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Welcome to Landmark Chambers' 'Current Issues in Immigration Detention' webinar

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Graham Denholm (Chair)

Topic:
Detained Fast Track cases: the current state of play

Philip Nathan

Topic:
Covid–19 and the Adults at Risk Policy

Alex Goodman

Topic:
Schedule 10 IA 2016 and Bail

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Schedule 10 IA 2016 and Bail

Alex Goodman

R (Humnyntski) v SSHD [2020] EWHC 1912 (Admin)

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- Delays in providing bail address rendered detention unlawful
- Systemic failures to provide bail addresses unlawful.
- Paragraph 2(1) requires that any grant of bail must be made subject to conditions. The conditions that may be imposed include “a condition about the person’s residence” (paragraph 2(1)(c)).

R (Humnyntski) v SSHD [2020] EWHC 1912 (Admin)

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- Paragraph 9 of Schedule 10 states:

"Powers of Secretary of State to enable person to meet bail conditions

(1) Sub-paragraph (2) applies where— (a) a person is on immigration bail subject to a condition requiring the person to reside at an address specified in the condition, and (b) the person would not be able to support himself or herself at the address unless the power in subparagraph (2) were exercised

(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of that person at that address.

(3) But the power in sub-paragraph (2) applies only to the extent that the Secretary of State thinks that there are exceptional circumstances which justify the exercise of the power.

See para [165]: SSHD failed to consider if there were exceptional circs.

R (Kaitey) v SSHD [2020] 3 WLR 936
Laing J

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Paragraph 1 to Schedule 10 to Immigration Act 2016

-Paragraph 1(1) of Schedule 10 to the Immigration Act 2016 provides that the Secretary of State may grant a person bail if the person is being detained under (a) paragraph 16(1), (1A) or (2) of Schedule 2 to the 1971 Act, under (b) paragraph 2(1), (2) or (3) of Schedule 3 to the 1971 Act, under (c) section 62 of the 2002 Act, or under (d) section 36(1) of the UK Borders Act 2007.

-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.

-Paragraph 1(5) to schedule 10 provides that

> (5) 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)

Paragraph 10 to Schedule 10 to Immigration Act 2016

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(1) An immigration officer or a constable may arrest without warrant a person on immigration bail if the immigration officer or constable—(a) has reasonable grounds for believing that the person is likely to fail to comply with a bail condition, or

(b) has reasonable grounds for suspecting that the person is failing, or has failed, to comply with a bail condition.

(9) A person arrested under this paragraph—(a) must, as soon as is practicable after the person's arrest, be brought before the relevant authority, and

(b) may be detained under the authority of the Secretary of State in the meantime.

(10) The relevant authority is—(a) the Secretary of State, if the Secretary of State granted immigration bail to the arrested person or the First-tier Tribunal has directed that the power in paragraph 6(1) is exercisable by the Secretary of State in relation to that person, or

(b) otherwise, the First-tier Tribunal.

(11) Where an arrested person is brought before the relevant authority, the relevant authority must decide whether the arrested person has broken or is likely to break any of the bail conditions.

(12) 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).

(13) If the relevant authority decides the person has not broken and is not likely to break any of the bail conditions, the relevant authority must grant the person bail subject to the same conditions (but this is subject to sub-paragraph (14), and does not prevent the subsequent exercise of the powers in paragraph 6).

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Covid–19 and the Adults at Risk Policy

Philip Nathan

R (Detention Action) v SSHD [2020] EWHC 732

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Summary of SSHD Steps taken to address Covid-19:

- First, guidance on hygiene had been issued to detainees, cleaning materials were to be provided, and individual IRCs were to devise plans for isolating individuals at increased risk
- Second, guidance had been issued to the SSHD's caseworkers whereby individuals from countries to which removal was not possible were not to be brought into detention unless considered to pose a high risk of public harm
- Third, the Adults at Risk guidance was to be applied to anyone identified as being at heightened risk from COVID-19 so that by the date of hearing the number of immigration detainees had been reduced from 1200 on 01January 2020 to 736 while a number of other detainees had been identified for release and / or review.

