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Immigration Detention, Deportation and Judicial Review in the Age of Covid 19

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Abstract: The first significant issue arising out of the COVID-19 pandemic for migrants who have been refused stay to come before the Administrative Court has been the question of the continued legality of immigration detention in the face of the risks and practical difficulties arising from the crisis. The pandemic raises two vital issues affecting the legality of immigration detention; on the one hand, that detainees may invite an increased risk of infection by reason of the "congregate" setting of detention centres, and on the other that removals in the short term will not be possible and that the probability of removal is uncertain even in the medium term. The issue is if the Home Office policy is "irrational and discriminatory" in its approach, which has led to inconsistencies in how the detention cases are handled. This paper enquires if the merit based judicial review can expedite the cases where administrative detention is concerned in circumstances of medical emergency. The argument here is that the Home Office should give full credence to the medical impact of detention to act in accordance with the Hardial Singh principles and by keeping in perspective the pandemic and the BMA reports of the unreasonableness of detention before deportation.

Keywords: *Administrative detention; Immigration Act 1971; Judicial Review, COVID-19; Hardial Singh principles; Rule 35; Shaw report; Medical Justice report; BMA - locked up locked out immigration detention report.*

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Introduction

The term administrative detention refers to the use by States for various purposes " including custody of persons who are considered to pose a security threat, for controlling immigration and cross-border movements, and in dealing with persons suffering from mental disorders, rehabilitation of minors, protection of minors, protection of public health and application of disciplinary sanctions" (Council of Europe, 2016). This process can intersect when the detention is in the Immigration Removal Centres in the UK where migrants are held who have been denied stay and are liable for deportation. The need is to evaluate how that impacts on the vulnerable migrants who are in the stage of being detained and there is potential for self harm prior to their removal from the UK[1].

The detention regime for migrants in the UK has become a matter of contention because of the continued presence of hundreds of detainees in immigration detention centres, including large numbers of people with health conditions that has put them at a higher risk from Covid-19, and those originally from countries which have imposed travel restrictions. The Home Office is required by law to publish its detention policies of migrants refused leave to remain and its perceived failure to do so is affecting the ability of those detained, especially vulnerable detainees, to evaluate or challenge their detention.[2]

There have been Covid 19 outbreaks at three of the Immigration Removal Centres (IRC)s over 2020. Of the 5 detention centres nationally Brook House had several effected detainees that led to closure over 10 day period and the detainees were transferred to other sites because of transmission (Bulman, 2021). On 23 October 2020 Dungarel House, the IRC in Scotland was infected by the coronavirus which led to the transfer of detained migrants (Global Detention Project, 2021). Despite the countrywide lockdown and advise to stay at home in the process of a new variant of Covid 19 the UK government has continued to enforce

[1] There are 3 types of detention centres for migrants who are due for removal from the UK which are the 10 Immigration Removal Centres (IRC)s, Short Term Holding Facility for those in 'pre departure accommodation' and prisons for foreign national prisoners (FNP)s.
[2] On 7 July 2020, the Home Office released the second version of the "Guidance for Immigration Removal Centres (IRCs), Residential Short-Term Holding Facilities (RSTHFs) and escorts during the Covid-19 pandemic." The guidance is intended to inform Home Office staff operating in IRCs and RSTHFs about Covid-19 measures in places of detention and covers the strategy for shielding those particularly vulnerable to the virus.

deportations and compelled migrants to return to Eastern European destinations in 2021 (Glenton, 2021).

The issue has been magnified as a result of the Immigration and Social Security Co-Ordination (EU Withdrawal) Act 2020. Part 1, Section 1 that repeals the free movement of EU workers[3] and its replacement by a framework for the points based system based on skills based migration into the UK. However, that has not diminished the period a migrant can be held which is of unlimited duration prior to their expulsion and the UK is the only country in Europe that has this approach of confining migrants who have been refused permission to stay (House of Commons, 2020)[4].

This paper will consider the detention regime for immigrants to the UK, and how it operates in the public law domain. The issues that impact on migrants who have been served with deportation orders and their vulnerability in the IRCs needs examination. It needs to determine how the Home Office has followed its own legal obligations of publishing and enforcing guidelines that prevent excessive stress on the migrants and exposes them to illnesses. The medical evidence from the British Medical Association (BMA) will be cited in order to frame the argument that the migrants who have been impacted in detention should have received improved treatment, access to legal assistance and to have been only detained if they were a threat to public interest.

Part A considers the impact of Home Office policy regarding detention, and the need to conform to its public guidelines; Part B is about the circumstances of migrants after being served with a deportation notice and the recourse to merits based judicial review; Part C concerns the medical reports and how that is a precursor to legal action in the courts; and Part D will examine improving the legal standards for the judicial review of those migrants who are awaiting deportation from the UK.

[3] Repeal of law the main retained EU relating to free movement etc.
Schedule 1 makes provision to—
(a)end rights to free movement of persons under retained EU law, including by repealing the main provisions of retained EU law relating to free movement, and
(b)end other EU-derived rights, and repeal other retained EU law, relating to immigration.

[4] An amendment to the Immigration and Social Security Coordination Act introduced s an amendment on 30/6/20 was not successful in passage. It stated ""Time limit in Immigration detention'. '(2) The Secretary of State may not detain any person under a relevant detention power for a period of more than 28 days for the relevant time". House of Commons, Consideration of Bill. Report Stage. https://publications.parliament.uk/pa/bills/cbill/58-01/0104/amend/immigration_day_rep_0629.pdf

1. Detention and Hardial Singh principles

The legal framework for administrative detention prior to deportation stems from the Immigration Act 1971 and the Secretary of State may invoke this to achieve the purpose.[5] This Act has been reinforced by Section 32 of the UK Borders Act 2007 which provides for automatic deportation of foreign criminals as defined in the section, i.e. a person who has been sentenced to a term of imprisonment of at least 12 months for commission of an offence within a category defined by the Home Secretary in accordance with section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002. Section 3(5)(a) of the Immigration Act 1971 states that a person who is not a British citizen is liable to deportation if the Secretary of States deems that his deportation is conducive to the public good, by an amendment in the Section 32(4) of the 2007 Act.

The most important consideration in detention prior to deportation are the principles established in *R v Governor of Durham Prison, ex parte Hardial Singh* ([1984] WLR 704) that interpreted the Home Secretary's policy for those who have been served with a notice to leave the UK. In this case an Indian national had been imprisoned after committing two offences and was subject to deportation after having served his sentence. The Court of Appeal in reviewing his detention upon a plea of habeas corpus held that the power of detention exercised under section 2(3) of the third Schedule of the Immigration Act 1971, given to the Secretary of State in paragraph 2, to detain individuals is not subject to any express limitation of time, it was, nevertheless, subject to limit.

