- They may be deported though, if they have been convicted of "*a particularly serious crime*" and "*constitute a danger to the community*"*:* para 380 of the Immigration Rules, Art 33 of the Refugee Convention and Art 21 of the 2004 Qualification Directive 2011/95;
- Section 72 of the NIAA 2002 creates a *presumption* the criteria are met where a refugee has committed a crime resulting in prison for 2 years or more, or a "*specified*" crime.

The 2004 Order

- The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 specified many crimes for this purpose which obviously might or might not be committed in a *"particularly serious*" way (but they were all "*specified", * irrespective);

- The 2004 Order specified any crime (of any seriousness) under section 25(1)(a) of the 1971 Act - facilitating the breach of immigration law by a person who is not a citizen of the European Union.

DN's case

- DN is a Rwandan Hutu who was granted refugee status;
- He was then convicted of offences, the most serious being under section 25(1)(a) of the Immigration Act 1971;
- The SSHD served DN with a notice of intention to deport him, relying on the presumption created by the 2004 Order, detained him in reliance on the notice then served a decision to deport;
- DN appealed without raising whether the 2004 Order was lawful and lost;
- The SSHD made a deportation order on 31/1/08 and detained him in reliance on that;
- DN then got a new solicitor (Paul) who issued a JR, in 3/08, based on the unlawfulness of the 2004 Order.

EN (Serbia) and Draga

- *EN (Serbia) v SSHD* [2009] EWCA Civ 630, [2010] 3 WLR 182 found that the 2004 Order was ultra vires section 72(4)(a) of the 2002 Act. DN had though by then been released;

- *R (Draga) v SSHD* [2012] EWCA Civ 842 then decided that the detention of a deportee was lawful if they failed to appeal the deportation process or failed and lost (e.g. because they didn't assert that the 2004 Order had been unlawful);

- The House of Lords then declined Mr Draga's application for permission to appeal.

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The next steps leading up to the Supreme Court

- Paul and Gordon and an Advice in 2/13. The key role of the Legal Aid Agency;

- DHCJ Ockelton refused PTA for JR on the 3/9/08 ("*The claim is entirely unarguable. Paras 17-38 of the defendant's summary grounds provide a complete answer to it*"); Charles J granted PTA for JR on 28/11/08; Collins J dismissed the claim by consent on 27/11/14; Vos LJ granted PTA on 19/1/16; the CoA dismissed the appeal, in a good way, on 22/2/18;

- The final piece of the jigsaw: Yaaser joined the team.

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Thank you for listening

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