



Immigration detention update: Review of the year and scanning the horizon

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30 January 2024



GARDEN COURT CHAMBERS

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Introduction

- This training will cover:
 - Top 5 issues from the past year (Greg)
 - Brook House Inquiry (Alex)
 - Bitesize Caselaw update (Alex)
 - Detention of EEA nationals (Eva)
 - Quantum update (Eva)
 - Procedural update (Eva)
 - What's coming up? (Greg)



Top 5 issues



Top 5 issues

- Illegal Migration At 2023
- ‘Second Opinions’ – *R (Medical Justice) v SSHD* [2024] EWHC 38 (Admin)
- Access to justice – *R (SPM) v SSHD* [2023] EWCA Civ 764
- Electronic monitoring
- Bail accommodation



ISSUE 1: Illegal Migration Act 2023 (1)

- Introduces new detention powers (s11)
- Codifies *Hardial Singh* (s12)
- Limits challenges to detention under the new powers (s13)
- Disapplies Independent Family Returns Panel (s14)
- Provides a power to search for and seize electronic devices (phones) (s15)



ISSUE 1: Illegal Migration Act 2023 (2) – new powers

- S11 of the Illegal Migration Act 2023 introduces new powers of detention via amendments to the detention powers in:
 - Schedule 2, para 16 of the 1971 Act (for immigration officers) via s11(2) pending decision as to whether the s2 conditions apply/duty applies and/or removal/grant of leave
 - S62 of the Nationality, Immigration and Asylum Act 2002 (for the SSHD) via s 11(6) on the same basis
- Limited protections for pregnant women/unaccompanied children
- May only be detained under these powers where they apply, and expands where they can be detained to “*any place that the Secretary of State considers appropriate*”
- Not yet in force



ISSUE 1: Illegal Migration Act 2023 (3) – *Hardial Singh*

- A person detained under paragraph 16 of Schedule 2 of the 1971 Act, Schedule 3 of the 1971 Act, s62 of the 2002 Act, the EEA Regulations 2016 or s36 of the 2007 may be detained:
 - “...for such period as, in the opinion of the Secretary of State, is reasonably necessary”
 - “...regardless of whether there is anything that for the time being prevents” removal/deportation
 - Where removal/deportation can no longer be achieved within a reasonable period “for such further period as, in the opinion of the Secretary of State, is reasonably necessary”
- The purpose of the changes is, according to the explanatory notes:

”As well as codifying, in part, the Hardial Singh principles, this clause also overturns the common law principle established in R(A) v SSHD [2007] EWCA Civ 804 (and later authorities) that it is for the court to decide, for itself, whether there is a reasonable or sufficient prospect of removal within a reasonable period of time.”



ISSUE 1: Illegal Migration Act 2023 (3) – *Hardial Singh*

- *Lam and Others v. Superintendent of Tai A Chau Detention Centre and Others* (Hong Kong) [1996] UKPC 5 (27 March 1996) (at §27):

“Their Lordships do not exclude the possibility that, by clear words, the legislature can confer power on the executive to determine its own jurisdiction. Say, for example, the power to detain was expressly made exercisable during such period as in the opinion of the Director removal from Hong Kong was pending. In such a case, the court's only power would be to review the Director's decision on Wednesbury principles.”



ISSUE 1: Illegal Migration Act 2023 (3) – *Hardial Singh*

- Any detention powers will be narrowly construed per Laws LJ (*In re Wasif Mahmood* [1995] Imm AR 311)
- The changes do not affect the Court’s power to make findings of fact – and the SSHD is afforded no further deference there. As held in *Fardous v SSHD* [2015] EWCA Civ 931 (at §43):
“*It is this objective approach of the court which reviews the evidence available at the time that removes any question that the period of detention can be viewed as arbitrary in terms of Article 5 of the European Convention on Human Rights.*”
- Unlike the solution suggested in *Lam*, the question is not subject to whether the SSHD considers detention is *pending*, but whether the SSHD considers detention is *reasonable*
- It is difficult to see how the SSHD could decide that a period of detention that was not *objectively* reasonable was reasonable in *her* view, without acting in breach of the *Lumba* principle. As held in *Lumba* at §30:
“*...the Hardial Singh principles reflect the basic public law duties to act consistently with the statutory purpose (Padfield) and reasonably in the Wednesbury sense...*”



