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Welcome to Landmark Chambers' Immigration Detention: An Update webinar

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Tim Buley QC (Chair)

Alex Goodman

Topic:
Recent test cases on immigration bail under schedule 10 Immigration Act 2016

Hafsah Masood

Topic:
Case law update

Ben Fullbrook

Topic:
Damages for Unlawful Immigration Detention: Recent Cases

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Schedule 10 IA 2016

Alex Goodman

The Main Provisions

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Paragraph 1(2) to schedule 10 to the Immigration Act 2016 provides:

(2) The Secretary of State may grant a person bail if the person is liable to detention under a provision mentioned in subparagraph 1.

Para 1(5) provides:

A person may be granted and remain on immigration bail even if the person can no longer be detained if (a) the person is liable to detention under a provision mentioned in sub paragraph 1, or (b) the Secretary of State is considering whether to make a deportation order against the person under section 5(1)

Para 10(12) provides:

If the relevant authority decides the arrested person has broken or is likely to break any of the bail conditions, the relevant authority must—

(a) direct that the person is to be detained under the provision mentioned in paragraph 1(1) under which the person is

liable to be detained, or

(b) grant the person bail subject to the same or different conditions, subject to sub-paragraph (14).

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DETENTION
CASE LAW UPDATE

Hafsah Masood

HARDIAL SINGH AND THE PERMISSIBLE "GRACE PERIOD"

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- It is well established that once detention has ceased to comply with the *Hardial Singh* principles, a detainee need not be released instantaneously, come what may: see *FM v SSHD* [2011] EWCA Civ 807, para 66. Recognised that the SSHD is not bound to release without regard to the risk of absconding or risk of harm. Conversely it will not necessarily be in the detainee's interests to simply be ejected from the detention centre if they have no address and no means of surviving.

- **The "grace period" is the time allowed to the SSHD, to take stock of the change of circumstances (typically, a development which affects time-scales for removal), and to make suitable arrangements for release (e.g. identifying and securing suitable accommodation).**

- Once that grace period expires, detention becomes unlawful.

How long?

- *FM v SSHD*, para 66: '*a **short** period of grace*'
- Courts have been unwilling to specify how long the grace period should be, and have declined to set a "long-stop."
- Historically, the periods permitted have been short – (see the excellent review in *Detention Under the Immigration Acts: Law and Practice*, Denholm and Dunlop (1st ed)).
- But in recent years, there has been some tendency for the periods to increase. Problem particularly acute in FNO cases, where there can be considerable delays in sourcing suitable accommodation for release. It has been held that a longer grace period might be justified in cases where the nature of accommodation required placed particular burdens on providers: *DM (Tanzania) v SSHD* [2019] EWHC 2576, paras 147-149.

R (AC) Algeria v SSHD [2020] EWCA Civ 36

- '*Increased energy and rigour should be required of the Secretary of State in relation to such final periods of detention'* (para 2), since she continues to detain on '*borrowed time'* (para 29)
- Once any of the second, third or fourth principles are breached, further detention is lawful '*only for a reasonable period to put in place appropriate conditions for release*' (para 38)
- The appropriate duration of the "period of grace" is fact-sensitive (para 39)
- Relevant facts include the history and risks to the public. While the risk to the public is '*a highly important factor*', it cannot justify indefinite or preventative detention (para 39).

R (AC) Algeria v SSHD [2020] EWCA Civ 36

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- On the facts, CA found that a period of 6 weeks or so, allowed by the High Court, was too long considering the history of the case, including the SSHD's repeated failure to arrange release into suitable accommodation (following the grant of conditional bail by the FTT *three* times).

- **CA held that in future, when the question of a "period of grace" arises or might arise, the SSHD should be expected to advance some evidence and make considered submissions as to what period is appropriate and why.**

R (SB) Ghana v SSHD [2020] EWHC 668 (ADMIN)

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- The Court found that the claimant's detention ceased to comply with the third principle of Hardial Singh on 16 April 2019

- In light of the CA's decision in *AC (Algeria),* there were focused and considered submissions by both parties as to what, if any "grace period" ought to be allowed to the SSHD (paras 105-108).

