

# No Recourse to Public Funds

»» New Judgment – 6 May 2020

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## *R (W, a child by his Litigation Friend J) v SSHD* (CO/3036/2019)

- ▶ Case concerned an 8 year old British boy supported by his migrant mother, who had due to the refusal to allow then access to the social security safety net:
  - been forced to move school five times, and
  - been street homeless with his mother
- ▶ The Court held on those facts:
  - the relevant Immigration Rules and the instructions, as presently formulated, did not adequately give effect to the UK's obligations under Article 3 ECHR and attendant authority (ie Limbuela)
  - that did not affect the ability of continued application of the restriction in the normal run of cases
  - it would require aspects of the regime to be amended to make clear to caseworkers the circumstances in which they are obliged not to impose a condition or to lift it for a person who is not currently destitute but will imminently become so

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# Detention



Case updates, Adults at Risk  
and Bail decisions

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## DN (Rwanda) [2020] UKSC 7

Important decision rejecting proposition a detention decision was sufficiently separate from the earlier immigration decisions to be insulated from challenge:

- The detainee was subject to deportation because he had committed an offence ('assisting unlawful entry' - s.25 IA'71) that fell under the Specification of Particularly Serious Crimes Order 2004 made under s72 of the NIAA 2002 which was subsequently struck down as ultra vires
- Given detention is always dependent on a prior immigration decision of one kind or another if the legal authority for the earlier decision is invalid the edifice on which the detention is founded crumbles
  - Without a lawful decision to deport, the question of detention cannot arise, much less be legal
  - The lawfulness of detention is always referable back to the legality of the decision to deport, and this is not an instance of a series of successive steps, each having an independent existence
- Was suggested *Res Judicata* argument could have been taken by Home Office though where deport appeal had been finally determined adversely by the IAC

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## Jalloh [2020] UKSC 4 – Tagging and Curfew

SC confirmed that Sch.3 IA 1971 did not authorise subjection to curfew (as per *Gedi* [2016] 4 WLR 93) and held:

- A curfew constituted the tort of false imprisonment as it:
  - directly and intentionally caused confinement in a delimited area
  - caused involuntary constraint as the Respondent knew a breach of tag could lead to a fine/imprisonment and re-detention
  - constraint could be effected by:
    - physical barriers (doors and bars)
    - physical people (guards)
    - threats (of force or legal process)
- Damages were recoverable, here £4,000 had been awarded for 891 days of curfew (*Jalloh* [2017] EWHC 2821)
- Best bit ...
 

*The idea that the claimant was a free agent, able to come and go as he pleased, is completely unreal*

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## Chief Inspector of Immigration's Annual inspection of Adults at Risk in Immigration Detention 29.04.2020

- The Home Office had made progress since 2016 AaR Guidance came in and there had been an overall reduction in the numbers detained, but it remained a *work in progress*
- There was force in the case for enhanced screening and assessment prior to detention where Detention Gatekeeper staff:
  - did not have direct contact with those referred for detention and had to rely on forms completed by various referring units
  - had to resort to internet searches to understand the significance of medication found with the person being referred
  - experienced differences and gaps in training, applied varied methods of recording and reporting what was discovered about a detainee, lacked time to explore vulnerabilities which was exacerbated by a detainee's state of mind on arrival
  - lacked genuine power decisions on detention being made elsewhere (ie CCD), and there being a lack of suitable accommodation, facilities and support to enable release in any event
- The scale and pace of progress on alternatives to detention needed to increase significantly
- Rule 35 and other reports were seldom engaged with properly and little feedback was provided on usefulness

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## Bail – Home Office letter to FTT President Clements

- ▶ Home Office Director (Appeals, Litigation & AR) wrote to FTT on 29.04.2020 saying:
  - It was *somewhat surprised* Judges had released so many people on immigration bail during the coronavirus crisis
  - Reminded of its success in *R (Detention Action & Anor) v Secretary of State for the Home Department* [2020] EWHC 732 (Admin)
  - Made the case that removal was still possible in some cases and asked Judges *provide written reasons* for granting bail
- ▶ The President responded in measured fashion :
  - *As [an] independent judiciary we decide bail applications in accordance with the law, which includes the guidance which has been issued*
  - *There has been no change in either the law or the guidance and it was being applied*
  - Noting the *mindful to grant* process had been implemented and provided reasons before the hearing to enable a revised response and augmentation of reasons by HOPO's
- ▶ Correspondence can be found here: <https://ilpa.org.uk/correspondence-between-the-home-office-and-the-president-of-the-fttiac/>

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## Home Office Policy and Guidance



The approach to interpretation

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## *Ellis* [2020] UKUT 00082 (1) – Construction of Home Office policy