ISSUE 1: Illegal Migration Act 2023 (3) – *Hardial Singh*

- The grace period changes reflect the current law (subject to addition of “*in the opinion of the Secretary of State*”)
- There is a real question as to whether the ‘grace period’ complies with Article 5 ECHR anyway (see BID intervention in *ASK v United Kingdom* (43556/20):
 - Detention during a “grace period” is arguably not detention with a view to deportation for the purposes of Article 5(1)(f).
 - The concept of a “grace period” runs directly contrary to the principle that Article 5 ECHR does not permit a balance to be struck between the state’s interests and the individual’s right to liberty (*A & Ors v United Kingdom* (Application no. 3455/05) at (§171)).
 - It is a core principle of Article 5(1)(f) that detention must not endure for a period that exceeds what is “*reasonably required for the purpose pursued*” (*Saadi v United Kingdom* §74 (Application no. 13229/03)).



ISSUE 1: Illegal Migration Act 2023 (4) – limitation of remedies

- S13 creates a power to grant bail to those detained under the new powers in s11 (s13(2)) by amending Schedule 10 to the Immigration Act 2016, and:
 - Makes it a relevant consideration to the grant of bail that the SSHD has a duty to remove under s2(1) (s13(3)(a))
 - Prevents bail being granted by the FTT for the first 28 days of detention under the new powers in s11 (s13(3)(b))
 - Except for unaccompanied minors being detained for removal, where it is 8 days from the point that detention for that purpose began (s13(3)(b)).
- S13 also provides that where a person is detained under the new powers detention (and refusal of bail) may not be challenged by way of judicial review for the first 28 days (s13(3)(4)).
- Not yet in force.



ISSUE 1: Illegal Migration Act 2023 (4) – limitation of remedies

- There are exceptions to the ouster clause:
 - Bad faith;
 - Where the SSHD/IO has acted “*in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice*”.
- S13(4) explicitly leaves open the possibility of habeas corpus – though that is only a remedy (though a historically flexible one).
- Whether the judicial review ouster will succeed when challenged remains unclear, given the detention context (however note the *Oceana* decision on a similarly worded ouster recently upheld in *LA (Albania) v SSHD* [2023] EWCA Civ 1337).
- Not in force.



ISSUE 1: Illegal Migration Act 2023 (5) – Family Returns Panel

- Removes the requirement to consult the Independent Family Returns Panel in respect of removal in any case where removal is pursuant to the powers in s2 or 4 of the IMA 2023, including for UASC (s14).
- Removes the requirement to consult the Independent Family Returns Panel in respect of detention in any case where detention is pursuant to the new powers in s11 of the IMA 2023, including for UASC (s14).
- Not in force.



ISSUE 2: Second Opinions - *R(Medical Justice) v SSHD* (1)

- Home Office Policy: *Interim Guidance: Requesting a second opinion for an external medical report/Medico-Legal Report*
- This provided:
 - All external medical reports requiring consideration under the Adult at Risk policy received while a person is detained must be referred for a second opinion unless
 - The decision has already been made to release
 - Removal is set for 10 working days
 - The external report is to be rejected anyway (e.g. not from a regulated expert)
- Where an external report is received:
 - It must be referred within 1 working day
 - Detainee will be given 2 working days to respond to the invitation
 - The second opinion appointment must take place within 7 working days of referral
 - Report will be completed in 5 further working days (!!!!!)
 - Casework continues as normal until consideration completed, no change to AAR level



ISSUE 2: Second Opinions - *R(Medical Justice) v SSHD* (2)

- Policy quashed by Linden J in *R(Medical Justice) v SSHD* [2024] EWHC 38 (Admin)
- The Court held:
 - The statutory guidance created a presumption that AAR would not be detained
 - It also created a principle that any decision to detain had to be justified on the available evidence, and that such justification had to remain in place for as long as the detention continued (§66)
 - Delaying consideration of a report was contrary to the statutory guidance if for more than a “de minimis” period (§72)
 - The policy met the *R(A)* threshold as “a policy which positively authorises or approves unlawful conduct by caseworkers” (§79)
 - Medical Justice had a legitimate expectation that they would be consulted on such a policy (§164)



