

Welcome to Landmark Chambers' Immigration Detention Challenges webinar.

The recording may be accessed [here](#).

Your speakers today are...



Graham Denholm

Detention Action & Subsequent
Cases



Tim Buley QC

Policy, Home Office Practice and
Tactical Considerations

Detention Action & Subsequent Cases



Graham Denholm

Detention Action

- *Detention Action & Ravin v SSHD* [2020] EWHC 732 (Admin)
 - Issued 18.3.20
 - Interim relief decided 25.3.20 (substantive claim ongoing)
 - Challenge to *“the on-going detention of all immigration detainees, in particular those with pre-existing conditions which increase vulnerability to COVID-19 ...[and] ... the absence of an effective system for protecting immigration detainees from COVID-19”* ([1])
 - Mr Ravin also sought an order for his release.

Detention Action

- Grounds
 - Failure to enquire into each detained case
 - Breach of the duty to maintain a safe system of detention
 - Breach of the protection duty under Articles 2 and 3 ECHR as regards detainees with pre-existing health conditions
- Evidential basis of generic claim was expert evidence from Professor Richard Coker, Emeritus Professor of Public Health at The London School of Hygiene and Tropical Medicine

Detention Action

- Steps taken by SSHD by time of hearing ([4] to [12]):
 - First, guidance on hygiene practices / cleaning to comply with PHE guidelines / cleaning materials to be provided on request / IRCs to devise plans for isolating at-risk detainees / movements in & out of IRCs curtailed
 - Second, minimising numbers. SSHD will not newly detain persons liable to removal to countries where removal not possible by reason of COVID-19 unless high risk of harm (see Tim's talk for update on policy position)

Detention Action

- Third, reduction of numbers of people already in detention (1.1.20 to 24.3.20 – reduction from 1,200 to 736). Reviews of detention prioritising those at heightened risk from Covid-19. According to the judgment: “*The Secretary of State is now applying the AAR policy to detainees who are in any of the PHE-identified increased-risk groups.*” (again, see Tim’s talk for update on policy position)
- Fourth, protection of those at increased risk who are not released, including reducing contacts with others

Detention Action

- Fifth, broader review of detention for those not at heightened risk, applying *Hardial Singh*, taking into account whether removal is to a country that is not accepting returns.
- Sixth, guidance on isolating detainees who are showing symptoms of Covid-19 infection.

Detention Action

- Combined effect of 2, 3 and 5 was that SSHD acting to reduce numbers
- Combined effect of 4 and 6 is that risks were being addressed for those who were not released
- Interim relief application modified in light of these developments [15]. Key relief sought was order for release of all persons from countries not accepting returns unless high risk of harm.

Detention Action

- Interim relief refused. Key reasons:
 - [17] Test for interim relief considered: “*since the relief sought [...] is, for all practical purposes, final relief, and for that matter also is an application for a mandatory order, this application for interim relief cannot succeed unless a particularly strong case is shown.*”
 - [19] SSHD entitled to time to review detention. In the face of the “*exceptional circumstances*” which existed. Nothing unlawful in prioritising higher risk cases, such that lower risk cases have to wait a short period for review. [20] If wrong, balance of convenience still favoured refusing interim relief.

Detention Action

- [24] Claim under ECHR Article 2 & 3 did not raise serious issue to be tried in light of the steps taken by the SSHD. Measures taken by SSHD address the concerns raised in the expert evidence.
- But note [25]: “We accept that those in detention, in what was described as a congregate setting, are exposed to particular risks arising from that setting. But in our view, in light of the measures that the Secretary of State has put in place already, and given also that all the evidence to date indicates her intention is to continue to review the situation and act as required, we do not consider that the particular problems presented by congregate settings are such as to give rise to an arguable claim that the immigration detention system fails to meet the standard required by article 2 and/or article 3.”