- ▶ *Gashi* [2003] EWHC 1198 and *R(K)* [2010] EWHC 3102 were not authority for the proposition that in the immigration field it is for the Home Office to interpret its own policy subject only to a rationality review
- ▶ Extra-statutory immigration policies should be read in their proper context and interpreted objectively in accordance with the language used
- ▶ It would be inimical to legal certainty if the Home Office were permitted (even subject to rationality review) to interpret it other than in accordance with the objective meaning that a reasonable and literate person would ascribe to it

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## *Ellis* [2020] UKUT 00082 (2) – Use of the word *normally* in policy

- ▶ For transitional cases, where policy stated ILR would *normally* follow after 6 years, settlement was not automatic simply because that length of residence had been secured
- ▶ Use of the word *normally* meant the Home Office maintained the maximum possible discretion
- ▶ Where a policy governed what happens in a normal case it remained open to the Home Office to take a different course provided
  - account was taken of the policy and
  - reasons had to be given for departing from the normal position
- ▶ Reasons could be brief but must be intelligible, adequate and enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues (*RG (Ethiopia)* [2006] EWCA Civ 339)

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# Nationality



The effect of delay on deprivation proceedings

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## *Hysaj (Deprivation of Citizenship: Delay)* [2020] UKUT 128 (1) – Delay doesn't assist

The UT evaluated the lawfulness of deprivation by reference to the discretion in section 40(3) BNA 1981 and exceptionality, and Article 8 proportionality and found:

- (1) No *historic injustice* arose from the fact an unlawful nullity decision had been made and defended denying the opportunity for consideration under preceding guidance which indicated deprivation would not *normally* be pursued after 14 years residence
- (2) There was no legitimate expectation had deprivation been pursued of benefit from the 14 year concession which was not clear and unambiguous (it used the term *normally*)
- (3) The 14 year concession did not apply anyway in that case as the clock had stopped due to the appellant's conviction in 2011
- (4) There was no substantive unfairness arising from the fact that others in a similar position to the Appellant were issued with deprivation rather than nullity decisions
- (5) Those deprived of citizenship are left with no leave and do not revert to holding ILR
- (6) Article 8 ECHR was not breached by reason of the Respondent's practice that following deprivation an applicant would be left *in limbo* for at least 8 weeks, but that was a fact sensitive assessment

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## *Hysaj (Deprivation of Citizenship: Delay)* [2020] UKUT 128 (2) – *Kaziu* in the alternative

- The decision is the subject of an appeal
- Note alternative approach in *Kaziu* (DC/00036/2018(Unreported))  
<https://tribunalsdecisions.service.gov.uk/utiac/dc-00036-2018>:
  - A decision is made by the Supreme Court is declaratory of the law as it has always been and does not just apply to similar cases which come up after the date of its decision . The effect of an SC ruling is that the law has always been wrong
  - The effect of the delay due to the nullity proceedings had been to deprive the appellant of the chance to have his case considered under the 14 year concession
  - Switching between nullity and deprivation generated a system which was unpredictable, inconsistent and unfair
  - There had been historic injustice and unfairness

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## The Right to Rent



Discrimination an indirect  
consequence only

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## *R (OTA Joint Council for The Welfare of Immigrants* [2020] EWCA Civ 542

- Evidence before the Court included that the Right to Rent requirements had:
  - led 42% of landlords to say they were less likely to consider someone who does not have a British passport
  - 27% to be reluctant to engage with those with foreign accents or name
- The Court held the scheme:
  - was a proportionate means of achieving a legitimate objective and was thus justified
  - did not intend, encourage or directly create discrimination
  - discrimination was entirely coincidental, the measure only collaterally impacting the target group through the checks required and penalties for default
  - if the discrimination is greater than Parliament envisaged when enacting the provisions then Parliament (or the Secretary of State) should address it
- JCWI intends to appeal to the Supreme Court

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## Children



Section 117B(6) and  
reasonableness of  
relocation

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## *Runa v Secretary of State for the Home Department* [2020] EWCA Civ 514.

- ▶ The Court rejected the contention application of s.117B(6) meant wherever one parent had the right to live in the UK and the other did not, it will be unreasonable for the child to leave as it would cause a split:  
*If Parliament had intended to enact such a rule of law, it could easily have said so. Section 117B(6) does not enact a rule of law but rather calls for a question to be asked and answered on the facts of each particular case*
- ▶ S.117B(6) must be read as a self-contained provision not as part of a broader human rights assessment as this would be contrary to *KO Nigeria's* direction that parental conduct is irrelevant to the question of reasonableness
- ▶ Focussing on the child if it would be unreasonable to expect it to leave the UK that was the end of the matter
- ▶ If it were not unreasonable there was still scope for a further exploration of human rights law set out in Article 8