- The claimant was a sexual offender, assessed as posing a high risk of harm, who required accommodation approved by the probation service

- The Court found that the appropriate "grace period" was 2 weeks, and the claimant's detention ceased to be lawful on 30 April 2019, when the grace period expired

PUBLIC LAW ERRORS AND UNLAWFUL DETENTION

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- General rule/principle in *Lumba*: **a public law error will result in detention being unlawful where the error is material i.e. where it bears on and is relevant to the decision to detain** (*R (Lumba) v SSHD* [2011] UKSC 12, para 68. See also *R (Kambadzi) v SSHD* [2011] UKSC 23, paras 41-42, 69 and 88)

- Issue that arose in a series of cases: whether detention pending deportation was unlawful where the decision to make a deportation order and the deportation order were made in breach of a rule of public law (having been based on a statutory instrument that was later declared to be ultra vires in *EN (Serbia) v SSHD* [2009] EWCA Civ 630).
  - In *Draga* [2012] EWCA Civ 842: CA answered, no. Fashioned a carve out from the general rule (see next slide).
  - In *DN (Rwanda)* [2018] EWCA Civ 273/[2020] UKSC 7
    - CA answered no, considering itself bound by *Draga*
    - Supreme Court , in a long-awaited decision, answered yes, detention was unlawful, and *Draga* was wrongly decided.

R (Draga) v SSHD [2012] EWCA Civ 842

- The unlawful deportation decision did bear upon and was relevant to the decision to detain (without it there could have been no decision to detain).
- But this approach did not pay sufficient regard to the statutory scheme as a whole, which included a right of appeal to the FTT against the decision to deport. In order to give effect to the statutory scheme, and in the interests of finality and certainty, there was a strong case for treating the FTT's decision as determinative of the lawfulness of the decision to deport.
- What did this mean for Mr Draga?
  - Mr Draga's statutory appeal against the deportation decision had been dismissed well before *EN (Serbia*). CA held that the SSHD was entitled to rely on the lawfulness of the decision to make a deportation order (as determined on appeal) as lawful authority for Mr Draga's detention.
  - What about after the judgment in *EN (Serbia)*? Following the judgment, the SSHD refused to revoke the deportation order. From this point, Mr Draga's continued detention became unlawful (Sullivan LJ and Pill LJ gave slightly different reasons for this conclusion).

Wider implications?

- *R (AB) v SSHD* [2017] EWCA Civ 59 – claimant sought to compel SSHD to return him to the UK following adverse judicial decisions on the DFT. Rejecting the appeal, the CA held:

  'Draga establishes that, without more, the simple fact that a decision relied upon by a decision-maker is found subsequently to have been unlawful does not affect the lawfulness of a later decision based upon it but made prior to the date on which the relied upon decision was held to have been unlawful …'

- The SSHD sought to rely on *Draga* – at least initially – in defending unlawful detention claims in "rough sleeper" cases, arguing that even if her policy was unlawful, it did not follow that detention was unlawful (this argument was abandoned after the policy was found to be unlawful).

DN (Rwanda) v SSHD [2020] UKSC 7

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- Supreme Court held that DN's detention was unlawful (from the outset) as a result of the illegality of the statutory instrument on which deportation action against him was based.

- The principle in *Lumba* applied with full force and effect to the circumstances of the case; it was not excluded by the existence of a right of appeal or the need for finality in litigation. *Draga* was wrongly decided

- Applying the principle in *Lumba*: detention was entirely dependant on the decision to deport. Without that decision, the question of detention could not arise, still less be legal. The detention was therefore inevitably tainted by public law error (Lord Kerr, para 18. See also Lord Carnwath, para 37).

