IN THE SUPREME COURT **UKSC/2026/0039**

OF THE UNITED KINGDOM

ON APPEAL FROM HIS MAJESTY'S

COURT OF APPEAL OF ENGLAND AND WALES (CIVIL DIVISION)

Jackson LJ, Lewis LJ and Zacaroli LJ

KB/06 p121 **Neutral Citation [2026] EWCA Civ 207**

B E T W E E N

THE KING (on the application of CHK)

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

RESPONDENT'S WRITTEN CASE

I. INTRODUCTION

1. The writ of *habeas corpus ad subjiciendum* (referred to in Part 87 of the Civil Procedure Rules ("**CPR**") as "habeas corpus for release") has long been recognised as one of the most important safeguards of individual liberty at common law, intended to discharge a person to freedom where no proper legal cause can be shown for their detention. Its significance is reflected in the court priority afforded to applications for the writ and the fact that there is no obligation to obtain permission to appeal against a refusal to grant a writ, or indeed permission to appeal a decision of the Court of Appeal in a habeas corpus case to this Court.

2. The significance of the remedy stands in sharp contrast to the purpose for which the appellant, CHK, seeks to employ it. This appeal forms part of a wider body of related litigation pursued by CHK. In support of the appeal, which advances no fewer than 15 grounds (exclusive of sub-grounds), CHK has filed a considerable quantity of

lengthy and discursive written material. However, reduced to its essentials, the gravamen of CHK's complaint is twofold:

a. the conditions of his immigration bail - an obligation to report to a police station on a fortnightly basis, that he could not work, and that he must comply with a digital reporting requirement - mean that he is *detained* for the purposes of the law of habeas corpus; and

b. there is no lawful authority for that detention, because the deportation order to which he is subject is void, due to the withdrawal and re-issue of a separate decision in relation to his claim for asylum and his human rights claim.

3. Both contentions are untenable. CHK is not detained. The bail conditions imposed on him fall well short of any plausible threshold required to justify the use of the writ of habeas corpus. In any event, there is lawful authority for those conditions, namely, the subsisting deportation order to which he is subject, and which was wholly unaffected by the withdrawal of a separate decision in respect of his claim for asylum and his human rights claim. There is, accordingly, no basis for a writ.

4. CHK's application was refused on the papers at the first opportunity by the learned Deputy Judge sitting in the Administrative Court, who immediately identified the core issues with CHK's claim, set out above. CHK chose not to exercise his right to renew his application to an oral hearing in the High Court and instead took advantage of the absence of a permission filter to appeal directly to the Court of Appeal. In dismissing the appeal, the Court of Appeal concluded that CHK's case was "*absurd*" and "*an attempt to abuse the remedy of habeas corpus*" ([54]).

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5. Nonetheless, the absence of any permission filter in habeas corpus proceedings has enabled CHK to continue to pursue this unarguable claim before this Court. For the reasons given below, the appeal should be dismissed.

6. The Secretary of State notes that this Court recently had cause to consider the law pertaining to habeas corpus in some detail in *Father v Worcestershire County Council* [2025] UKSC 1 ("***Worcestershire***"). While the facts giving rise to that judgment were very different from the facts of the present case, it is respectfully submitted that the legal principles the Court articulated in *Worcestershire* provide a complete answer to the present appeal also.

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II. FACTUAL BACKGROUND

7. The parties to this appeal were, regrettably, unable to agree a single Statement of Facts and Issues ("**SFI**"). Pursuant to directions from the Registrar, each party has filed its own document. In accordance with UKSC Practice Direction 5.10, the Secretary of State adopts her Amended Statement of Facts and Issues and does not repeat its contents here.

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8. The Secretary of State notes that on 21 September 2026 the First-tier Tribunal (Immigration and Asylum Chamber) (Judge Curtis) promulgated its decision (the "**FTT Decision**") following a hearing on 1 and 2 June 2026. The FTT Decision determined three appeals brought by CHK against decisions of the Secretary of State:

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   a. PA/07245/2017, against the decision dated 17 July 2017 refusing CHK's protection and human rights claims;

   b. HU/69645/2025, against the decision dated 17 October 2025 refusing the human rights claim CHK was treated as having made by letter of 30 June 2021; and

   c. EU/75179/2025, against the decision dated 17 October 2025 refusing CHK's application of 30 June 2021 for leave to remain under Appendix EU to the Immigration Rules.