Detention Action

- Interim relief application by C2 academic as SSHD agreed to release. Note discussion of this at [29]:

“...in our view there was nothing in the evidence concerning the Second Claimant’s own circumstances that approached establishing a case that would cross the threshold for a grant of interim relief. We suspect that the same conclusion would apply in many other individual cases. The guidance already issued by the Secretary of State has as a focus, consideration of individual cases on their own terms. In principle, it seems to us that it is likely that the arrangements already put in place by the Secretary of State, which where necessary include the option of transferring detainees to hospital, will be sufficient to address the risks arising in the vast majority of cases.”

Detention Action

- Guidance on future cases:

“The Courts will always stand ready to determine urgent cases, and in particular those touching on matters of public interest. But the golden rules are that representatives who bring claims must prepare those claims cogently and conduct the litigation sensibly and proportionately, and most of all, they must cooperate with each other when preparing cases and bringing them to the Court. These golden rules are particularly relevant now, and must be adhered to.”

Zalys [2020] 4 WLUK 86

- Saini J decision on interim relief 6.4.20.
 - EU national, rape conviction in 2001 & other convictions
 - Facing deportation
 - Appeal heard but not determined, possible judgment delayed in light of pandemic
 - Rule 35 report – in light of multiple health problems detention likely to have an impact on physical and mental health – AAR L3 conceded, but detention maintained

Zalys [2020] 4 WLUK 86

- Submitted
 - Breach of HS3, Covid-19 insurmountable obstacle to removal & assessment of legality must take account of health issues
 - Rule 35 report = AAR L3 - detention could not be justified under the AAR policy, particularly given that C faced a serious risk of harm from Covid-19

Zalys [2020] 4 WLUK 86

- Order
 - Serious issue to be tried
 - Balance of convenience favoured maintaining status quo
 - Permission granted and urgent substantive hearing listed
 - Legality of detention had to be determined within a matter of weeks.
Proposed listing at start of April term (i.e. from around 21.4.20, so 2 weeks after hearing)
 - In the event claimant released, so rolled up hearing did not proceed.

E v SSHD [2020] 4 WLUK

- Interim relief application before Swift J, 28.4.20
 - Release ordered, subject to suitable accommodation becoming available, and reporting conditions
 - Greek national, victim of serious crime in UK (kidnapping and sexual assault), subsequently became addicted to drugs, had convictions for “numerous” offences.
 - NRM reconsideration ongoing
 - Submitted should be released as she was an adult at risk:
 - As a victim of trafficking,
 - As a victim of torture
 - Due to heart condition: heightened risk from Covid-19

E v SSHD [2020] 4 WLUK

- Court's approach
 - Victim of trafficking – NRM reconsideration unlikely to be considered quickly, real prospect of showing at trial that detention contrary to policy on this issue
 - Victim of torture – In itself, this meant AAR L2. Court held this did not compel release as removal possible within reasonable (albeit, uncertain) period.
 - Heart condition – on the facts, this fell to be investigated further but did not compel release.

Balance of convenience favoured release on terms sought (i.e. if accommodation from Salvation Army available).

Bello v SSHD

- Interim relief judgment – Chamberlain J [2020] EWHC 950 (Admin), 20.4.20
- Final judgment, Johnson J, not yet reported, 29.4.20

Bello v SSHD

- Facts
 - Nigerian national
 - Serious mental health problems
 - Conviction 2009 of attempted rape and kidnap
 - Hospital order. Judge said if that disposal not appropriate, life sentence would be justified
 - June 2018 discharged into community
 - Detained 13.12.19 pending removal
 - RDs cancelled on various occasions, most recently (5.4.20) because air travel to Nigeria suspended in face of pandemic
 - Physical ill-health: type 1 diabetes, asthma, sleep apnoea
 - Advised to shield in detention

Bello v SSHD

- Submissions on interim relief application
 - Breach of HS2 & 3
 - Breach of AAR on basis that level 3 risk
 - Breach of positive obligation under Articles 2 and 3 ECHR
- Discussion on interim relief application
 - SSHD contended removal possible within reasonable period (possibly May 2020)
 - Accepted AAR L2 by reference to mental health issues
 - Issue as to whether person with Covid-19 comorbidities necessarily falls within AAR L3
 - Serious issue to be tried, real prospect of success, but not overwhelmingly likely to succeed. Urgent rolled up hearing ordered.

