



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

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GARDEN COURT CHAMBERS



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Introduction

- The aim of this training is to set out the key things you need to know about what happened in immigration detention law in 2022
- The training will cover:
 - Top 5 immigration detention cases of 2022
 - Top 5 issues going on in 2022
 - Bitesize issues
 - Bitesize cases
 - Quantum update
 - What's coming up?



Top 5 cases



(1) *R(Kaitey) v SSHD* [2021] EWCA Civ 1875

- The appellant challenged the decision to impose conditional bail on him pursuant to Schedule 10 of the Immigration Act 2016 despite the fact that he could not lawfully be removed (and relying on *B(Algeria) v SSHD* [2018] AC 418).
- Case concerned the effect of the original provisions in s61 of the Immigration Act 2016 which operated in effect to reverse the decision in *B(Algeria)* and the question of whether the provisions in Schedule 10 that replaced it were to be read in the same way.
- The Court held that “*liable to detention*” had the same meaning as in *Khadir* [2006] 1 AC 207 – he did not need to be *lawfully* detained in order for there to be a power to impose bail conditions on them.
- No equivalent to *Hardial Singh* for bail.



(2) *R(Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin)

- Claimant challenged the operation of the Detained Duty Advice Scheme on the basis that it posed a high risk of interference with the right of access to justice due to:
 - DDAS providers taking no/few steps to provide legal advice to 8,000+ detainees
 - immigration bail advice not being provided to detainees
 - incompetent providers being permitted to continue on the DDAS scheme
- Court rejected the claim on all grounds. The monitoring scheme was not sufficiently inadequate to create a risk of a lack of access to the courts. The extension of the contracts was not *Tameside* unlawful.



(3) *R(SPM) v SSHD* [2022] 4 WLR 92 (Women for Refugee Women)

- Challenge to provision of access to legal advice/representation in Derwentside.
- Derwentside opened in November 2021 replacing Yarl’s Wood as the main female IRC.
 - In July 2021 a tender was opened for DDAS services, but there were “*insufficient compliant*” responses, so those already working Yarl’s wood were given a six month contract.
 - A second tender bought three firms in, based 2 ¼ to 5 ½ hours’ drive away.
- There were two advice surgeries a week, and the default arrangement was by telephone.
- Claimants claimed that was insufficient – needed access to in-person legal advice.
- Claims were rejected:
 - The provision of legal advice via telephone or video-conference instead of in-person, for a six-month period did not amount to a denial of effective access to justice “*in real world conditions*”.
 - No breach of PSED, nor was it discriminatory.



(4) *R(MA) v Coventry City Council* [2022] EWHC 98 (Admin)

- Claimants challenged the lawfulness of guidance issued for “short-form” age assessments conducted in Dover, and the SSHD’s decision to detain them and treat them as adults.
- Rationale was to exclude full age assessment referrals for those who were clearly adults. However the guidance provided for a short-form assessment in cases that were by definition not obvious.
- Court held that the guidance was unlawful as it did not comply with the *Merton* principles on age assessments because e.g. there was no provision for appropriate adults or a ‘minded-to’ process, they were detained and had just arrived.
- Detention for the purposes of an age assessment “*within the parameters*” of ordinary detention was lawful, provided the assessment complied with *Merton* guidelines (and therefore detention was unlawful if extended by an unlawful assessment).
- Note contrasting approach from Swift J in *R (HAM) v London Borough of Brent* [2022] EWHC 1924 (Admin)



(5) *C3 v SSFCDA* [2022] EWHC 2772 (Admin)

- Claimants were British women who had travelled to Syria to join ISIS and had been captured and were being detained by the authorities in the Autonomous Administration of North and East Syria – sought a writ of habeas corpus.
- Secretary of State had never been involved in their capture or custody but AANES had indicated that it would release them if the UK government made an "official request" together with arrangements for their repatriation – they refused.
- Claimants sought *habeas corpus*.
- Application refused because the Secretary of State was not detaining them and did not have control over their detention – he could only respond to the AANES request.