These limits were based on the following considerations:

"*First of all, it can only authorize detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong*

[5] The Immigration Act 1971 provides (1)The Secretary of State may by order remove from a specified person a right of abode in the United Kingdom which he has under section 2(1)(b).(2)The Secretary of State may make an order under subsection (1) in respect of a person only if the Secretary of State thinks that it would be conducive to the public good for the person to be excluded or removed from the United Kingdom.

for the Secretary of State to seek to exercise his power of detention" (Woolf LJ at Para 7).

Before enforcing a deportation order the Secretary of State evaluates if the Judicial Review against its terms will fail when it is raised to prevent removal of the detainee. Where the merits based judicial review does not raise any issues which will prevent a removal then the Home Office will proceed towards deportation. The most important consideration is on the grounds upon which it could be suspended which are claims under the Human Rights Act made for the first time or further submissions that fall to be considered under paragraph 353 of the Immigration Rules (Home Office, 2018a, p. 30).

The Home Office guidelines stipulate that the claimant may depend on newly admissible evidence that has not previously been considered by the Secretary of State in deciding a previous application or claim. This is where the right of appeal has been exercised against the refusal of that previous application by the court in an appeal at the Immigration Appeal Tribunal (Home Office, 2016a). If that procedure has been exhausted then there needs to be consideration of the new evidence and this would entitle the first-time asylum or human rights claim, or further submissions that fall under the paragraph 353 on fresh claims (Home Office, 2022)[6].

The process for judicial review that is merits based arises when there is detention prior to deportation of the migrant who has been served with deportation orders pending their removal. This may even be if the case is obviously unarguable on the facts or if there is an existing precedent denying judicial review. It was made in the background of a policy to disclose the details for the reasons of additional detention. The only essential fact that needs to be shown in these circumstances is that the person who is affected by the decision must be informed of the reasons for the detention.[7] The

[6] The Fresh claims are based upon the Grounds raised in the JR amount to a first-time protection claim, where the grounds amount to a first time claim for asylum or humanitarian protection and the claimant has not previously made an asylum or humanitarian protection claim (note that EU asylum claims are inadmissible unless there are exceptional circumstances as defined in paragraph 326F of the Immigration Rules) OSCU will: suspend removal refer the protection claim to the Asylum Casework Directorate or to Criminal Casework Directorate for deportation cases refer the JR to the litigation handling team to be handled in accordance with the usual JR process (refer to the judicial review guidance) (Home Office, 2022, p. 33).

[7] Home Office Enforcement Instructions and Guidance, Chapter 55.6.3, Form IS91R Reasons for detention: This form must be "served" on every detained person. "In addition, there must be a properly evidenced and fully justified explanation of the reasoning behind the decision to detain placed on file in all detention cases". The guidance states that there

presumption that a JR is bound to fail does not mean that it is not arguable and, therefore, the permission to proceed on the merits stage should be granted (Home Office, 2022, p. 31).

The principles developed by the courts deal with merits based judicial review of the reasonableness of the Home Secretary's policy and its merits. In *Lumba (WL) v Secretary of State for The Home Department* ((2011) UKSC 12, UKSC 2010/0062, /0063) the claimants were two foreign national prisoners (FNPs), who had been detained under the 1971 Act, and after completing their sentences of imprisonment they were to return to their home countries. They raised the issue of the deportation orders being unlawful based on the Home Office's unpublished policy introduced in 2006 which stated that in cases of immigrants detained and waiting to be deported, there was a presumption that they would be released. However, it followed an unpublished policy which favoured detaining the FNP'S instead.

The Supreme Court held there had been a duty to publish such policies, and the failure to publish them made the detentions unlawful. Lord Dyson giving the leading judgment stated that under English public law principles the "immigration detention power need to be transparently identified through formulated policy statements" (Home Office, 2022, p. 34)[8]. His Lordship stated:

[T]here was a deliberate decision taken at the highest level to conceal the policy that was being applied and to apply a policy which, to put it at its lowest, the Secretary of State and her senior officials knew was vulnerable to legal challenge. For political reasons, it was convenient to take a risk as to the lawfulness of the policy that was being applied and blame the courts if the policy was declared to be unlawful (Home Office, 2022, p. 34, para 166)

The Court also considered the detention as a breach of *Hardial Singh* principles and considered their detention was for an un reasonable period by affirming that "*in considering whether a person had been detained for an unreasonable length of time, risk of re-offending is relevant by contrast time spent reasonably challenging deportation is not relevant; non-cooperation with efforts to return is of limited relevance. It is for a court of first instance to decide whether Mr Lumba's detention for almost 56*

are "five possible reasons for detention" which are set out on the IS91R form, these are: "You are likely to abscond if granted immigration bail. There is insufficient reliable information to decide on whether to grant you immigration bail. Your removal from the UK is imminent. You need to be detained whilst alternative arrangements are made for your care. Your release is not considered conducive to the public good". House of Commons Home Affairs Committee Immigration detention Fourteenth Report of Session 2017–19 Report, together with formal minutes relating to the report Ordered by the House of Commons to be printed 12 March 2019

[8] Lord Dyson at p. 34

months was in breach of the principles. Accordingly, his claim is remitted to the High Court" (Home Office, 2022, para 129-148).

The requirement of a published policy by the Home Office again came up for judicial review in *R (O) v Secretary of State for the Home Department* ((2016) UKSC 19 (2016) 1 WLR 1717), when O, a Nigerian national aged 38, who entered the UK illegally in late 2003 with her three-year old son were detained under the Mental Health Act (MHA) 1983. She committed an offence in violation of the Children and Young Persons Act 1933, s 1, of cruelty to her son and was detained at the Yarl Wood IRC for almost three years (2008-2011). This was justified by the risk of absconding and harm despite a 2009 recommendation, under the s 48 of the MHA, for her to be transferred to a hospital.

O raised the lawfulness of her detention from 22 July 2010, and (the first review which was a year later following the government's receipt of the 2011 report) until 6 July 2011 when she was released on bail. The issue was her detention between March -July 2011 and the matter reached the Supreme Court. Their Lordships considered the case on the principles of the *Lumba* ruling (para, 17).

Lord Wilson formulating the leading judgment stated that a medical report was provided to the authorities to challenge her deportation which was relevant to the detention policy and should have been given proper consideration in the reviews (para 22-25). His Lordship held that the refusal to release her during this period was procedurally wrong but that the case did not provide the opportunity to reconsider the nature of the court's review of the legality of the Home Secretary's application of the policy (para 37).

The ruling in *R (Frances) v Secretary of State (Bail for Immigration Detention intervening) (2014) EWCA Civ 718 (2015) 1 WLR 567,* was to the effect that the "*Home Secretary's satisfactory management in the policy required a 'practical enquiry and treatment available to a detainee only when released and which would be likely to have a positive improvement in the detainee's condition, could be relevant and its availability should form part of the consideration on detention*" (para 48).