9. The FTT allowed CHK's appeal on human rights grounds. It held that CHK met

LEG/10 s117 p1588

Exception 2 in section 117C(5) of the Nationality, Immigration and Asylum Act 2002 and that there were very compelling circumstances for the purposes of section 117C(6), such that deportation would constitute a disproportionate interference with his private life and with his family life with his wife, referred to as "AH", contrary to Article 8 ECHR (FTT Decision, [186], [215]-[216]). The FTT dismissed the protection appeal on both asylum and humanitarian protection grounds and dismissed the Appendix EU appeal.

10. The Secretary of State has applied for permission to appeal the FTT Decision. In the interim, the deportation order to which CHK is subject remains in force.

III. LEGISLATIVE FRAMEWORK

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(a) Applications for writ of habeas corpus: CPR Part 87

11. Part 87 of the Civil Procedure Rules ("**CPR**") governs applications for a writ of habeas corpus for release.

12. Under Part 87.2 the applicant must make the application by filing a claim form under Part 8, together with a witness statement or affidavit. The witness statement or affidavit must (CPR 87.2(2)):

    (a) State that the application is made at the instance of the person being detained;

    (b) Set out the nature of the detention; and

    (c) Subject to (3), be made by the detained person.

13. Upon initial consideration, a single judge may consider the application on paper (CPR 87.3). Where an application is dismissed under CPR 87.4, an applicant may request reconsideration at an oral hearing (CPR 87.4(2)).

14. An order that the detained person must be released (CPR 87.5(g)) is "*sufficient authorisation for a governor of a prison, police officer or other person to release the detained person*."

(b) Orders for the deportation of "foreign criminals"

LEG/07 s3 p1547

15. Section 3(5)(a) of the Immigration Act 1971 (the "**1971 Act**") provides that a person who is not a British citizen is "*liable to deportation from the United Kingdom if…the Secretary of State deems his deportation to be conducive to the public good.*"

16. Section 5(1) provides that where a person is liable to deportation under (*inter alia*) section 3(5), then "*subject to the following provisions of this Act the Secretary of State may make a deportation order against him …; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force."*

LEG/12 s32 p1590

17. Section 32(1) of the UK Borders Act 2007 (the "**2007 Act**") defines a "*foreign criminal*" as a person "*(a) who is not a British citizen or an Irish citizen, (b) who is*

convicted in the United Kingdom of an offence, and (c) to whom Condition 1 or 2 applies."

18. Condition 1, which is the relevant condition in the present case, is that "*the person is sentenced to a period of imprisonment of at least 12 months*": section 32(2) of the 2007 Act.

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19. Section 32(4) of the 2007 Act deems the deportation of a foreign criminal to be conducive to the public good for the purpose of section 3(5)(a) of the 1971 Act. Section 32(5) of the 2007 Act provides that "*the Secretary of State **must** make a deportation order in respect of a foreign criminal (subject to section 33)*" (emphasis added).

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20. Section 33(1)(a) of the 2007 Act provides that section 32(4) and (5) do not apply where "*an exception in this section applies (subject to subsection (7) below)*". The relevant exceptions include Exception 1, where "*removal of the foreign criminal in pursuance of the deportation order would breach (a) a person's Convention rights, or (b) the United Kingdom's obligations under the Refugee Convention*": see s. 33(2) of the 2007 Act. Section 33(7) of the 2007 provides that "*[t]he application of an exception – (a) does not prevent the making of a deportation order; (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good; but section 32(4) applies despite the application of Exception 1 or 4.*"

LEG/12 s33 p1591

(i) <u>*Pending appeals and deportation orders*</u>

21. Where a person makes a protection claim or human rights claim, a refusal of that claim carries a right of appeal under section 82 of Nationality, Asylum and Immigration Act 2002 (the "**2002 Act**").