R (Detention Action) v SSHD [2020] EWHC 732

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- Fourth, for those at heightened risk who were not released steps were being taken to reduce contact with others and support to self-isolate
- Fifth, the detention of those not in high risk groups was to be reviewed by reference to whether the proposed country of return was accepting removals, applying the *Hardial Singh* principles, and
- Sixth, guidance had been issued regarding symptomatic individuals in the IRC estate, providing for isolation for seven days and, if necessary, hospitalisation.

R (Detention Action) v SSHD [2020] EWHC 732

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Judgment at paragraph 19:

"The Claimants contend that because the Secretary of State has decided as a general rule not to initiate detention for persons who would be removed to countries who, because of COVID-19 are not presently accepting removals, it must follow that detention of any person in an immigration detention centre pending removal to such a country is already unlawful. We do not agree. The two classes are not in materially the same position."

Is this logical?

Judgment at paragraph 35:

'*In our view, a sensible co-operation before this case would have led to the same result.'*

Claimants Ordered to pay Defendant's Costs. Was this really fair? Subsequent Cases suggest not.

Detention Action Second Step

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No Detention where Removal impossible unless High Risk

- Policy remains undisclosed
- During the first lockdown 1800 individuals brought into immigration detention between 01 April and 30 June.
- All removable? If not, then all of those High Risk? Seems unlikely.

Detention Action Third Step

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Adults at Risk

R (Bello) v SSHD EWHC 950 (Admin) and [2020] EWHC 3014 (Admin)

Final Judgment at paragraph 49:

"However, both Mr Payne and Mr Buley, rightly in my judgment, contend that the question of whether a person has been subject to a four year plus custodial sentence is not to be considered in isolation and certainly does not, in and of itself, justify a decision to detain. Rather it is a trigger to an assessment of whether they pose a public protection concern."

Bello Interim Relief [2020] EWHC 950 (Admin)

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Judgment at paragraph 30:

“Mr Byass properly concedes that Mr Bello's mental health condition makes him a level 2 risk in term of the AAR Policy. But… his condition is stable. As to his vulnerability to COVID-19, there is a real question of interpretation as to whether every person identified as vulnerable by reason of comorbidities ipso facto falls to be categorised as a level 3 risk…I see some force in Mr Buley's suggestion that the answer to that question is yes, but I do not think the answer is ***obvious****.”*

Interim relief refused. Case adjourned to expedited rolled up hearing.

Bello – Final Hearing [2020] EWHC 3014 (Admin)

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Shortly before the hearing, SSHD disclosed the Step 3 policy. See paragraph 35 of final Judgment:

". . . particular account must now be taken of the latest [Public Health England] guidance and the risk factors contained therein, which are believed to increase the risk of severe illness from COVID-19 . . . Where these specific risk factors are identified . . . individuals should be considered and assessed as an Adult at Risk Level 3."

Things were obvious. Confirmed Level 3. Order for Claimant's release.

R (O and Others) v SSHD [2020] EWHC 1243 (Admin)

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Two Claimants released before hearing and claims likely to be transferred to County Court – See ZA (Pakistan) v SSHD [2020] EWCA Civ 146

Third Claimant, E, pursued claim on 3 basis but first two of interest:

- Trafficking and Adults at Risk Policy
- Torture and Discrepancy between Adults at Risk Policies

AAR Policies and Torture

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- Internal AAR Guidance: The decision maker must assess what evidence there is to support the individual's account by using the levels of evidence referred to below in this guidance. Where there is professional evidence of torture, the individual should be regarded as being at level 2 in the terms of this policy. Where the professional evidence indicates that a period of detention would be likely to cause harm they should be regarded as being at level 3.

- Statutory AAR Guidance: 11. The following is a list of conditions or experiences which will indicate that a person may be particularly vulnerable to harm in detention. • having been a victim of torture (individuals with a completed Medico Legal Report from reputable providers will be regarded as meeting level 3 evidence, provided the report meets the required standards)

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Detained Fast Track cases: the current state of play

Graham Denholm

The DFT: What was it? Why are we talking about it?