This had been overlooked in the *Frances* ruling which had been wrongly decided. His Lordship noted that the "*power to detain a person pending deportation in Schedule 3, para 2(1) of the 1971 and under the words in parenthesis in para 2(3) was a mandate subject to two conditions: (a) there was a prospect of deportation within a reasonable time; (b) the SSHD had to consider, in accordance with the policy, whether to exercise the power to detain. If either condition was not met, the mandate would cease and the detention would become unlawful*" (para 49).

The Home Secretary cannot breach any limb of the *Hardial Singh* principles which will be at variance with the overall treatment of the

unlawful application of policy which had made detention during the whole of the period of detention unlawful. These were of paramount importance and the requirement in public law for the Home Secretary to properly apply the published policy does not have any lesser effect than the requirement in public law for her to comply with them.

The determination made in a judicial hearing that the detention was unlawful can have wide ranging implications. In *R (DN (Rwanda)) v Secretary of State for the Home Department* ((2020) UKSC 7) the Claimant had in 2000 been granted refugee status and indefinite leave to remain on the basis of a well founded fear of persecution as a Hutu if he was returned to Rwanda. He was subsequently convicted of a number of offences, the most significant of which was assisting unlawful entry of a non-EEA national (his niece) into the UK. He was sentenced to 18 months imprisonment and after having completed the custodial element of his sentence, the Home Secretary decided to deport him on the basis of article 33(2) of the Refugee Convention which allows the expulsion of refugees "whom there are reasonable grounds for regarding as a danger to the security of the country". It was alleged that he had been convicted of a "particularly serious crime" and that he "constituted a danger to the community".

The decision was based on section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002, which gave the Home Secretary the power under the (Specification of Particularly Serious Crimes) Order 2004 to specify 'particularly serious offences'. Assisting unlawful immigration to a member state was such a specified offence and the Claimant was accordingly held in immigration detention pending the enforcement of a deportation order. DN challenged the deportation decision by way of a judicial review and following a separate Court of Appeal decision in *(EN (Serbia) v Secretary of State for the Home Department EWCA Civ 630 [2009]* it was decided that the 2004 legislation was unlawful and should not be relied upon. DN changed his judicial review to focus on the lawfulness of his immigration detention and his case was rejected by the Court of Appeal who followed the decision of *R (Draga) v Secretary of State for the Home Department [2018] EWCA Civ 273* which stated that detention was lawful, even where the decision to deport was not.

The Supreme Court allowed the appeal and held that DN should be able to pursue a claim for damages for false imprisonment. The Court ruled that the decision to detain is always referable back to the decision to deport and if the initial decision is unlawful, so is the subsequent detention. This meant that DN could pursue a claim for damages for false imprisonment. Lord Kerr for the majority invoked Lord Dyson's judgment in **Lumba**, on

the similarity between a detention which is unlawful because there was no statutory power to detain and a detention which is unlawful because the decision to detain was made in breach of a rule of public law.

"Here, as in Lumba, there was no lawful statutory power to detain. The statutory power to which recourse had been had in deciding to make the deportation order, and in making it, was invalid. Detention in this instance was for the express purpose of facilitating the deportation. Without the existence of a deportation order, the occasion for (much less the validity of) detention would simply not arise. To divorce the detention from the deportation would, in my view artificial and unwarranted" (para 17).

Lord Kerr held that the making of a deportation order was a two stage process involving (1) notice of a decision to deport and (2) the making of the deportation order. Detention at both stages was "**entirely dependent"** on the decision to deport as "**without that decision the question of detention could not arise, much less be legal**." Accordingly, the detention was inevitably "**tainted**" by public law error and "**the principle in Lumba applies with full force and effect to the circumstances of this case"** (para 18).

His Lordship rejected the argument made by the Home Secretary that the independent judicial decision embodied in the statutory appeal process 'removed the legal error' and/or break the chain of causation between the decision to deport from the decision to detain. He held that the decision to deport was the precursor to the decision to detain and if the deportation order was invalid, the unlawfulness of a detention that was based upon it was also void:

"*This is not an instance of a series of successive steps, each having potentially, an independent existence, capable of surviving a break in the "chain". To the contrary, the lawfulness of the detention is always referable back to the legality of the decision to deport. If that is successfully challenged, the edifice on which the detention is founded crumbles*" (para 20).

The previous decision, separating detention and deportation the "Draga case was wrongly decided" (para 21). The implications of this decision are significant and if a person is detained on the basis of an order which is later decided to be flawed in some way, or made unlawfully, they can make a claim for unlawful detention. The judicial review process then applies the Hardial Singh principles in order to invoke the test which is of the legal right not to be unlawfully detained prior to deportation. The failure to implement even one of the principles will render the detention void and the un lawfulness can be challenged by judicial review.

2. Merits based judicial review in deportation

The advent of Brexit has ended the free movement of workers from the EU in the UK, and the circumstances of those are already in the UK. Under the EU (Withdrawal Agreement) Act 2020 the UK has enforced Brexit and the Immigration and Social Security Co-ordination (EU Withdrawal) Act ends the free movement of workers and includes the provisions that will lead to the Government's new points-based immigration system from 2021. Part 1, Schedule 1 makes provision to—

"(a)end rights to free movement of persons under retained EU law, including by repealing the main provisions of retained EU law relating to free movement, and

(b)end other EU-derived rights, and repeal other retained EU law, relating to immigration. ".

The EU workers can apply for the EU Settlement Scheme (settled and pre-settled status) in parallel with the rights and status of EU, EEA and Swiss citizens living in the UK whose status will remain the same until 30 June 2021, as the UK has left the EU with a deal. Further, the UK has announced that it will "not apply fully EU law to the issue of pre- or settled status but rather a simplified residence check with a few extras but critically not applying the comprehensive sickness insurance (CSI) requirement" (Home Office, 2020, p. 5).

However, while the EU citizens presently living in the UK can only be targeted for immigration control if they are found not to be exercising '*treaty rights,*' there are reports that those being unemployed or having committed a criminal offence, can be deported if it is considered in the 'public interest' (Detention Action, 2021). There have been thousands of EU citizens who have targeted for detention and deportation, and over the past decade, and many have been subjected to the government's controversial policy of indefinite immigration detention. There were 973 EU citizens in the IRCs at the end 2010 and this had a peak of just over 5,000 in 2017 and there were approximately 3,900 who had been detained in 2019 (National Statistics, 2019).

The EU citizens are hindered by several factors such as the inability to claim asylum accommodation which is a common route out of detention for those with no fixed address. Upon release as they are without documentation they are unable to even register for a GP and avail treatment for the mental health problems that had been aggravated by their detention (Townsend, 2017). The risk to potentially hundreds of thousands of EU citizens is very real from depression, nervous collapse and suicides. This has been exacerbated with the Home Office operating clandestine tactics to

target EU citizens for detention and deportation from 2015-2017 (Section 4: Additional grounds for refusal of permission to stay).