Top 5 issues



(1) GPS monitoring

- From 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.
- From 31 January 2022 those already on bail had their circumstances reconsidered and should be made subject to electronic monitoring unless an exception applies.
- The exceptions are: (i) it would breach Convention rights; and (ii) it would not be practical to do so.
- There is a policy – 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 and 8 will need to be established). However also need to consider: (i) implications for the Equality Act 2010 (ii) Data Protection Act issues.



(2) GPS monitoring (cont.)

- Intention is to roll out the use of “non-fitted” devices (smart-watches) and preliminary work is underway
- How does the Home Office plan to use this data (from Immigration Bail v14 at p41)?

“...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 a breach of immigration bail conditions has occurred, or intelligence suggests a breach has occurred to consider what action should be taken in response to a breach up to and including prosecution

o where a breach of immigration bail conditions has occurred, which has resulted in the severing of contact via EM, trail data will be used to try to locate the person

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

[Emphasis added]



(2) Bail accommodation

- 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.



(3) Manston

- Manston STHF opened in February 2022 to conduct border security screening and asylum screening of people who had arrived in the UK in Kent
- Widely publicised overcrowding and detention in excess of legal limits in Manston STHF also:
 - Lack of adequate accommodation/food/access to telephones/lawyers/interpreters
 - Being detained well in excess of legal limits (including UASCs)
 - Diphtheria outbreak resulting in at least one death
- Detention Action threatened wide-ranging legal action
- Bail for Immigration Detainees threatened legal action over lack of access for charities and lawyers to the site
- HO appears to have got the numbers under control (for now)



(4) Second Opinions

- New Home Office Policy: *Interim Guidance: Requesting a second opinion for an external medical report/Medico-Legal Report*
- This provides:
 - 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



(5) Napier and Penally

- Numerous ongoing civil claims following the use of Penally and Napier barracks, and the judgment in *R (NB and other) v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin)
- Many in Napier barracks were in *de facto* detention in January 2021
- Many in both were subject to illegal curfews
- County Court is aggressively case-managing these claims and there is a CMC on 17 April 2023 to identify lead cases to which any solicitors with lodged claims are invited to attend



Bitesize issues



Bitesize issues

- **Offender management: caseworker guidance (1 November 2022)**
 - Updates to Adults at Risk guidance to include information about the management of individuals who suffer from a serious health condition/mental health condition which requires specialised treatment or medication.
- **Detention case progression panels (31 March 2022)**
 - Changes have been made to the timing and scheduling of Case Progression Panels section so as to require the addition of independent panel members in a panel, to the case progression roles and responsibilities section, and to the performance goals in Annexes A and B.



Bitesize cases



Bitesize cases

- *BVN v SSHD* [2022] EWHC 1159 (Admin): Trafficking case. SSHD imposed stricter/ additional bail condition than those imposed by High Court order. Bourne J held that C was not on immigration bail and so SSHD had no power to impose additional condition.
- *Niagui v Governor of HMP Wandsworth (Rev1)* [2022] EWHC 2911 (Admin): *Habeas corpus* case. C acquitted in Magistrates' Court late Friday eve but was not released despite intervention by court and legal representatives.
- *Ali v Home Office* [2022] EWHC 866 (QB): Successful appeal from a decision of HHJ Baucher in the County Court (DFT case).
- *R (PZX) v SSHD* [2022] EWHC 2890 (Admin): Judgment on costs in interim relief proceedings. Costs assessed on indemnity basis.
- *R (MH) v SSHD* [2022] EWCA Civ 1296; [2022] 10 WLUK 68: Dublin III removal challenge. Appeal on costs. Held that Court of Appeal will only interfere where judge below was '*obviously wrong*'.



Quantum



Quantum: introduction and general principles

- 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.

Example ‘nominal damages’: *ZA Pakistan* [2018] EWHC 183. C unlawfully detained as he had not had R35 examination w/in 24 hrs, but would have been detained regardless. Error did not cause detention.



Quantum: inflation and 10% uplift (1)

- 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).

Example: 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 £7,583.61.

- Top tip: use *Lawtel* on Westlaw

Quantum: inflation and 10% uplift (2)

Inflation calculator

Update past PI awards and settlements using the Inflation Calculator below.

