27 November 2019

PRESS SUMMARY

R (on the application of Hemmati and others) (Respondents) v Secretary of State for the Home Department (Appellant)

[2019] UKSC 56

On appeal from: [2018] EWCA Civ 2122

JUSTICES: Lady Hale (President), Lord Reed (Deputy President), Lord Wilson, Lady Arden, Lord Kitchin

BACKGROUND TO THE APPEAL

The five respondents arrived in the United Kingdom illegally and claimed asylum. They had all travelled to the United Kingdom via at least one other member state of the European Union in which they had already claimed asylum. In each case, the Secretary of State requested those states to take responsibility for examining the asylum claims pursuant to Parliament and Council Regulation (EU) No 604/2013 of 2013 ("Dublin III" or "the Regulation"). Each member state ultimately agreed to that request.

Each of the respondents was detained for a period of time pending his or her removal from the United Kingdom pursuant to paragraph 16(2) of Schedule 2 to the Immigration Act 1971 ("the 1971 Act"). In 2015, the Secretary of State had published a policy in relation to such detention in Chapter 55 of her Enforcement Instructions and Guidance ("the EIG").

The respondents challenged the lawfulness of their detention by bringing claims against the Secretary of State for the Home Department. The High Court dismissed the challenges of the first to fourth respondents, but the detention of the fifth respondent was found to have been unlawful. The first to fourth respondents appealed to the Court of Appeal. In the case of the fifth respondent, the Secretary of State appealed to the Court of Appeal. By a majority, the Court of Appeal allowed the appeals of the first to fourth respondents and dismissed the Secretary of State's appeal. The Secretary of State now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Kitchin gives the sole judgment, with which Lady Hale, Lord Reed, Lord Wilson and Lady Arden agree.

REASONS FOR THE JUDGMENT

There were two particular questions before the Supreme Court **[2]**. First, was the detention of each respondent lawful, given that article 28 of the Regulation permits detention where there is

a "*significant risk of absconding*"? The phrase "*risk of absconding*" is defined in article 2(n) of the Regulation as the existence of reasons in an individual case, based on objective criteria defined by law, to believe that the person might abscond. Secondly, if the detention was not lawful, are damages payable either under domestic law for false (or wrongful) imprisonment, or pursuant to what is known as the *Factortame* principle established in *Brasserie du Pecheur SA v Germany; R v Transport Secretary; Ex p Factortame Ltd No 4* (Joined Cases C-46/93 and C-48/93) [1996] QB 404?

A policy such as that embodied in Chapter 55 of the EIG is published so that an individual affected by it knows the criteria by which the executive has chosen to exercise the power conferred upon it by statute. Its publication also allows the individual to make appropriate representations in relation to that exercise of power as it affects him or her **[49]**. The executive must follow its stated policy unless there are good grounds for not doing so **[50]**. Chapter 55 does not establish objective criteria for the assessment of whether an applicant for international protection who is subject to a Dublin III transfer procedure may abscond. Its contents do not constitute a framework with certain predetermined limits. Further, it does not set out the limits of the flexibility of the relevant authorities in assessing the circumstances of each case in a manner which is binding and known in advance. Therefore, the Court of Appeal was right to hold that Chapter 55 cannot satisfy the requirements of articles 28(2) and 2(n) of the Regulation **[65]**.

Chapter 55 does not satisfy the requirements laid down by the Court of Justice of the European Union in *Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie v Al Chodor* (Case C-528/15) [2017] 4 WLR 125. Because Chapter 55 does not set out the limits of the flexibility of the relevant authorities in assessing the circumstances of each case in a manner which is binding and known in advance, it lacks the necessary qualities of certainty and predictability. It therefore does not constitute a "*law*" for the purposes of articles 28(2) and 2(n) **[74]**. A broader question is whether a statement of policy and public law adherence to it can ever amount to a binding provision of general application and so a "*law*" within the meaning of article 2(n) **[75]**. That question should be decided in a case in which it is necessary to do so **[79]**.

Any claim by the respondents for damages under European Union law must be judged by reference to the principles established in *Francovich v Italy* (Case C-6/90) [1993] 2 CMLR 66 and *Factortame*. However, those principles do not constrain the claim by the respondents for damages for wrongful imprisonment **[88]**. In *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245, the Supreme Court considered the test for when a public law error bearing upon and relevant to a decision to detain can found a claim for damages for false imprisonment. That test is met in the cases in this appeal. There was a requirement for a binding provision of general application containing objective criteria underlying the reasons for believing that an applicant might abscond, and that requirement was not satisfied. This was fundamental to the decision to detain and it makes no difference whether the source of that requirement lay in European Union or domestic legislation **[98]**.

Chapter 55 did not comply with articles 28(2) and 2(n) of the Regulation, with the consequence that, in the case of each of the respondents, the decision to detain lay outside the scope of any legitimate exercise of the discretion conferred by Schedule 2 to the 1971 Act. The ingredients of the tort of wrongful imprisonment were undoubtedly present. The right under domestic law to claim damages for wrongful imprisonment is not dependent on the law being clear. Nor is it dependent upon whether the illegality is the consequence of a failure to comply with European Union legislation (as in this case) or has some other cause **[101]**.

The majority in the Court of Appeal were right to hold that the respondents were wrongfully detained. The respondents are entitled to compensation under domestic law for any loss that the wrongful detention has caused them **[105]**, **[114]**. The Secretary of State's submission that the respondents should only be entitled to nominal damages is rejected **[106]** – **[112]**. It is not necessary in this appeal to consider the respondents' alternative claim for damages under European Union law, since it is not contended that any such damages would exceed those payable for false imprisonment under domestic law **[113]**. The County Court will assess the amount of damages, if it cannot be agreed **[114]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
https://supremecourt.uk/decided-cases/index.html