Those migrants from EU who had psychological problems having been detained for sleeping outside were assessed for deportation after it was considered in the 'public interest' which led to their detention and removal from the country. The matter was raised by judicial review by three East European migrants to prevent their deportation from the EU. This was heard by the High Court and it concerned the Home Office policy version 3.0, 1 February 2017 of detaining those found to be rough sleeping and then enforcing their deportation (Home Office, 2016b).

In **R (Gureckis) v Secretary of State for the Home Department** ([2017] EWHC 3298 (Admin)) the claimants sought judicial review of the Home Office policy entitled 'European Economic Area (EEA) administrative removal'. This policy contained guidance for immigration officers setting out the circumstances in which rough sleeping would be treated as an 'abuse' of EU Treaty rights, that was leading to any EEA national found sleeping rough who was liable to deportation, providing it was proportionate. The policy was implemented by means of "planned operations which specifically targeted EEA nationals who had been sleeping rough and dealt with them by a combination of detaining them, removing them and asking them to leave the UK voluntarily" (para 21).

The claimants were all EEA nationals who were subjected to deportation order because they had been found to be sleeping rough under the policy. The rational of the policy, under the Home Office 's perspective was the "increase in rough sleeping' between 2010 and 2015 and the perception that there had been an increased 'surge' in the number of EEA nationals entering the UK 'intent on rough sleeping' (para, 53). Mrs Justice Lang DBE ruled that the policy was unlawful and made the order to quash the policy based on the "defendant's guidance, 'European Economic Area (EEA) administrative removal', insofar as it treats rough sleeping, whether intentional, harmful or otherwise, as an abuse of Treaty rights" (para 127).

Connor Johnstone in an evaluation of the ruling has drawn 3 basic propositions from the decision as follows:

"1. Rough sleeping was not an 'abuse of rights' within the meaning of article 35 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (as embodied in domestic law in regulation 26 of the Immigration (European Economic Area) Regulations 2016).

2. The policy discriminated unlawfully against EEA nationals and rough sleepers. This flowed from ground 1. The policy treated rough sleeping EEA nationals less favourably than British nationals, without any justification.

3. The application of the policy involved unlawful 'systematic verification' in breach of the express terms of Article 14(2) of the Directive (Johnstone, 2017).

There are thousands of EU nationals being sent to detention centres and many others being targeted by UK immigration or required to prove their status when accessing services and the system for securing their rights has encountered problems from its inception. The Settled Status Scheme, the UK government's system for EU citizens living in the UK to secure their rights has also not been satisfactorily implemented prior to Brexit. The reports suggest that 900,000 people are yet to apply, with over 1 million being granted only the weaker 'Pre-Settled Status" (O' Carroll, 2020). The implication is that there are hundreds of thousands of people at risk of becoming undocumented migrants after 1 January 2021 when Britain leaves the EU and become " subject to a hostile environment" being "already targeted for detention and deportation" (Detention Action, supra 34).

The problem has become magnified because of the Covid -9 epidemic when the UK government's policies regarding the impact of the pandemic on detention and deportation procedures has come up for challenge in the courts. This has created the grounds for challenge because of the ambiguity and the failure to disclose its detention policies in the proper manner has led to judicial review against the Home Office criteria for deportation. There was an application filed on 18 March 2020 to determine the policy under which the government was detaining those who were subject to a deportation order.

In *Detention Action and Anon (Michael Ravin) v SSHD* ([2020] EWHC 732 (Admin)) there was a challenge based on granting interim relief against "the on-going detention of all immigration detainees, in particular those with pre-existing conditions which increase vulnerability to COVID-19 …[and] … the absence of an effective system for protecting immigration detainees from COVID-19". The proceedings for judicial review "(para 1). The claimants stated that the Home Office was under an obligation to disclose its new COVID detention policies and to create a presumption against new detentions of people who are not currently removable. It disclosed a number of detention policies and materials related COVID which have not been disclosed publicly, either on the Home Office website or anywhere else. These include a document entitled "Operational Instructions: COVID-19 –

detention considerations v 1.3" (20 March 2020). This confirmed that persons with health conditions placing them at increased risk from COVID-19 should be considered and assessed as an Adult at Risk 3; a document entitled 'General principles for managing COVID-19 in an immigration removal centre (IRC), residential short-term holding facilities (RSHTF)' (20 March 2020); a list of countries to which the Defendant cannot remove detainees (which has been produced daily, from 17 March 2020), with the instruction that only *"high harm FNOs"* whose removal is proposed to a country on the list should be referred to the Detention Gatekeeper to be considered for detention. It was confirmed in a statement by an official of the Defendant's official, Frances Hardy, that this guidance was sent to *"frontline"* and *"detained casework staff"*, *"in order to prevent detention where the SSHD has, at present, no way of removing a detainee"* (para 4-8).

The application stated that the government had not published these policies which made it onerous for individuals effected to raise in court to challenge the Home Secretary's detention prior to deportation. The Court held that the Secretary of State was intending *" to reduce the numbers of persons detained; steps are being taken to render detention safe for those who are in increased-risk groups but who cannot, for example, for reasons of public protection, be released; those who are not released but are too ill to remain in detention are to be transferred to hospital*"(para 24).

The Court stated further that "*for those who are in detention but not in any of the increased risk groups, the Secretary of State is to review the detention taking account in particular whether the person is due to be removed to a country not presently accepting returns, and whether in those circumstances, their continued detention satisfies the principles stated in R v Governor of Durham Prison ex parte Hardial Singh [1984] 1 WLR 704. Thus, the focus of many if not all detention reviews will now be whether it has ceased to be practicable within a reasonable time to remove the person concerned from the UK in light of any restrictions on returns applied by the relevant receiving country by reason of COVID-19*" (para 10-11).

The Court ruled "*When removal ceases to be possible within a reasonable period, the Secretary of State's power to detain will come to an end. But even when a country informs the Secretary of State that it will no longer accept removals, the Secretary of State is entitled to a period (albeit short) in which to review the detention of those concerned and decide what steps to take*" (para 18). The ruling does not impact about any substantive principle regarding the Hardial Singh cases and seems relevant to the procedural aspects.

The second point raised by the claimants was the breach of Article 2 Right t life and Article 3 Right not to be tortured was breached by the detention in the IRCs. based on the principle "*not to continue to detain persons if*

the circumstances of their detention give rise to a real risk of article 2 or 3 ill-treatment" (para 21). The Court ruled that there was no "*arguable case that maintaining the immigration detention system including the measures taken to date by the Secretary of State gives rise to a real risk of death or article 3 ill-treatment of persons who remain in detention*" (para 27). Despite rejecting the *ECHR arguments, the court stated that it will 'accept that the congregate setting places at higher risk'* " (para 25).