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- A process, defined in policy, for the speedy processing of asylum claims whilst the asylum applicant remained in detention.
- Dates back to 2000. Suspended July 2015 in face of multiple challenges.
- Never reinstated.
- Legal controversies continue: *TN (Vietnam)* heard in SC earlier this week

The DFT: What was it? Why are we talking about it?

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- Why are we talking about a process that ended 5+ years ago? Two reasons:

1. Ongoing relevance to immigration advice:
    - Applicants still in UK pursuing (or wishing to pursue) protection claims
    - Applicants removed potentially entitled to be brought back
2. False imprisonment claims for those who were detained in the DFT

The DFT in outline

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- In its most recent form, defined in two policy documents:
  - *Detained Fast Track Processes* (v6.0, 14 October 2014) (previously, *DFT & DNSA – Intake Selection (AIU Instruction)*)
  - *Detained Fast Track Processes – Timetable Flexibility* (v2.0, January 2012)
  - If you are considering older cases, some archival detective work necessary to track down relevant version of policy

The DFT in outline

- For a case to be routed into the DFT, the SSHD had to satisfy her/himself:

  - That the **claim** was suitable for the DFT:
    - A “quick decision” was possible (around 10-14 days)
    - *Quick decision* means a quick decision that is fair and sustainable *(JB (Jamaica) v SSHD* [2014] 1 WLR 836*)*
    - Policy guidance on factors weighing for/ against a quick decision being possible

  - That the **applicant** was suitable for the DFT:
    - “*Suitability Exclusion Criteria*” in *Detained Fast Track Processes,* intended to ensure vulnerable individuals were not routed into the DFT: pregnancy, physical and mental illness, trafficking victims (positive RG decision), those where there is evidence of torture, etc.

The DFT in outline

- Decision to route into DFT based on information gleaned at Screening Interview stage (but case could be removed from DFT if later apparent that unsuitable).

- Officials required to ask sufficient questions at the screening stage to reach a sustainable decision on the suitability of a case for the DFT. Sufficient does not mean detailed, but should traverse, as a minimum:
  - Factual and legal basis of the claim in sufficient detail to give a sense of its complexity
  - Existing and potential corroborative evidence including documentary evidence, and e.g. potential witnesses, medical evidence, etc
  - Need for, and timescales for, translation

- Claims which turn on corroborative evidence from external sources which cannot be obtained within the relevant timescale may be unsuitable. Paradigm case is *JB (Jamaica).*

The *Detention Action* cases

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- DFT brought down by challenges made by Detention Action. For present purposes, sufficient to note:

  – *Detention Action v SSHD* [2014] EWHC 2245 (Admin) (Ouseley J) ('***DA1***'); multiple flaws identified in the DFT. Those shortcomings required the early instruction of lawyers. They delays in applicants being able to instruct lawyers meant the system as a whole gave rise to an unacceptable risk of unfairness, and so was unlawful. Relief limited to a declaration as to the position at the date of judgment (***DA2***, upheld on appeal, ***DA3***). Findings on specific shortcomings of value in individual cases.

The *Detention Action* cases

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- *Detention Action v SSHD* [2014] EWCA Civ 1634 (***DA4***): Lack of clarity as to whether detention post-decision, pending appeal, was governed by the DFT policy (v5.0, June 2013) meant that detention was unlawful for that reason.

- If detention could / would have been authorised post-appeal notwithstanding the application of this policy, only nominal damages payable.

- The first instance judgment of Lewis J in *PN (Uganda) v SSHD* [2019] EWHC 1616 (Admin) at [119]-[125] is a helpful illustration of the application of DA4 in practice.

The *Detention Action* cases

- *Lord Chancellor v Detention Action* [2015] WLR 5341 (DA6)
  - CA upholding High Court finding that the Fast Track Rules 2014, which governed appeals to the FTT in DFT cases were unlawful.
  - Dyson LJ: "*the time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases… The system is therefore structurally unfair and unjust. The scheme does not adequately take account of the complexity and difficulty of many asylum appeals, the gravity of the issues that are raised by them and the measure of the task that faces legal representatives in taking instructions from their clients who are in detention*."