ISSUE 3: Access to Justice – *R(SPM) v SSHD*

- Case concerned the lack of in-person legal visits at Derwentside IRC in the first half of 2022.
- LAA would not provide funding for solicitors to travel to Derwentside for initial advice.
- However:
 - Demand in the area far outstripped supply of LA providers
 - Remote interviews made it more difficult to obtain clients' paperwork/for clients to disclose particular kinds of histories
- Appellants argued (appealing Lang J) that the failure to provide in-person advice created a real risk of a denial of access to justice, and also that detention was unlawful.
- CA held:
 - This was not really a challenge to the SSHD but a collateral attack on LASPO/the Lord Chancellor who was not involved;
 - In-person visits were not “essential” for a solicitor to provide an effective legal service;
 - No real risk of denial of access to justice;
 - Would not have rendered detention unlawful anyway as not a *Lumba* error.



ISSUE 4: GPS monitoring (1)

- Since 31 August 2021, everyone subject to deportation proceedings or a deportation order who becomes subject to immigration bail **must** be considered for electronic monitoring pursuant to paras 2(2) and 2(3) of Schedule 10 to the Immigration Act 2016.
- The exceptions are: (i) it would breach Convention rights; and (ii) it would not be practical to do so.
- There is a policy (Immigration Bail v 18.0) – with tightly drawn indicators of where HR might be breached.
- This policy’s application is challengeable in many cases (and the scope of what is likely to breach Articles 3, 4 and 8 will need to be established).
- However also need to consider: (i) implications for the Equality Act 2010 (ii) Data Protection Act issues.



ISSUE 4: GPS monitoring (2)

- This year has seen: (i) increase in use of EM by 56% (ii) use of non-fitted devices (*Constantly on edge': The expansion of GPS tagging and the rollout of non-fitted devices Annual review of GPS tagging in the immigration system, 2023 Dr Jo Hynes & Mia Leslie*)
- Non-fitted devices are GPS-enabled fingerprint scanners:
 - Less heavy and cumbersome than ankle tags;
 - Still affect people's ability to carry out everyday activities, create a stigma, create a sense of being under constant surveillance;
 - Vibrate up to 10 times per day;
 - Reviews are not being carried out regularly as required.



ISSUE 4: GPS monitoring (3)

- How does the Home Office plan to use this data (from Immigration Bail v18 at p40)?

“...trail data will be held by the EM supplier but may be accessed by the Home Office where one or more of the following applies and where proportionate and justified in the circumstances in accordance with data protection law:

...

o where it may be relevant to a claim by the individual under Article 8 ECHR...

[Emphasis added]

- There is a challenge to the use of EM systems that was heard by Lavender J in December.



ISSUE 5: Bail accommodation (1)

- There continue to be serious issues and delays with bail accommodation
- Delays caused by:
 - Policy requirement for Strategic Director to consider release of FNPs
 - Delays in making/considering accommodation applications/probation delays
 - Lack of accommodation stock (hotels issue)
 - HO refusing s4(2) 1999 Act support as detention is ‘adequate accommodation’
 - Refusal to provide Sch 10 accommodation (no exceptional circs./no residence condition)
- See *R(Merca) v SSHD* [2020] EWHC 1479 (Admin) and *AC(Algeria) v SSHD* [2020] EWCA Civ 36 for right approach.



ISSUE 5: Bail accommodation (2)

- Delays resulting in people being kept in accommodation that might be suitable for a week or so, for far too long – keep an eye on suitability
- HO has argued (see e.g *R(Sawko) v SSHD* [2023] EWHC 3146 (Admin); *R(Bounar) v SSHD* [2023] NIKB 94) that the power to accommodate in Sch 10 to the Immigration Act 2016 only arises where bail has already been granted to a specified address. This is not correct:
 - *Humnyntskyyi* at §§18-19 [2020] EWHC 1912 (Admin): a specified address includes both one already specified and one to be specified – otherwise would be circular
 - SSHD and FTT each has a power to vary conditions to add/modify a condition of residence (para 6 of Schedule 10)



Brook House Inquiry



Brook House Inquiry Report - Findings

- Final Inquiry Report published on 19 September 2023
- 19 incidents found to be credible breaches of Article 3 ECHR
- “Wholesale failure” of detention safeguards
- “Toxic culture” and “breeding ground for racist views”
- Home Office and G4S blamed for failings – complete rejection of the ‘bad apples’ theory