There has been case commentary by Tim Buley QC, Graham Denholm, Alex Goodman, and Christopher Jacobs who state that in refusing to grant interim relief the judicial review has led to the following principles that have established that firstly, that the courts are aware of the " gravity of the risks and the potential urgency of challenges to detention in the present context, but also to the significant operational pressures facing the Home Office and to the fast moving nature of events. Meritorious claims which are properly particularised are likely to be recognised as urgent, albeit the timetables imposed by the court are likely to make allowance for the pressures on the Home Office and GLD as well" (Buley et al., 2020).

Secondly, the case has established the " basis for allowing additional time has significantly diminished" in the existing cases the "detainees at heightened risk from Covid-19, it seems to us that this point now has no remaining force either in relation to expedition or substance, given that reviews in those cases were expected to be completed the same day". Thirdly, the "observations about the need for litigants to act proportionately in bringing claims has not been understood, at least by the majority of Administrative Court judges, as meaning that meritorious cases challenging detention in current circumstances should not be pursued on an expedited timetable" (Buley et al., 2020).

Fourthly, "the risks to health flowing from the COVID-19 pandemic in the IRC will be relevant to an assessment of whether removal within a reasonable period remains possible (Buley et al., 2020). Fifthly, the affect that the pandemic is having on "Home Office case working and/or the possibility of removals taking place will self-evidently bear on the potential timescale for removal" and its foresee ability and in many instances "this uncertainty and delay may mean a breach of the third *Hardial Singh* principle can readily be demonstrated". Sixthly, the "factors ordinarily relevant to the assessment of the legality of detention do not lose their relevance in the pandemic" and extended detention based on "outstanding representations, delays in travel documents being granted, etc, remain relevant and potentially critical" (Buley et al., 2020).

Seventh principle is that the Secretary of State's assessment of the "high risk of harm" based on "any past offending with a high risk of

reoffending regardless of how long ago and public harm" with no "consideration of the particular circumstances should be challenged where appropriate" as per "Elizabeth Laing QC in *R (BA) v SSHD* [2011] EWHC 2748 (Admin), at [169]". The balancing of such a risk "is for the court and if the Secretary of State's assessment is not based on evidence" then the court may be willing to take a very different view" of it being present (Buley et al., 2020). The final ground that can be ascertained is that when judicial review claims are brought there has to be a "careful assessment of the sort of timescale within which the Secretary of State should be asked to respond" and the Court asked to make an order or list a hearing and the court are "willing to grant very significant expedition in appropriate cases" for an interim hearing (Buley et al., 2020).

This is a framework in which the courts can be expected to review judicial review applications based on their merits when it concerns detention in the IRCs. The coronavirus pandemic has set a very strict test upon the Secretary of State to deal with a claim for detention to be lifted and the public interest along with the potential harm if the person was released will be looked at objectively by the courts. The intention will be viewed from the perspective of the Home Office and if these have gazetted and if the steps to alleviate hazards to the detainees have been implemented. The Hardial Singh principles and the ECHR will be evaluated on that basis and an objective decision can be made by the court.

3. Medical grounds for preventing deportation

The Home Office has in developing a framework for the purpose of filtering detention has formulated the Adults at Risk (AAR) policy which is to protect vulnerable people. This process evaluates the vulnerability of detainees and balances this factor with the timetable for removal, the risk of absconding and the risk of offending. This was brought into effect by the section 59 of the Immigration Act 2016 which requires the Home Secretary to issue guidance for determining whether a person is vulnerable and consequently whether they should be detained. [9] This legislation was enacted after the Review into the Welfare in Detention of Vulnerable Persons by

9 Section 59 Guidance on detention of vulnerable persons
(1)The Secretary of State must issue guidance specifying matters to be taken into account by a person to whom the guidance is addressed in determining—
(a)whether a person ("P") would be particularly vulnerable to harm if P were to be detained or to remain in detention, and
(b)if P is identified as being particularly vulnerable to harm in those circumstances, whether P should be detained or remain in detention.

Stephen Shaw who identified the need to reduce the use of detention which incontrovertibly undermines the welfare of persons (Shaw, 2016).

There are two Home Office documents labelled 'Adults at Risk policy' the first of which is the actual policy statement issued to comply with Section 59, which consists of the general principles by which vulnerability is assessed and compared with other factors relevant to detention. These protect an individual who will be an adult at risk if "*they declare that they are suffering from a condition, or have experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention those considering or reviewing detention are aware of medical or other professional evidence, or observational evidence, which indicates that an individual is suffering from a condition, or has experienced a traumatic event (such as trafficking, torture or sexual violence), that would be likely to render them particularly vulnerable to harm if they are placed in detention or remain in detention – whether or not the individual has highlighted this themselves*" (Home Office, 2016c).

The second source of referral is the Home Office published guidance for its caseworkers, entitled "Adults at risk in immigration detention" ("AAR caseworker guidance")[10] specifies how detention decisions should be made and is far more detailed than the statutory guidance. According to the AAR policy, " *'vulnerable" individuals are defined as those who exhibit one of the following risk indicators: mental health condition or impairment; post-traumatic stress disorder (PTSD); pregnancy, serious physical disability or other serious physical health condition or illness; old age (70 years +); transsexual or intersex; or victim of torture, sexual or gender-based violence, female genital mutilation (FGM); human trafficking or modern slavery*".

The case worker guidance is aimed to achieve a vulnerable client released from detention. It entails the evaluation based upon the indicators of risk which include steps when applying the policy is to identify whether the person has any indicators of risk. The statutory guidance and other vulnerabilities that impact on the physical and psychological health of the detainee. The caseworker guidance makes clear that the list is a non-exhaustive and officials must be conscious of other conditions and experiences that would make a detainee vulnerable. The "Guidelines also allows case workers to consider other unforeseen conditions which may render the individual particularly vulnerable under the AAR policy"

[10] The AAR caseworker guidance forms part of the broader Offender Management Guidance "for officers dealing with enforcement immigration matters within the UK" ("Offender Management Guidance") Chapter 55, Enforcement Instructions and Guidance which forms part of the Offender Management Guidance (published 27 April 2016)

[Paragraph 12 Adults at Risk Statutory Guidance August 2016 (SI 18081601 08/16)].