Post-*Detention Action*

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- Litigation since the DA cases has focussed on the implications of DA6, and the circumstances in which a decision of the FTT in a DFT appeal should be set aside or quashed.

- This is of critical importance, both

  – (a) in relation to the applicant's protection claim, and

  – (b) as regards the legality of detention. If there is an error of law in a decision upon which a detention decision is predicated, the detention itself is unlawful: *DN (Rwanda) v SSHD* [2020] 2 WLR 611

Post-*Detention Action*

- Subsequent to DA6, the President of the FTT adopted a practice of setting aside decisions taken under the 2014 Rules on grounds of procedural impropriety under Rule 32 of those Rules on **a fact-insensitive basis**.

  – Arguably wrong to do so on current state of the law – see *TN (Vietnam)* (following slides), albeit pending SC case may change this.

  – Whether a set-aside order under Rule 32 made without consideration of the facts retrospectively renders detention unlawful remains to be determined. Recent County Court case (*Ali v Home Office*) held not. May be resolved by *TN (Vietnam)* in SC.

- Issue remained as to whether the conclusions in DA6 applied to the (materially identical) 2005 Fast Track Rules.

Post-*Detention Action*

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- *TN (Vietnam) & US (Pakistan) v SSHD* [2017] 1 WLR 2595 (Ouseley J)
  - The analysis in DA6 did apply to the 2005 Fast Track Rules, but
  - It does not follow that every DFT appeal decision must be quashed.
  - A decision would only be quashed if unfair and this was in interests of justice
  - Application to be made to the FTT

Post-*Detention Action*

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- *TN (Vietnam) & US (Pakistan) v SSHD* [2018] EWCA Civ 2838
  - Appeal against Ouseley J in the High Court
  - No challenge to finding that 2005 Rules unlawful
  - CA agreed with Ouseley J that unlawfulness of Rules did not lead to every appeal decided under the 2005 Rules being unlawful. Decision turned on facts of each case

Post-*Detention Action*

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- *TN (Vietnam) & US (Pakistan) v SSHD* [2018] EWCA Civ 2838 (contd)
  - Singh LJ at [103]; non-exhaustive list of factors to take into account when deciding whether or not to quash:
    - (1) A high degree of fairness is required in this context.
    - (2) What the Court of Appeal said in DA6 should be borne in mind: that the 2005 Rules created an unacceptable risk of unfairness in a significant number of cases. Depending on the facts it may be that the case which the court is considering is one of those cases.

Post-*Detention Action*

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- *TN (Vietnam) & US (Pakistan) v SSHD* [2018] EWCA Civ 2838 (contd)
    - (3) There is no presumption that the procedure was fair or unfair. It is necessary to consider whether there was a causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court.
    - (4) It should also be borne in mind that finality in litigation is important. There may be a need to ask how long the delay was after the appeal decision was taken before any complaint was made about the fairness of the procedure. There may also need to be an examination of what steps were taken, and how quickly, to adduce the evidence that is later relied on (for example medical evidence) and whether it can fairly be said that in truth those further steps were taken for other reasons, such as a later decision by the Secretary of State to set removal directions. This may suggest that there is no causal link between the risk of unfairness that was created by the 2005 Rules and what happened in the particular case before the court.

Post-*Detention Action*

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- *TN (Vietnam) & US (Pakistan) v SSHD* [2018] EWHC 3546 (Admin)
  - Following judgment of Ouseley J, TN and US applied to FTT for their DFT determinations to be set aside. FTT held it had no jurisdiction. TN and US judicially reviewed that decision.
  - Divisional Court held that the correct venue for a challenge to the DFT determination was the Administrative Court, not the FTT.