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22. Section 78 of the 2002 Act provides:

> "*(1) While a person's appeal under section 82(1) is pending he may not be—*
>
> *(a) removed from the United Kingdom in accordance with a provision of the Immigration Acts, or*

(b) required to leave the United Kingdom in accordance with a provision of the Immigration Acts.

(2) In this section "pending" has the meaning given by section 104.

(3) Nothing in this section shall prevent any of the following while an appeal is pending— ...

(b) the making of a deportation order in respect of the appellant (subject to section 79), or ...

(4) This section applies only to an appeal brought while the appellant is in the United Kingdom in accordance with section 92."

LEG/10 s79 p1574 23. Section 79 of the 2002 Act provides:

"(1) A deportation order may not be made in respect of a person while an appeal under section 82(1) against the decision to make the order—

(a) could be brought (ignoring any possibility of an appeal out of time with permission), or

(b) is pending.

(2) In this section "pending" has the meaning given by section 104.

(3) This section does not apply to a deportation order which states that it is made
LEG/12 s32 p1590 *in accordance with section 32(5) of the UK Borders Act 2007.*

(4) But a deportation order made in reliance on subsection (3) does not invalidate
LEG/07 s5 p1552 *leave to enter or remain, in accordance with section 5(1) of the Immigration Act 1971, if and for so long as section 78 above applies."*

24. Subsections (3) and (4) were added by the 2007 Act. The explanatory memorandum to the 2007 Act states:

"114. Subsection (2) disapplies the prohibition on making a deportation order while an appeal to the Tribunal against a decision to make an automatic deportation order is pending or could be brought. If a deportation order is made it invalidates any leave to enter or remain that the person has or is subsequently given while the order is in force (section 5(1) of the Immigration Act 1971). However, new subsection (4) of section 79 of the Nationality, Immigration and

Asylum Act 2002, inserted by subsection (2), provides that a deportation order made under section 32 will not invalidate the deportee's leave to enter or remain while an in-country appeal against an immigration decision is pending."

LEG/10 s104 p1585 25. "Pending", for the purpose of section 78 is defined by section 104 of the 2002 Act which provides:

"(1) An appeal under section 82(1) is pending during the period—

(a) beginning when it is instituted, and

(b) ending when it is finally determined, withdrawn or abandoned (or when it lapses under section 99)."

LEG/07 s5 p1552 26. Section 5(2) of the 1971 Act enables the Secretary of State to make a further order to revoke a deportation order.

27. Under paragraph 13.4.2 of the Immigration Rules, a deportation order remains in force until either: a) it has been revoked; or b) it has been quashed by a court or tribunal.

D/32 p2073 28. In *R (on the application of MM) v Secretary of State for the Home Department (effect of withdrawal section 94B)* [2025] UKUT 385 (IAC) ("***MM***"), the Upper Tribunal held that the withdrawal of a decision to refuse a human rights claim does not have the effect of invalidating a deportation order made under s. 32(5) of the 2007 Act: see Headnote (1) and (2) and 68.

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(c) Immigration detention and immigration bail

(i) The Secretary of State's power of detention

LEG/07 sch3 p1557 29. By paragraph 2(3) of Schedule 3 to the 1971 Act, "*where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom…*". By paragraph 2(3A) of the same Schedule, a person liable to be detained under paragraph 2(3) of Schedule 3 "*may be detained for such period as, in the opinion of the Secretary of State, is reasonably necessary to enable…the removal to be carried out.*"

30. These provisions confer a power on the Secretary of State to detain, pending removal, an individual who is liable to deportation under section 3(5)(a) of the 1971 Act on the

LEG/07 s3 p1547

basis that his deportation is conducive to the public good and who is subject to a deportation order under section 5(1) of the same Act. That includes individuals in the position of the Appellant, i.e. foreign criminals within the meaning of section 32(1) of the 2007 Act who are the subject of a deportation order in consequence of the Secretary of State's duty to make a deportation order in section 32(5) of the 2007 Act.