There are, however, various AAR policies and procedures that apply only in IRCs. Home Office staff and IRC staff must follow various procedures set out in Detention Services Orders ("DSOs") which engage the AAR policy, such as: DSO 08/2016 Management of Adults at Risk in Immigration Detention February 2017. The evidence level then determines how the vulnerability should be assessed against other factors. Level 1 is a declaration of vulnerability made by a detainee or their legal representative. It has minimal impact on detention decision-making because it just expresses the existing requirements of the *Hardial Singh* principles and its main purpose is to identify the issue for further investigation. The Secretary of State has a *Tameside* duty[11] to investigate further in some circumstances: see **R (Bah) v Secretary of State for the Home Department (**[2018] EWHC 2942 (Admin) at paragraph 107**).**

The Level 2 assessment is professional evidence that the individual is vulnerable. requires greater justification of detention, but it will still not be enough in most cases to secure release and under the caseworker guidance, detention will still be justified where either the date of removal is fixed, or can be fixed in a reasonable time scale. The Level 3 evaluation is based on professional evidence that the individual is vulnerable and that detention is likely to cause harm (typically demonstrated by evidence that it has already caused harm). The availability of this evidence will diminish the possibility of detention and then it could only be justified when removal has been set for a date in the immediate future and there are no barriers to removal such as the individual presents a significant public protection concern, or if they have been subject to a 4 year plus custodial sentence (UK Visas et al., 2016, pp. 12-13).

The Detention Centre Rules provides a channel for reporting on the vulnerable detainees by the IRC managers to the Home Secretary. This process is governed by the Rule 35 of the Detention Centre Rules 2001 the process by which vulnerabilities are reported to Home Office case workers.[12]

[11] The Tameside is a principle that Lord Diplock stated in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, in which he held " The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly", p. 1065B.

[12] "The purpose of Rule 35 is "to ensure that particularly vulnerable detainees are brought to the attention of those with direct responsibility for authorising, maintaining and reviewing detention. The information contained in the report needs to be considered in deciding whether continued detention is appropriate in each case."(55.8A)[1] A

The Rule 35 report must be completed by a doctor after examining a detainee (1) whose health condition is likely to be aggravated by continued detention (2) they suspect of having suicidal intentions; and (3) they are concerned may have been the victim of torture.

The Rule 35 report is then submitted to the Home Office decision maker who must review and respond within a set time frame. The guidance states that Rule 35(1) reports should normally be categorised as Level 3 Declaration of Vulnerability, and Rule 35(3) reports should normally be categorised as at least Level 2. The detention policy is set out in **Detention and Temporary Release** (also known as Chapter 55), which states it must be reviewed on a constant basis. [13]

In **R (IS (Bangladesh)) v Secretary of State for the Home Department (**[2019] EWHC 2700 (Admin)) the detainee was under 18 when he was placed in detention and he challenged the legality of his detention for a period of 28 months pending his deportation. He argued that it was unlawful to detain him for that period of time having regard to his young age, mental health, history of self-harm and risk of suicide. He claimed the infringement of his rights under articles 3, 5 and 8 of the ECHR. The Court held that the period of detention between 28 July 2016 and 29 June 2018 was lawful and did not involve a breach of his Convention rights. The duration between 29 June 2018 and 30 November 2018 was unlawful and amounted to a breach of his right to liberty under Article 5 ECHR. His treatment of being placed under constant observation for a period of 75 days whilst unlawfully detained amounts to a separate breach of the right to respect for private life under Article 8 ECHR. However, this not amount to the prohibition on inhuman or degrading treatment under Article 3 ECHR.

The Court made two important observations which were that under "*a report is submitted under r35 Detention Centre Rules 2001 there is an obligation to engage with the concerns raised by the doctor, to review detention (in line with the AAR policy), and where detention is being maintained to set out a clear rationale*". (as per the Detention Services Order 09/2016) (para 91). There was no analogy between a custodial or immigration detention because the "*purpose of a custodial sentence is different from that of immigration detention. The former is designed to achieve the principles of sentencing, including punishment and the reform and rehabilitation of offenders (see s142A(2)(3) Criminal Justice Act 2003). The latter can only be imposed (in this context) for the purpose of achieving a person's deportation*" (para 95).

[13] Home Office Enforcement Instructions and Guidance, Chapter 55.6.3, Form IS91R Reasons for detention: This form must be "served" on every detained person. "In addition, there must be a properly evidenced and fully justified explanation of the reasoning behind the decision to detain placed on file in all detention cases".

The Court also stated that "given the time already spent" "any further detention would be a breach of the spent the Hardial Singh principles" (para 168). Furthermore that " in all circumstances continued detention from 29 June 2018 was unlawful both as being in breach of the *Hardial Singh* principles and being in breach of the AAR policy (on the basis of information that the Defendant should, by now, have secured) (para 171). This is because vulnerability is deemed to be a relevant factor when applying the *Hardial Singh* principles, the two different restrictions on the power to detain can lead to the same breach.

The review powers of the courts under the AAR policy are carried out using ordinary public law principles rather than the intense scrutiny used for the *Hardial Singh* principles. In **R (ASK) v Secretary of State for the Home Department** ([2019] EWCA Civ 1239) the Court of Appeal stated:

It is well-established that, whilst the true construction of a policy such as the EIG or AAR Policy is a matter for the court, the decision to detain is discretionary. Therefore, subject to the Hardial Singh principles under which it is for the court to consider whether a reasonable time in detention has been or is likely to be exceeded, the decision by the Secretary of State's to keep an individual in detention is subject to challenge only in accordance with the ordinary principles of public law (including Wednesbury), to determine whether the decision-maker has acted within the limits of the discretionary power conferred on him by the statute (see R (LE (Jamaica) v Secretary of State for the Home Department [2012] EWCA Civ 597 ("LE (Jamaica)") (para 29).

There has been criticism about the application of the Rule 35 and its ability to filter through the medical reports of vulnerable detainees. Alexander Schymyck argues that there "*are very few detention centre GPs who issue Rule 35(1) and (2) reports. The presumption that Rule 35(3) (torture) reports from detention centre GPs should start at Level 2 means that, for many victims of torture, the outcome of the Rule 35 procedure will be only Level 2 evidence and a decision to maintain detention. Helpfully, the caseworker guidance does state that reports from 'Freedom from Torture, the Helen Bamber Foundation or another reputable medico-legal report provider' will be accepted as Level 3 evidence. Other expert reports about a detainee's experience of torture will generally need to demonstrate that detention is likely to cause harm, for example by exacerbating mental health problems caused by the torture, in order to reach Level 3*" (Schymyck, 2020).