Post-*Detention Action*

- *Hameed v SSHD* [2019] EWCA Civ 456
  - Appeal from HHJ Thornton sitting in the High Court
  - Finding that FTT decision unlawful solely because made under the 2005 Rules set aside, following *TN (Vietnam)*

Post-*Detention Action*

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- *PN (Uganda) v SSHD* [2019] EWHC 1616 (Admin)

  - 2005 Rules case challenging (1) lawfulness of FTT appeal determination, (2) detention and (3) removal.
  - Lewis J held
    - FTT determination unlawful as claimant had not had sufficient time to obtain necessary evidence of lesbian relationships outside UK (i.e. the truncated timescales in the 2005 Rules had caused prejudice on the particular facts of her case)
    - FTT decision quashed so remained outstanding. **SSHD ordered to bring PN back to the UK**.
    - Detention unlawful from refusal of asylum claim until appeal rights exhausted, but not thereafter, as SSHD entitled to rely on appeal decision.

Post-*Detention Action*

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- *PN (Uganda) v SSHD* [2020] EWCA Civ 1213 (Court of Appeal)
  - Overturned conclusion that detention lawful after PN was appeal rights exhausted:

> [86] In my judgment the public law failures in this case, being the unlawful 2005 DFT Rules and the unfair FTT proceedings which were quashed by the judge, were relevant to and bore upon the decision to detain PN after [PN became appeal rights exhausted on] 10 September 2013. This was because PN was being detained following the conclusion of the FTT proceedings which have been quashed. In those circumstances the detention from 10 September 2013 to 12 December 2013 was unlawful because, properly analysed, there had been no determination in the FTT and it would not be possible to complete such a determination within a reasonable period of time..

Post-*Detention Action*

- *Ali v Home Office* (BAILII)
  - HHJ Baucher in Central London County Court
  - Considers and rejects argument that a set-aside order under Rule 32 of the 2014 Rules means prior detention unlawful absent a finding of unfairness.

Post-*Detention Action*

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- Pending: *TN (Vietnam)* in the Supreme Court. *Per* SC website:

> This appeal concerns the legal consequences of a ruling that the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 (the 2005 Rules) were ultra vires. The UKSC is asked to decide:
>
> 1.Are individual appeal decisions taken under the 2005 Rules automatically a nullity?
>
> 2.If not, what is the correct approach to take when considering applications to quash or set aside appeal decisions taken under the 2005 Rules?
>
> 3.Was there procedural unfairness on the facts of TN's case?

CONCLUSIONS

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- Potential avenues of challenge to DFT detention:
  - Failure to make appropriate / sufficient enquiries at screening stage
  - Unsustainable conclusion that case suitable for DFT (too complex, time needed for expert / medical evidence / locating witnesses / etc)
  - Unsustainable conclusion that applicant unsuitable for DFT (evidence of torture / mental illness / etc). DA1 particularly helpful on this, and see also *Zafar v SSHD* [2016] EWHC 1217 (Admin)

CONCLUSIONS

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- Potential avenues of challenge to DFT detention (contd):
  - Unfair appeals process
  - Detention unlawful because predicated upon the outcome of an appeal decision that was unlawful and has been quashed.
    - If quashed because of a finding that unfair, then it will follow detention unlawful
    - If set aside under Rule 32 without considering facts, it may be that case-specific unfairness has to be demonstrated (see *Ali*, but this is yet to be authoritatively determined).

VENUE

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- Need to give careful thought to venue:
  - If appeal decision already set aside or quashed then claim for damages for false imprisonment in County Court or QBD
  - If appeal decision still extant and case decided under 2005 Rules, the case must be brought in Administrative Court as an out of time JR.
  - If case decided under the 2014 Rules and decision still extant, appropriate route may be an application to FTT followed by claim in County Court or QBD.
  - Hybrid claims (e.g. a claim raising both conventional grounds of challenge such as *Hardial Singh* and also requiring a quashing order) will require careful thought as to venue and timing.

IMMIGRATION CONSIDERATIONS

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- Implications of the authorities go beyond detention:
  - A person who was removed following an unfair appeal in the DFT may be entitled to an order that they be returned to the UK (see *PN (Uganda)*)
  - If an appeal determination is quashed the appeal remains outstanding and the DFT decision will not be the “starting point” (*per Devaseelan*) at the rehearing.

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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 Q&A section which can be found along the top or bottom of your screen.

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Thank you for listening

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