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(ii) Immigration bail and the duty to attach conditions

31. By paragraph 1(1)(b) of Schedule 10 to the Immigration Act 2016 (the "**2016 Act**"), the Secretary of State may grant bail to a person who is being detained under paragraph 2(3) of Schedule 3 to the 1971 Act pending removal pursuant to a deportation order. Alternatively, bail may be granted by the FTT on application by a person so detained: paragraph 1(3)(b) of Schedule 10 to the 2016 Act. A person may be granted and remain on immigration bail "*even if the person can no longer be detained, if (a) the person is liable to detention under a provision mentioned in sub-paragraph (1)…*" (where sub-paragraph (1) includes detention under paragraph 2(3) of Schedule 3 to the 1971 Act as set out above).

LEG/08 para1 p1563

LEG/07 sch3 p1557

LEG/08 para1(3) p1564

32. By paragraph 2(1) of Schedule 10 to the 2016 Act, and subject to an exception relating to electronic monitoring which is not material for the purposes of the present appeal, where immigration bail is granted to a person, it must be granted to subject to "*one or more*" of a list of "*conditions*". The list includes a condition requiring the person to appear before the Secretary of State or the FTT at a specified time and place, and a condition about the person's residence.

IV. SUBMISSIONS ON SECRETARY OF STATE'S ISSUES

33. In summary, the Secretary of State's position is that:

    a. CHK's bail conditions do not amount to "*detention*" for the purposes of the law of habeas corpus.

    b. If any such detention did exist, the Deportation Order provides the requisite legal basis for the detention.

c. The lawfulness of the Deportation Order is not a matter that may be challenged on an application for a writ of habeas corpus.

34. The structure of the Secretary of State's submissions is as follows:

a. First, the Secretary of State addresses the issues as she has articulated them in her Amended SFI.

b. Second, the Secretary of State addresses the issues as they have been formulated by CHK, and the submissions made by CHK in his written case.

35. On 23 September 2026, seven days after the deadline for the filing of his written case, CHK also filed a "*Supplemental Note on the Habeas Corpus Act 1816: bail, custody and restraint*". The Secretary of State does not respond to that further document. CHK does not have permission to rely on these further submissions, and if the "Supplemental Note" were to be read with CHK's written case of 46 pages, the length of his written case exceeds the 50-page limit, without CHK having sought permission from the Court to exceed that limit (see Supreme Court Practice Direction 5, §5.9).

J/02 p1121
LEG/05 p1528

(a) ISSUE 3

LEG/03 p1514

To what extent (if at all) may the writ of habeas corpus for release under CPR Part 87 be used to challenge the lawfulness of detention (or of a sufficiently serious curtailment of liberty) pursuant to an extant deportation order issued by the Secretary of State?

36. Although this was Issue 3 in the Secretary of State's SFI, it is taken first here for the following reasons:

a. First, the existence of the Deportation Order provides a complete answer to the appeal, having regard to the detailed analysis of the law relating to *habeas corpus* that this Court conducted in *Worcestershire*. Whether or not the bail conditions in question constitute "detention" for the purposes of *habeas corpus*, they are authorised by law. That alone is sufficient to refuse the writ.

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b. Second, CHK has appealed on the (misguided) basis that the Court of Appeal erred by considering the question of detention (i.e., Issues 1 and 2 in the Secretary of State's SFI) ahead of the question of whether any detention is authorised (Issue 3 in the Secretary of State's SFI). Nothing turns on the order

in which these points are taken. Each is a complete and independent answer to the appeal. The Secretary of State is therefore content to adopt CHK's favoured approach.

37. The key proposition as respects the Court's consideration of Issue 3 is that habeas corpus is not a mechanism for conducting a wide-ranging inquiry into the facts of whether a person's detention is justified in substance. It is a mechanism by which a gaoler is called to court to show cause, in a narrow sense, for the applicant's detention. The position is helpfully summarised in the leading textbook on *habeas corpus* as follows:

> "The form of review available on habeas corpus may be described as follows. The writ is directed to the gaoler or person having custody or control of the applicant. It requires that person to return to the court, on the day specified, the body of the applicant and the cause of his detention. The process focuses on the cause returned. If the return discloses a lawful cause, the prisoner is remanded; if the cause returned is insufficient or unlawful, the prisoner is released. The matter directly at issue is simply the reason given by the party who is exercising restraint over the applicant".[1]

38. Where there is an underlying authority for the detention - for example, an order authorising the detention - that will constitute a good return to the writ in almost all cases. The position was set out recently by this Court in *Worcestershire* (emphasis added):

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> "58. …there are many circumstances in which an individual is detained by someone on the basis of a lawful authority to do so. In such cases, the person who is detaining the individual will give a good return to the writ of habeas corpus and will have **a complete defence** by showing that they have such lawful authority."