The failure of the Level 3 declaration of vulnerability does not include those foreign nationals who have been victims of torture which has been defined as an important failing of the AAR policy. The recent review by the UN committee of UK's compliance with its obligations under the United Nations Convention against Torture, expressed its concern as follows: *The Committee is very concerned by reports that victims of torture are routinely*

detained for immigration purposes in the State party and that the State party's guidance for identifying whether a person being considered for immigration detention is an "adult at risk" and rule 35 (3) of the Detention Centre Rules 2001 are largely ineffective at identifying victims of torture and have not resulted in the release from detention of the vast majority of those people who are at risk of suffering serious harm as a consequence of detention.[14]

The courts have twin roles in adjudicating the application of the AAR policy which are, initially, they are the final arbiter of what the policy means and make that decision objectively, rather than reviewing the interpretation adopted by the Home Office.[15] Furthermore, the courts are in a position to award damages when the vulnerable has been held in detention and there is a probability that there will be psychological damage suffered.[16]

4. **Increasing the scope of the review powers**

The Home Office works in conjunction with the National Health Service to provide health services in the IRCs across the UK. This enables those in detention to be cared for depending on their health condition and risk of self harm (Public Health England, 2015). The National Health Service Act 2006, Section 3B (1) (c), formulates the responsibility for commissioning all health services in the IRCs and prisons in the UK. There is a Partnership Agreement between the Home Office, NHS England and Public Health England since 2013 which is based on (i) clinical need which implies that detainees must receive health care equivalent to the standard available to the general population and in accordance with the Detention Centre Rules; (ii) health and wellbeing services in removal centres should

[14] UNHCR, Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention (2012); UN Committee against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN doc. CAT/C/GBR/CO/6 (7 June 2019), para. 55(c).

[15] In *R (Son Le) v Secretary of State for Health and Social Care* [2018] EWHC 3655 (Admin) the courts reviewed breaches such as the failure to respond to a Rule 35 report as required by the caseworker guidance.

[16] The Courts only award nominal damages if the person would have been detained in any event and no aggravated damages are awarded for being an Adult at Risk, although vulnerability may be relevant to compensatory damages: see **R (Majewski) v Secretary of State for the Home Department** [2019] EWHC 473 (Admin), Para 20.

seek to improve health and wellbeing with equal focus on patients with physical and mental illness.[17]

These guidelines have been further strengthened in the Covid 19 pandemic by establishing the "*Partnership working between Immigration Enforcement, NHS England and Public Health England (PHE).There should be close working and liaison between the IRC supplier, IRC healthcare provider and Home Office staff and management, ensuring guidance and updates are regularly shared and any updates, or information about incidents or possible cases of COVID-19 are shared and jointly owned*" (Home Office, 2021).

The follow up Shaw Report reflected on the AAR policy for improving condition for vulnerable detainees. It findings were premised on *" a different approach to detention. Instead of the principle of detaining vulnerable people only in 'very exceptional circumstances' (as had been the case under the previous policy), AAR is based on balancing evidence of risk against immigration considerations, and detaining only when the latter outweigh the former*" (Home Office, 2018b).

The findings of Shaw were significant also in terms of preventing the spread of infection in the stated objectives of his assessment. Recommendation 8: "In future, capacity in the immigration estate should not be increased by adding extra beds to rooms designed for fewer occupants. Where this has already occurred (e.g. Campsfeld House, Brook House), these extra beds should be removed, and capacity reduced or extra space created" (p. 20).

Recommendation 11: the "current Adults at Risk policy should be amended. Detention of anyone at AAR Level 3 should be subject to showing 'exceptional circumstances" (p. 20). Recommendation 12: "Consideration should be given to AAR Level 2 being sub-divided and, if adopted, the presumption against detention for those in the upper division should be strengthened. The Home Office should consider the merits of the UNHCR Vulnerability Screening Tool" (p. 34) Recommendation 13 "there should be no detention of over 70 year olds except in exceptional circumstances" (p. 35).

These set of recommendations are prudent and have foresight if there was a pandemic and the government had to acknowledge the practical wisdom of adopting these reforms. There is also the Recommendation 20 which is for santisation that deals with the proposal "*that an action plan should be drawn up to address the shortcomings found in healthcare facilities with this*

[17] Partnership Agreement, first published in 2013 and republished in April 2015, between Home Office Immigration Enforcement, NHS England and Public Health England, at p. 12.

immigration estate to ensure the clinically safe, compliant and appropriate environment for the delivery if care of detainees" (p. 60).

Shaw criticised the implementation of Rule 35 where he found that health checks were being carried out to the detainees by medical professionals, in order, to highlight transformations in their condition. Shaw found that these reports are "routinely rejected for minor errors" and "enjoyed the confidence of neither the doctors who complete them or the caseworkers who receive them". This omissions had been recorded in his first report which also disparaged Rule 35 for not doing "what is was intended to do", and his conclusion in his subsequent report was that "nothing I have seen has suggested any fundamental change to this position" (p. 2.137 -2.139).

The British Medical Association (BMA) in their report has corroborated many of the findings of the first Shaw Report and has also influenced the follow up report (British Medical Association, 2017). The BMA's report argues that "*immigration detention should be phased out, and replaced with more humane means of monitoring people facing removal from the UK. However, while it continues, there should be a clear limit on the length of time people can be held in detention, and detainees' healthcare rights should not be infringed. Its basic premise is that immigration detention population is diverse, and can present with complex needs; high rates of mental health problems; specific vulnerabilities as the result of past traumatic experiences; and that detainees are entitled to the same range and quality of healthcare services as the general public receives in the community*" (Executive Summary pages 6-7).

In their specific approach to processing Rule 35 reports the BMA recommended under the head *'Advocating for patients and raising concerns' that the '' Rule 35 reports are not medico-legal reports, and so are not expected to be completed to that standard. They should, however, be clear, legible, and contain sufficient information to help the caseworker in responding to the report. – Doctors should ask detainees with capacity to give their consent to medical information being shared with the Home Office. If the detainee refuses, the doctor can still submit the Rule 35 report, but must omit confidential medical information. The detainee should be informed of the possible implications of doing so. – Upon receipt of a response to a Rule 35 report from a Home Office caseworker, doctors can and should challenge the decision reached if they disagree with it*" (p. 65).

The Medical Justice (MJ) Charity surmised that the AAR policy had failed "to identify vulnerable persons and therefore fails to protect vulnerable persons from inappropriate detention" (Medical Justices, 2017). It estimates "*that more vulnerable people are detained for longer''. Their reasoning is based on the AAR's "policy's interpretation of 'dynamic assessment of vulnerability' leads to a*

weakening of the previous protective categories; the change of definition of torture served to unlawfully exclude many victims of non-state violence from protection (this change has now been reversed following a legal challenge (MJ & others v SSHD, EHRC intervening (2017) 2461 (Admin)). *The introduction of different Levels of Evidence has led to a lowering of the threshold for maintaining detention of those at risk of harm in detention. In addition to demonstrating that they belong to a category of persons identified as at increased risk of harm in detention the AAR policy requires that detainees demonstrate that they are likely to suffer harm in detention to qualify for protection equivalent to 'very exceptional circumstances' (the threshold in the previous policy*" (Medical Justices response to the Shaw , supra 92).