Other recent applications of the *Lumba* principle

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- *R (Hemmati) v SSHD* [2019] 3 WLR 1156
  - Claimants detained pending transfer under the Dublin III Regulation. Art 28(2) of the Regulation provides that persons subject to procedures under the Regulation can be detained where there was a "significant risk of absconding", defined as the existence of reasons in individual case, based on objective criteria defined by law, to believe a person might abscond.
  - Supreme Court found that Chapter 55 of the EIG did not satisfy these requirements
  - Did it mean the claimants detention was unlawful? Yes, the test in *Lumba* was met. There was a requirement for a binding provision of general application containing objective criteria underlying reasons for believing an applicant might abscond, which was not satisfied. This was fundamental to the decision to detain (Lord Kitchin, paras 92-98)

Other recent applications of the *Lumba* principle

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- What about an public law error in a certification decision made under the Immigration (EEA) Regulations – can it render detention unlawful?
  - *R (Lauzikas) v SSHD* [2018] EWHC 1045: if the error (in that case a misdirection in law about the appropriate test) was material to the certification, this would be a public law breach which bore on the decision to detain (para 72). On the facts not material, as decision would have been the same regardless of the error. Consistent with Lumba? (see Lady Hale's speech, para 207).
  - One to watch: unlawful detention claims arising from the CA's decision in *Hafeez* [2020] EWHC 437 (Admin).

A PROCEDURAL NOTE:
ZA (PAKISTAN) [2020] EWCA Civ 146

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- ZA brought an unlawful detention claim in the Admin Court. Interim relief was granted, leading to his release from detention a day after the claim was issued.

- This left only the claim for damages (ZA was also seeking a declaration that his past detention was unlawful and a declaration that the SSHD's policies had not been applied to him so that his detention was unlawful. But *'in reality the claim for declarations added nothing to the claim for damages':* para 71)

- Dingemans LJ gave the following reminders, at paras 69-74:

ZA (PAKISTAN) [2020] EWCA Civ 146

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- Claims for damages alone may not be brought in the Admin Court: see CPR 54.3(2).

- The procedures of the Admin Court are not well suited to determine contested historic events giving rise to claims for damages where disclosure and cross-examination of witnesses will be relevant (para 69)

- Once ZA had been released from detention both parties should have addressed their minds to the issue of whether the claim should have been transferred either to the QBD or County Court.
  - NB: the overriding objective requires that cases are allotted an appropriate share of the court's resources: CPR 1.1(2)(e). Parties are required to help the court to further the overriding objective, see CPR 3.1.

- There would have been advantages to such a transfer for both parties

ZA (PAKISTAN) [2020] EWCA Civ 146

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- From the Claimant's point of view:
  - There would have been no need to obtain permission to bring the claim
  - There would have been a process for calling witnesses and for cross examination. This would have meant that the claimant could give oral evidence in support of his case (which would have been helpful on the facts)

- From the Defendant's point of view:
  - There would have been statements of case and proper case management of the claim, which would have given clarity to the case being made.
  - There would have been formal disclosure of documents

- Expressed hope that in the future all parties should give timely consideration to the issue of transfer from the Admin Court when issues of continuing detention have been resolved.

Damages for Unlawful Immigration Detention: Recent Cases

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Structure

1. Substantial v Nominal Damages
2. Compensatory Damages – the Heads of Loss
3. Exemplary Damages
4. Human Rights Damages
5. Older authorities
6. Recent cases

Substantial v Nominal Damages

- Nominal damages if been lawfully detained in any event: ***R (Lumba) v SSHD*** [2012] 1 AC 245 at [95]

- Balance of probabilities, not a test of inevitability: ***OM (Nigeria) v SSHD*** [2011] EWCA Civ 909 at [23]

- Burden of proof on the SSHD: ***R (EO) v SSHD*** [2013] EWHC 1236 (Admin) at [70]-[74]

- "Would not could": ***R (Sapkota) v SSHD*** [2017] EWHC 2857

- Damages to compensate Claimant, not disciplinary or vindicatory vehicle to express a judge's disapproval of state action: ***R (Lauzikas) v SSHD*** [2019] 1 WLR 6625

- Supreme Court rejected argument that damages should be nominal in circumstances where detention would have been lawful if the law had been different: ***R (Hemmati) v SSHD*** [2019] 3 WLR 1156

Compensatory Damages – the Heads of Loss

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1. Basic award / general damages
2. Damages for personal injury
3. Adjustment for inflation and Simmons v Castle
4. Aggravated damages
5. Special damages (i.e. pecuniary losses)

Exemplary damages

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- Punitive rather than compensatory.