39. The lawful authority for CHK's bail conditions is the Deportation Order. Where a deportation order has been made, the person subject to the order may be detained under the authority of the Secretary of State pending removal: paragraph 2(3) of Schedule 3 to the 1971 Act. A person is eligible for immigration bail if they are detained or liable to be detained under paragraph 2(3) of Schedule 3 to the 1971 Act.

LEG/07 sch3 p1557

X/05 p2476 [1] Farbey and Sharp, "*The Law of Habeas Corpus"* (3rd edt., Oxford, 2011), p. 21.

If bail is granted, at least one bail condition must be attached to it. Thus, the Deportation Order provides the ultimate legal authority for the bail conditions which, on CHK's case, constitute detention and justify the use of the writ of habeas corpus.

40. The Deportation Order has been in force since May 2017 and has never been withdrawn. Its existence is a full defence to this appeal.

41. CHK's complaint is that the Deportation Order is "*void ab initio"* because the separate decision to refuse and certify his claim for asylum and in respect of his human rights claim was withdrawn.

42. That is an impermissible attempt to go behind the Deportation Order, for reasons that are explained in the paragraphs immediately below. But it is in any event a *non-sequitur.* The Deportation Order was wholly unaffected by the withdrawal of the refusal and certification decision (see *MM*). There is no legally coherent dispute to be had on the facts of this case.

D/32 p2073

43. The circumstances in which the court will, on a habeas corpus application, go behind an order providing authority for detention in order to determine the lawfulness of that order are extremely limited. In general, a person who seeks to challenge the underlying lawfulness of the instrument authorising their detention must instead do so either by way of appeal in the relevant proceedings, or otherwise by way of judicial review.

44. In other circumstances, an appeal will lie against the decision authorising or purporting to authorise the relevant detention. In such a case, the proper mechanism by which the instrument may be challenged is by way of appeal in those proceedings rather than by way of judicial review. This was considered in the following terms by this Court in *Worcestershire*:

D/48 p1812

> "82. … Therefore, if the individual wishes to challenge the detention order in circumstances where there is a right of appeal, they are obliged to do so by way of appeal and are precluded from doing so by judicial review. Although not usually described as such, the suitable alternative remedy rule is a form of abuse of process doctrine. It means that the judicial review procedure cannot be used inappropriately, ie where there is another suitable remedy available.

83. In accordance with this jurisprudence, in the present context an appeal against the care order is a suitable alternative remedy. The relief sought by the father in the application for habeas corpus, when properly analysed, is for the care order to be quashed so that in the exercise of his parental responsibility he can decide that the children should return to live with him. This relief could have been obtained by an appeal against the care order, which would be conducted on the basis of a review of the decision of DJ Solomon or by a re-hearing if the interests of justice so required: see rule 30.12 of the FPR.

…

86. The practical effect of this analysis in a detention case based on an order of a court is that, if there is a right of appeal, the individual is precluded from applying for judicial review of the court order in conjunction with habeas corpus. Since the court order cannot be challenged in that way, the outcome of the habeas corpus application will be a foregone conclusion. It will fall to be dismissed, because the order provides a clear lawful basis for the detention. As explained above, if the individual pursues an appeal, an application for habeas corpus is unnecessary, so there is no good reason to allow any such application to remain on foot."