Bello v SSHD

- Final decision (by reference to unofficial transcript prepared by C's team)
 - SSHD argued only for a brief extension of detention for further assessment of risk of harm posed by C.
 - Judge referred to operational instructions dated 20.3.20 to the effect that individuals who, under PHE guidance, have specific risk factors in relation to Covid-19, should be treated as AAR L3. (Tim will update).
 - Common ground that AAR L3
 - Policy on detention of individuals from countries to which removal not possible was unclear at time of hearing on evidence before the Court, and not pressed for Claimant.
 - SSHD unable to displace initial assessment that risk of harm was low

Bello v SSHD

- “*real and significant*” risk of absconding.
- Judge concluded that continued detention was incapable of rational justification under AAR policy, given the lack of public protection concerns and, further, that there was no real prospect of removal within a reasonable period, such that detention breached *Hardial Singh* principle (iii).
- Permission was granted and release ordered.

R v Manning [2020] EWCA Crim 592

- Appeal against sentence by Solicitor General on grounds of undue leniency. Concluding paragraphs ([41]-[42]) of potential relevance to immigration detention cases.
- Remember, authorities are clear that “*the conditions in which the detained person is being kept [and] the effect of detention on him and his family*” are relevant to HS reasonableness (see *Lumba* at [104]). *Manning* may help in analysing these matters in the present context.

R v Manning [2020] EWCA Crim 592

- [41] “[...] We are hearing this Reference at the end of April 2020, when the nation remains in lock-down as a result of the Covid-19 emergency. The impact of that emergency on prisons is well-known. [...] The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19.”

Policy, Home Office Practice and Tactical Considerations



TIM BULEY QC

COVID-19 AND DETENTION

- Covid-19 is critically relevant to legality of detention for two freestanding reasons:
 - Removal will likely be impossible in the short to medium term and uncertain in the medium to longer term
 - All detainees are at higher risk of contracting Covid-19 by reason of the “congregate” setting of detention centres. This will be of particular significance for detainees whose underlying health conditions makes Covid-19 more than

PRE-EXISTING HOME OFFICE POLICY (1): ENFORCEMENT INSTRUCTIONS AND GUIDANCE 55

- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/804785/Chapter-55-detention-v26.0ext.pdf
- Presumption in favour of release for all detainees
- More detailed guidance on detention of foreign national offenders (FNOs)
- EIG 55.10 (which used to deal with vulnerable individuals) abolished and replaced with Adults at Risk Guidance
- Relevance of EIG 55 to legality:
 - Can inform *Hardial Singh* assessment
 - Query breach of policy makes detention unlawful on *Lumba* analysis?

PRE-EXISTING HOME OFFICE POLICY (2): ENFORCEMENT INSTRUCTIONS AND GUIDANCE 55

- From guidance on detaining FNOs:
 - “Imminence” defined for FNOs “where a travel document exists, removal direction are set, there are not outstanding legal barriers and removal is likely to take place in the next four weeks” (EIG 55.3.2.4)
 - “Risk of Harm” – EIG 55.3.2.6
 - Note emphasis on professional risk assessment (NOMS etc)
 - Overall risk, EIG 55.3.2.10
 - Release “medium” and low EIG 55.3.2.11

PRE-EXISTING HOME OFFICE POLICY (3): ADULTS AT RISK POLICY

- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721237/Adults_at_risk_in_immigration_detention_-_statutory_guidance_2_.pdf
- Presumption of release for those vulnerable within meaning of policy (NB separate from general presumption of release)
- Vulnerable adult has a “condition” or experienced “traumatic event” “that would be likely to render them particularly vulnerable to harm ... in detention”
- Presumption in favour of release greater according to quality of *evidence*, not seriousness of condition or likely harm:
 - Level 1, self-declaration
 - Level 2, professional evidence of vulnerability
 - Level 3, professional evidence specifies that detention “is likely to cause harm”
- Presumption can be overridden by “immigration factors”. Precious little guidance on how balance should be struck