Brook House Inquiry Report – Next Steps

- 33 recommendations
- Headline recommendation is a 28-day time limit for immigration detention
- No Home Office response yet (holding response sent on 4 January 2024)
- Report is very helpful for PAPs and JR grounds
- GC Brook House Inquiry Conference on Youtube:

https://www.youtube.com/watch?v=j_gnIfxwtSo



Bitesize Caselaw Update



Caselaw Overview

- Very few substantive determinations in the Administrative Court following *ZA (Pakistan) v Secretary of State for the Home Department* [2020] EWCA Civ 146
- More IR judgments are being published
- Following slides are a whistlestop tour of 2023 cases (with a couple already in 2024)



R(JXL) v SSHD [2023] EWHC 510 (Admin)

- UTJ Cooke
- Heavy criticism of counsel for the SSHD and officials. On risks of absconding and offending: *“So I am unimpressed by the decision-making of the Defendant's officials, and I cannot give their assessment much weight.”* (Para 55)
- Over 2 years of detention (mostly unlawful)
- Release ordered despite no barriers to removal (Para 77)



R(MXK) v SSHD [2023] EWHC 1272 (Admin)

- Chamberlain J
- Stop and detention for questioning about NHS debts when re-entering the UK
- NHS debts not a basis for cancelling/curtailing leave therefore once it is established that the ‘flag’ against an individual’s name relates only to an NHS debt then no basis for detention for the purpose of examination (Paras 64, 67)
- Secret policy regarding this practice was unlawful (Paras 74)
- Also breach of PSED (Para 88)



R(Kumar) v SSHD [2023] EWHC 1741 (Admin)

- HHJ Dight CBE
- C refused to be interviewed at airport without his solicitor. D decides that he had failed to allow himself to be interviewed without reasonable excuse
- D's conduct was procedurally unfair and denied C's common law right to access to justice (Para 65)
- Detention unlawful from the point at which the decision was made (Para 77)



Johnson v SSHD [2023] EWHC 1260 (KB)

- Sir Nigel Sweeney
- Followed an earlier trial on liability where C had lost (apart from an admitted period of unlawful detention) – see *Johnson v Secretary of State for the Home Department* [2022] EWHC 3120 (KB)
- Costs against C, but did award C the costs of making an application for specific disclosure (Para 51)



Jasseh v Home Office [2024] EWHC 31 (KB)

- HHJ Richard Roberts
- Gambian national. Two periods of detention between 10 September 2019 to 15 September 2021
- First period: No ETD process with the Gambia at the time but initial detention lawful as there was a prospect of returns starting again on 1 January 2020 (Para 161). But in breach of *HS* principles by 16 January 2020 (Para 163)
- Second period: unlawful purpose purely for release arrangements (Para 191)



R(KL) v SSHD [2023] EWHC 1752 (KB)

- UTJ Church
- Claimant had already been granted FTT bail.
- No substantive justification advanced for further detention (Para 11)
- Release ordered with accommodation within 7 days (Para 17)



R(NVC) v SSHD [2023] EWHC 3172 (Admin)

- Tim Smith (Deputy)
- C had already been granted FTT bail. Issue was about POD decision precluding C from accessing support for victims of trafficking
- Inferred serious issue to be tried from grant of permission in test litigation (Para 34). L3 AAR so balance of convenience clearly favoured release (Para 38)
- Release ordered with accommodation within 14 days (Para 44)



R(ER) v SSHD [2023] EWHC 3187 (Admin)

- Chamberlain J
- FTT bail already granted but refusal to provide Schedule 10
- Very compelling case that detention was unlawful (Para 25)
- Judge highly critical of lack of evidence provided by SSHD to back up submissions about accommodation delays (Para 26)
- Release ordered with accommodation within 3 days (Para 28)
- Similar: *R(Barizi) v Secretary of State for the Home Department* [awaiting publication]



R(GVA) v SSHD [2023] EWHC 2838 (Admin)

- Lang J
- Challenge to negative RG decision found to have no real prospect of success.
- Challenge to detention found to have no real prospect of success and therefore IR refused.



Unlawful detention of EEA nationals



Detention of persons protected by Withdrawal Agreement (1)

- Pre-Brexit: in certain circumstances, EU law breaches gave rise to damages claims – *Francovich* (Cases C-6/90 and C-9/90)
- In accordance with European Union (Withdrawal) Act 2018 (EUWA 2018), for *Francovich* damages to be available:
 - Conduct complained of must have occurred before 11pm on 31 Dec 2020; and
 - Claim challenging the conduct must have been brought by 31 Dec 2022 (unless failing amounts to criminal act).