D/48 p1812 45. Although *Worcestershire* concerned detention pursuant to an order of a court, the Supreme Court's analysis was built on authority concerning detention pursuant to executive decisions in the immigration context. In *R v Secretary of State for the Home* D/33 p2097 *Department, Ex p Muboyayi* [1992] QB 244 ("***Muboyayi***"), the claimant was detained on the authority of a direction of the Secretary of State with a view to his removal. The Court of Appeal allowed the Secretary of State's appeal against the grant of a writ. The proper procedure was an application for judicial review of the refusal of leave to enter, since unless and until that decision was quashed the detention was lawful (pp 253-258). Lord Donaldson MR noted that an application for *certiorari* in support of habeas corpus had always been required in appropriate cases, and that the introduction of the modern judicial review procedure, with its in-built safeguards, justified confining the writ. That analysis was said by this Court to "*foreshadow[…] the* D/48 [68] p1829 *analysis in our judgment*" (*Worcestershire*, [68]).

46. On the facts of this case, the ultimate authority for the "detention" is the Deportation Order. The Deportation Order is lawful until and unless the order or the decision to

deport CHK is set aside by a court or tribunal of competent jurisdiction (and the exhaustion of any relevant appeal) or the order is withdrawn.

47. The general rule that a person challenging the lawfulness of a decision or order underlying the detention must do so by way of the appropriate appeal, or (where no appeal route is available) by way of judicial review, admits of only very limited exceptions. CHK seeks to rely on one such exception, namely, where an issue of precedent fact arises. This exception was summarised as follows in *Worcestershire*:

D/48 p1812

> "69. On the current state of the law, it appears that there is an exception to the general rule that habeas corpus cannot be used to challenge the lawfulness of an order for detention, and that an application for judicial review to quash the order is required to do that. In *Muboyayi*, pp 254—255, Lord Donaldson MR put to one side challenges to the lawfulness of an order for detention made by an official where the power exercised by the official depends upon the objective existence of some precedent fact, of which *Khawaja* [1984] AC 74 is the classic example. In such cases an application for habeas corpus can be used as a procedural vehicle to bring a challenge to the lawfulness of the order for detention on the basis that the precedent fact does not exist, as an alternative to seeking a quashing order using the judicial review procedure. … As Glidewell LJ explained in Muboyayi [1992] QB 244, 266, in such cases the detaining officer is under an obligation to prove by evidence the existence of the precedent facts in order to justify the detention, which is not the case where the power to detain depends upon the officer making a rational evaluative judgment or exercising discretion. …"

D/33 254 · p2107

D/25 p1943

D/33 266 · p2119

48. The Supreme Court in *Worcestershire* went on to observe that the distinction between precedent fact cases and other cases involving detention pursuant to executive orders is not "*free from difficulty*": [70], citing the discussion in Farbey and Sharp at pp 56 – 64 and an article by Simon Brown (later a Law Lord) entitled "Habeas Corpus – a new chapter" [2000] Public Law 31. The Supreme Court noted (still at [70]) that the validity of this distinction "*might have to be addressed in future in some suitable case*", but that it did not arise on the facts of the *Worcestershire* case itself, for various reasons set out at [71].

X/05 p2476

49. Any precedent fact exception similarly does not apply in this case, albeit for different reasons than in *Worcestershire*. In that regard, it is true that any jurisdiction to have

detained CHK did depend on a precedent fact, namely his being a "foreign criminal" within the meaning of sections 32 of the 2007 Act, as it is the fact that he is a "foreign criminal" that provided the basis for the Deportation Order which in turn provides the lawful authority for CHK's detention. However, there is no doubt that CHK is a "foreign criminal":

LEG/12 s32 p1590

a. he is not a British or Irish national (section 32(1) of the 2007 Act);

b. he was convicted in the UK of an offence (section 32(2) of the 2007 Act); and

c. he was sentenced to a period of imprisonment of at least 12 months (section 32(2) of the 2007 Act).