PRE-EXISTING HOME OFFICE POLICY (4): ADULTS AT RISK POLICY, CASEWORKER GUIDANCE

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/784634/adults-at-risk-policy-v5.0ext.pdf

Further guidance on how immigration factors will interact with presumption of release:

- Level 1, suitable for “consideration for detention” where “the date of removal can be forecast with some certainty” and is a “reasonable timescale”
- Level 2, consider for detention *only* where “the date of removal is fixed, or can be fixed quickly”, or “level of public protection ... that would justify detention” or risk of non-compliance
- Level 3, “considered for detention” either “removal has been set for a date in the immediate future” and all other arrangements set, or:

the individual presents a significant public protection concern, or if they have been subject to a 4 year plus custodial sentence, or there is a serious relevant national security issue or the individual presents a current public protection.

- NB underlined words considered by Johnson J in *Bello* case, 4 year sentence a gateway but does not justify if not accompanied by serious public protection *risk*
- For level 3, “very unlikely that compliance issues, on their own, would warrant detention of individuals falling into this category”

COVID-19 POLICY (1): VULNERABLE PERSONS

Published policy (referred to in *Detention Action*) about application of AAR policy to those with Covid-19.

- Must assess where person is at risk under AAR policy, any health condition may make more vulnerable
- List of high risk conditions here: <https://www.gov.uk/government/publications/covid-19-guidance-on-social-distancing-and-for-vulnerable-people/guidance-on-social-distancing-for-everyone-in-the-uk-and-protecting-older-people-and-vulnerable-adults>

- Where present:

The AAR policy sets out a number of indicators of risk which cover the risk factors set out in PHE's guidance. Where these specific risk factors are identified (see further below), individuals should be considered and assessed as an Adult at Risk Level 3.

- Policy is clear but not being applied in practice (e.g *Bello* case, policy ignored and existence denied before interim relief judge Chamberlain J, [2020] EWHC 950 (Admin))
- Less clear what you do in a non-high risk situation

COVID-19 POLICY (2): REMOVABILITY

- *Detention Action* judgment records policy as follows (para 5):
 - ... *With a view to minimising the number of persons held in detention, the Secretary of State has decided that she will not exercise her power to bring into detention persons liable to removal from the UK to countries where removal is not possible by reason of COVID-19 (presently some 50 or so countries), unless the person concerned is considered to present a high risk of harm to the public.*
- But:
 - On face, applies only to new detention, not existing detainees. Arguably irrational
 - Not updated. Last version of list 22 March. EG Nigeria closed airports on 26 March, does not appear to be added
 - Ceased 10 April, apparently not replaced
- EG *Bello* case, treated as irrelevant though Nigeria airports closed
- In my evidence to Home Affairs Select Committee on 7 May I suggested that absence of policy or guidance about difficulties in removal major lacuna in Home Office policy suite

PRESSURE POINTS

- Significant numbers of detainees released (in DA, 736 of 1200, many released since)
- Home Office says it is now only detaining high risk offenders. Plainly right if one takes seriously the above policies that should be the case.
- In practice therefore challenges are likely to revolve around following issues:
 - Failures to apply policies, perhaps because not disseminated
 - Failure to recognise *cumulative* effects of policies
 - Errors in assessment of risk / harm, conflation of past offending with risk (*NB* see para 169 in *R (BA) v SSHD* [2011] EWHC 2748 (Admin), per Elizabeth Laing QC (now J), and see Johnson J in *Bello*)
 - Over optimistic assessments of prospects of return. *NB* Richards LJ in *R (MH) v SSHD* [2010] EWCA Civ 1112, *sufficient* prospect to justify detention (para 76).
 - Problems over release address

TACTICAL ISSUES

- Bail – some indication that very high success rates for bail, so go for bail alongside any claim for unlawful detention
- Interim relief or final hearing? Seek both in the alternative
- Release address – arrange in advance if possible.
- Costs issues

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the chat section which can be found along the top or bottom of your screen.

Thank you for listening

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