Is that really the end for EU law damages?



Detention of persons protected by Withdrawal Agreement (2)

- Art 4 Withdrawal Agreement confirms that its provisions have the same legal effect in UK as they do in any of EU MS and that they are to be interpreted and applied in accordance with the general principles of Union law (*Francovich* damages are recognised as a principle of EU law).
- S. 7A(2) EUWA 2018 provides that in general rights, powers, liabilities, restrictions, remedies and procedures arising from Withdrawal Agreement are to be recognised and available in domestic law.
- S. 7A(3) then emphasises that principle of general recognition and availability is something to which every other enactment, including EUWA 2018 itself, is to be subject → arguably operates as trump card which overrides contrary statutory provisions.
- Some caselaw in support:
 - *HMRC v Perfect* [2022] EWCA Civ 330
 - *Allister v Secretary of State for Northern Ireland* [2022] NICA 15
- For further details see this [blog post](#).



Quantum



Quantum principles - a recap

- General principles
 - No requirement that D must have foreseen harm, must bear responsibility for loss caused
 - Damages assessed in round and not mechanistically by way of a fixed daily tariff
 - Initial shock of detention will attract greatest award, with rate at which damages increase falling the longer person is unlawfully detained
- Need to establish:
 - Length of UD; and
 - Circumstances and impact of detention on client. Witness and, in some cases, expert evidence is required.
- Substantial (compensatory) vs nominal damages
 - Causation is key for more than nominal damages to be awarded
 - If person would have been detained despite public law error C is entitled to nominal damages only.



Quantum: inflation and 10% uplift

- Key tool to arrive at reasonable figure: compare to awards of damages in decided cases
- BUT historic award:
 - needs to be increased to reflect inflation; and
 - needs to reflect 10% '*Simmons v Castel*' uplift (for cases decided post April 2013).

Examples:

In *Thompson* [1998] QB 498, damages award was £3,000 for first 24 hrs in Feb 1997. Now the equivalent damages award considering inflation and 10% uplift would be £8,069.03.

In *MK Algeria v SSHD* [2010] EWCA Civ 980, damages award was £12,500 basic awards + £5,000 for aggravated damages. The total damages award today is £32,745.74.



New reported cases: 2023

- *Rapheael Olufemi Oluponle v The Home Office [2023] EWHC 3188*
 - Length of UD: 60 days
 - Damages: £20,000
 - No initial shock but impact of detention was “serious, the conditions appalling and he told me of the long-lasting effects on him” (§167)

- *Douglas Ngumi v AG of the Bahamas and Ors [2023] UKPC 12*
 - Privy Council case
 - Length of UD: 6.5 years
 - Damages: \$750,000
 - Part of appeal was whether CoA erred in assessment of damages and interest



Procedural update



Procedural update

- All UD cases allocated number beginning with K12 and case managed by HHJ Bloom → if UD case not given K12 number it has not been recognised as UD case
- If issuing in CLCC, state in cover letter that (1) claim is UD case, (2) ask that it be allocated K12 number and (3) it be allocated to HHJ Bloom
- Order for settlement needs to be in the terms of a Tomlin Order. Otherwise, simply use the Part 36 notice of acceptance and the Court will produce an Order itself.
- Any new claims issued in respect of Napier, Penally or Tinsley House should be accompanied by covering letter asking that they be listed for a CMC with the CMC for large group claim which will be heard in early April (no date yet).
- All detention FI claims should be modelling their directions on format of the [Business and Property Work in the County Court](#).
- HHJ Bloom intends to list PTRs in all cases instead of listing for trial because so many of them settle.



What's on the horizon?



What's on the horizon?

- Derwentside expanding – HO also seeking to expand Manston, Bexhill and Yarl's Wood,
- Manston crisis – many people detained in late 2022 will have viable civil actions,
- Napier/Penally/Tinsley – still a few cases being settled,
- Illegal Migration Act 2023:
 - Rwanda - new powers coming into force
 - Interpretation of s12
- Electronic Monitoring case – policy challenge judgment
- Accommodation issues will continue
- *ASK* coming out



Thank you

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