The MJ argued in their submission that the AAR policy has "*not improved identification of those at risk. and additional indicators of risk were added, but there is no reporting mechanism for those new indicators. Rule 35 only applies to those with a history of torture (rule 35(3)), those at risk of suicide (rule 35(2) – hardly used) and where the doctors has identified detention being injurious to the detainee's health (rule 35(1)- in practice this is invoked for detainees with serious disabilities and where a detainee has already significantly deteriorated)*" (Medical Justices response to the Shaw, supra 92).

The concern was that "*likelihood of harm occurring is detailed in a rule 35 (3) report, this appears to be frequently treated as level 2 evidence. It is difficult to ascertain the reason for this- in our view it appears that Home Office caseworkers are simply used to rule 35(3) reports being level 2 evidence and do not tend to engage with the information on a more substantial level*". The MJ contend that "*Rule 35(1) reports are the obvious tool for obtaining level 3 evidence. In practice, very few such reports are completed and almost exclusively in cases of serious physical disabilities or where significant harm has already occurred*".

The MJ has acted on behalf of detainees to improve access to justice and to challenge the period of detention that a detainee has to stay in an IRC pending deportation. This has been pertinent in the judicial review proceedings against a government deportation policy under Chapter 60 of the General Instructions to Home Office caseworkers that consisted of a removal notice window policy (the RNW policy) started in 2015. Under this policy "individuals are given between 72 hours and seven days' notice that they can be removed without further warning at any time over the next three months". This could be even in three days after being given notice" after which, those subject to a RNW must find an immigration lawyer, make representations explaining why they should be allowed to stay, and wait for the Home Office to decide their application. The policy went through various amendments but it was still left in its essence to be used to enforce deportation against a migrant held in detention (Home Office, 2018c).

In *R v on the Application of (1) FB (Afghanistan) (2) Medical Justice and Equality and Human Rights Commission* ((2020) EWCA Civ 1338) the appellants FB, an Afghan national was joined by Medical Justice, in raising it against the RNW and gained in March 2019 an interim injunction. The basis of the claim was the notice of a removal window, which it was argued was unlawful, because there was the statutory scheme that required notice of directions specifying date and time of removal. If that was not accepted the RNW unlawfully interfered with the right of irregular migrants to access to justice.

The appellants argued that the case was materially indistinguishable from the In **R (Medical Justice)** [2010] EWHC 1925 (Admin), where the Court of Appeal focused on the risk to the right of access to justice that was included in the Home Office policy that provided "*several exceptions which allowed for removal less than 72 hours after notification of removal directions was given, e.g. where the Secretary of State considered reduced notice necessary to maintain order and discipline because there had been an earlier frustrated removal. These exceptions were successfully challenged (in which Silber J (5-30) was upheld by this court: [2011] EWCA Civ 1710 ("the 2010 Medical Justice case (CA)"); and were then abandoned. In that case, it was assumed that it was not unlawful for the policy to fix 72 hours as the usual minimum removal notice period*" ((2020) EWCA Civ 1338, para 32).

The Court of Appeal held that there was "no inherent unlawfulness about the Secretary of State effecting removal of an irregular migrant where notice was given in the form of a removal window, even if no notice of the exact intended date and time of removal is given" ((2020) EWCA Civ 1338, para 74-84). The Court agreed on the second ground that the Policy denied the common law right of access to justice which was established in common law.

In accordance with this principle, Hickinbottom LJ held that *"At common law, it is well-established that there is generally a public law duty to give an individual notice of any decision which has a direct adverse impact on his or her rights or interests; but that duty is neither absolute nor stand-alone. It is a duty associated with the obligations of procedural fairness... "* ((2020) EWCA Civ 1338, para 81).

Hickinbottom LJ stated further "*that where, within the statutory immigration scheme, there is an intention that notice is given to an individual then that intention is express and clear, for e.g., section 4 of the Immigration Act 1971 provides that certain powers to refuse leave to enter or remain, and to vary and cancel such leave, "shall be exercised by notice in writing given to the person affected As the unfairness is inherent in the Policy itself, Ms Kilroy submitted that the focus of the tribunal and (particularly) Freedman J on the case studies and evidence of numbers of cases in which an*

irregular migrant's access to justice had in fact been interfered with was misplaced. I agree" ((2020) EWCA Civ 1338, para 126).

A declaration was therefore made at that the JRI Policy was unlawful insofar as it gave rise to a real risk of preventing access to justice ((2020) EWCA Civ 1338, para 165).

Lord Burnett of Maldon LCJ stated that although he agreed overall that the Policy was unlawful and needed revision there were lawyers making unmeritorious claims on behalf of detainees. His Lordship held "*Any system of removing irregular migrants must operate in the sure knowledge that some are reluctant to leave the United Kingdom, even when there is no basis for remaining here, and will take whatever steps are permitted by the legal and administrative arrangements in place to resist, delay or frustrate removal. Late claims raised shortly before the known date of removal have been endemic, many fanciful or entirely false. Whilst there is no suggestion of any such conduct in these proceedings, it is a matter of regret that a minority of lawyers have lent their professional weight and support to vexatious representations and abusive late legal challenges*" ((2020) EWCA Civ 1338, para 178).

This case demonstrates in the sequence of claims that MJ has raised in court on the unlawfulness of detention when there is the concern for the impact on the medical health of the detainee. The MJ has expressed a preference for the previous policy that was present under Chapter 55 Enforcement Instructions and Guidance rather than the Adults at Risk policy. It considers this to open categories of detention which are difficult to bridge. This concern has been increased by the application of the Rule 35 that has been in consistently applied across the IRCs. It has left the Home Office case workers unable to coherently deal with the vulnerable detainees who are not collated in a manner that could bring to the attention as sufficiently impacted from detention to be released.

Conclusions

The detention of those migrants who have been assigned for deportation is a process that has been magnified by the coronavirus which has served to demonstrate two aspects of the UK immigration policy. The first is the ability to confine those in the IRCs to indefinite periods before giving them the opportunity to legally be represented to challenge the decision of the Home Office. The second issue is the period in which the deportation order can be enforced which can be in short time scale which may override the medical condition of the detainee and could breach the Hardial Singh principles and human rights obligations.

The substantive basis for the merits based review allows the Home Office decisions to be challenged on the basis of not being publicly

disclosed and for being inconsistent. They can also fall outside the policies and procedures of not applying the case law guidelines; key statutory principles, Wednesbury rules, and for not being within the spirit of natural justice in terms of denying the claimant a fair hearing.

The ground based reality of applying for interim relief has been highlighted by Detention Relief in their cause of action. The courts have been careful in abiding by public policy guidelines of allowing the Home Office to be flexible in an emergency but has also given the procedures full scrutiny. It challenges brought by Medical Justice it has followed closely the adoption of the official and has not waived its discretion to declare the policy illegal. There is the input that the medical professionals and legal researchers have brought to the surface that has maintained the standards of public law and made it to conform to established principles.

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