<p>Value of award or settlement, £</p> <input type="text" value="3000"/>	<p>Results Copy summary</p>
<p>Month Year</p> <p>February 1997</p>	<p>Current value of award or settlement £7,583.61</p>
<p>Apply Heil v Rankin uplift?</p> <p><input type="radio"/> Yes</p> <p><input checked="" type="radio"/> No</p>	<p>Based on RPI of 155.0 in February 1997</p> <p>and RPI of 356.2 in October 2022</p>
<p>Apply Simmons v Castle uplift?</p> <p><input checked="" type="radio"/> Yes</p> <p><input type="radio"/> No</p>	<p>Sum to adjust £3,000.00</p> <p>Date from 01 February 1997</p> <p>Date to 01 October 2022</p>
<p>Calculate Clear</p>	



Reported cases: seminal cases (1)

- *Thompson v Commissioner of Police for the Metropolis* [1998] QB 498
 - Key authority which sets out guidelines for basic and aggravated damages
 - Civil actions against police case but equally applicable to immigration cases
 - Damages guidelines: £500 for first hour (*today*: £1,263.94), £3,000 for first 24 hours (*today*: £7,583.61). BUT: damages per day of detention have to be assessed on reducing scale
- *MK Algeria v SSHD* [2010] EWCA Civ 980
 - Length of UD: 24 days
 - Damages: £12,500 basic awards + £5,000 for aggravated damages (*total today*: £30,775.81)
- *Muuse v SSHD* [2009] EWHC 1886 (QB)
 - Length of UD: 128 days
 - Damages: £60,000 [£25,000 (basic), £7,500 (aggravated), £27,500 (exemplary)], (*today*: £84,655.07. NOTE: exemplary damages not subject to 10% uplift)
 - No specific vulnerability, prior experience of custody so ‘no initial shock’



Reported cases: seminal cases (2)

- *R (B) v SSHD* [2008] EWHC 3189 (Admin)
 - Length of detention: 6 months
 - Damages: £32,000 (*today*: £58,892.63) and £6,000 for aggravated damages
 - Torture victim
- *R (NAB) v SSHD* [2011] EWHC 1191 (Admin)
 - Case where detainee does not cooperate with removal
 - Length of detention: 82 days
 - Damages: daily rate: £75 (*today*: £124.94)
 - Relevant to level of damages: no ‘first shock of detention’, no mental health impact, C’s persistent refusal to comply with requirement to sign documents to facilitate deportation



New reported cases: 2021 and 2022 (1)

- *Rees Commissioner of Police of the Met* [2021] EWCA Civ 49
 - Appeal against quantum judgment
 - Length of UD: almost 2 years
 - Damages: £155,000 (basic: £87,000, aggravated: £18,000, exemplary: £50,000)
 - Malicious prosecution and misfeasance in public office
 - Court held that interest pursuant to s35A Senior Courts Act 1981 should not generally be awarded in false imprisonment claims (§46)
- *Juvete v SSHD* [2021] 4 WLUK 127
 - Length of UD: 23 days
 - Damages: £12,500
 - SSHD failed to consider whether detention necessary before C removed from UK to Romania



New reported cases: 2021 and 2022 (2)

- *R (Abdulbaker) v SSHD* [2022] EWHC 1183 (Admin)
 - Length of UD: 40 days
 - Damages: £17,500
 - Breach of 3rd *Hardial Singh* principle and unreasonable delay in providing accommodation
- *R (Kessie-Adjei) v SSJ* [2022] EWHC 722 (Admin)
 - C argued that his Art 5 ECHR rights had been breached
 - Court found no breach of Art 5 but assessed appropriate damages award in ‘just satisfaction’ had liability been made out. Sets out principles for human rights breach damages → see §§112-117
 - Length of detention: 49 days
 - Damages: £5,000
 - Amount low as significant weight attached to C’s own conduct. Detention triggered by serious breach of licence conditions by committing further offences.



What next?



What is on the horizon?

- *Hemmati* cases – coming to the end of 6 years since March 2017 (but note extensions in PI claims)
- Civil claims for Manston
- Napier and Penally cases: damages claims are proceeding
- Challenges to EM policy
- More use of detention for first time asylum seekers post Rwanda judgment?
- Accommodation issues will continue



Thank you

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