- Justified where compensatory damages (with or without aggravated damages) are “inadequate to punish [the defendant] for his outrageous conduct, to mark [the] disapproval of such conduct and to deter him from repeating it”: see ***Rookes v Barnard*** [1964] 1 AC 1129 at p.1228 and ***Muuse v SSHD*** [2010] EWCA Civ 453 at [70].

- A failure to give full and accurate information to the court in defence to a judicial review is one reason to merit exemplary damages: ***R (Santos) v SSHD*** [2016] EWHC 609.

Human Rights Damages

- Section 8 of the Human Rights Act 1998. Sub-section (3):

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

Older authorities

- ***Thompson v. Commissioner of Police for the Metropolis*** [1998] QB 498 (key authority on damages for false imprisonment – not immigration-specific).

- ***MK (Algeria) v. SSHD*** [2010] EWCA Civ 980 (useful summary of key principles at [8].

- Two big awards:
  - ***Muuse v SSHD*** [2009] EWHC 1886 (QB)
  - ***R (B) v SSHD*** [2008] EWHC 3189 (Admin)

- ***R (NAB) v. SSHD*** [2011] EWHC 1191 (Admin) (where detainee does not co-operate with removal).

Recent cases

1. ***Sino v SSHD*** [2017] EWCA Civ 1975
2. ***Mohammed v SSHD*** [2017] EWHC 2809 (QB)
3. ***Sapkota v SSHD*** [2017] EWHC 2857 (Admin)
4. ***Majewski v SSHD*** [2019] EWHC 473 (Admin)
5. ***Holownia v SSHD*** [2019] EWHC 794 (Admin)

Sino v SSHD [2017] EWCA Civ 1975

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- Court of Appeal allowed an appeal against a summary assessment of £3,750 in damages for 150 days – due to procedural unfairness
- Quantum assessment remitted to the High Court, but judges did indicate the figure seemed “surprisingly low”.

Mohammed v Home Office [2017] EWHC 2809 (QB)

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- 3 separate periods of detention totalling 445 days (260 within prison)
- Torture victim and PTSD sufferer
- Judge had a “sense of unease” about possible political motivation to detention, but did not find any deliberate motive on part of the SSHD
- Obvious breaches of rule 35 procedure
- No initial shock
- Prison more restrictive environment than IRC
- Total award (relying mainly on ***AXD***, inc basic and aggravated): £78,500
- Interesting postscript aimed at critics of judges who award damages to foreign criminals

Sapkota v SSHD [2017] EWHC 2857 (Admin)

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- 36 days unlawful detention
- Substantial damages for whole period
- Aggravating features relating to the circumstances of arrest and treatment in detention
- For the first 24 hours - £6,000 basic award and £5,000 aggravated damages
- Remaining 35 days: £12,000
- Special damages (loss of earnings): £658.63

Majewski v SSHD [2019] EWHC 473 (Admin)

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- SSHD policy of deporting EEA nationals found sleeping rough
- Claimant apprehended and detained for 38 days pending removal
- Claimant had alcohol dependency
- For first 24 hours £6,400
- £8,400 for remainder of period.

Holownia v SSHD [2019] EWHC 794 (Admin)

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- Another rough sleeper case
- 153 days in detention
- Claimant went on hunger strike during detention
- £6,000 for initial shock
- Aggravated damages for hunger strike: £5,000
- Total award £37,000
- Claim for exemplary damages (for pursuing unlawful policy) refused.

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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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