50. CHK does not contest any of these matters. The position is thus on all fours with *Muboyayi* (at 255B):

D/33 255 · p2108

"In the present case the right to detain does indeed depend upon a precedent fact or series of facts. They are that (a) the applicant was a person who might be required to submit to examination under paragraph 2 of Schedule 2 to the Act of 1971 and he was detained pending a decision to give or refuse him leave to enter and/or (b) he was a person in respect of whom directions might be given under paragraphs 8 to 14 and he was detained pending the giving of directions and his removal in pursuance of any directions given. However, and this is what distinguishes it from Khawaja's case, the existence of this precedent fact is not challenged." (emphasis added)

D/25 p1943

51. In his written case, CHK advances, for the first time, a series of matters that he contends are precedent facts, namely (paragraph 65):

a. *"Whether CHK holds subsisting indefinite leave to remain";*

b. *"Whether his in-country appeals remain pending";*

c. *"Whether the decision of 12 May 2017 was withdrawn in its entirety";*

D/01 p723

d. *"Whether any deportation order was made after 17 July 2017";*

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e. *"Whether the Respondent addressed regulations 27 and 32 of the Immigration (EEA) Regulations 2016 before the Deportation Order was made".*

52. To the extent that these are matters that CHK is entitled to raise for the first time in his written case, none of these amounts to an objective fact that the Secretary of State was required to prove in order to have jurisdiction under sections 32 of the 2007 Act in this case. With one exception, they are either matters wholly collateral to the making of the Deportation Order (e.g., whether CHK had in-country appeal rights in respect of a different decision; whether the certification and refusal decision of 12 May 2017 was "*withdrawn in its entirety*", whatever that is intended to mean); or matters that would conceptually post-date the making of the Deportation Order (e.g., whether any subsequent Deportation Order was made; whether CHK retained indefinite leave to remain after the making of the Deportation Order).

LEG/12 s32 p1590

D/01 p723

53. The only outlier is the reference to regulations 27 and 32 of the Immigration (EEA) Regulations. Those regulations codified in domestic law the EU law prohibition on the expulsion of a person with a right of permanent residence save on serious grounds of public security or public policy. Prior to the withdrawal of the UK from the EU, that was reflected in section 33(4) of the 2007 Act:

LEG/12 s33 p1591

> "(4) Exception 3 is where the removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would breach rights of the foreign criminal under the EU treaties."

54. However, this does not avail CHK either. The FTT has concluded that CHK was not entitled to any form of leave to remain under Appendix EU to the Immigration Rules because he does not and did not enjoy any derived right of residence in the UK under EU law (and thus did not acquire a right of permanent residence as a matter of EU law either). As such, he cannot come within the exception.

55. In the absence of any true issue of precedent fact, habeas corpus is not the proper procedure by which CHK may contest the decision to deport him or the Deportation Order. Challenges to that decision and/or to the validity of the Deportation Order belong in the FTT on appeal, a route CHK has in fact taken, or by way of judicial review. There is no role here for the writ, or for this Court.

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56. The Deputy Judge was accordingly correct to dismiss the habeas corpus application on the basis that the Deportation Order remained in force at all material times and provided a clear legal basis for (i) the Appellant's original detention pursuant to paragraph 2(3) of Schedule 3 of the 1971 Act, and (ii) for the grant of bail subject to

LEG/07 sch3 p1557

LEG/08 para2 p1564 conditions pursuant to paragraph 1(1)(b) and paragraph 2(1) of Schedule 10 to the 2016 Act.

(b) ISSUES 1 AND 2

Issue 1: What is the meaning of "detention" for the purposes of an application for a writ of habeas corpus for release under CPR Part 87 and, in particular, is physical incarceration required?

LEG/03 p1514

Issue 2: If physical incarceration is not required for the purposes of an application for a writ of habeas corpus for release under CPR Part 87, what degree of curtailment of an individual's liberty is sufficient to warrant such an application, and did the Court of Appeal err in holding that any such threshold was not satisfied on the facts of this case?

57. Insofar as the Supreme Court considers it necessary to address them, it is convenient to consider Issues 1 and 2 together.

58. There is no doubt that habeas corpus may only be used where the applicant is detained, or subject to a "*deprivation of liberty amounting to detention*": *Worcestershire*, [31] (and for a much earlier articulation of the same proposition, see *Gossage's Case* [1892] 2 AC 326, per Lord Halsbury at p. 333, Lord Watson at pp. 333-334 and Lord Herschell at p. 338). The requirement for detention is explicit in CPR Part 87 itself: see above. However, there is less clarity about the meaning of "detention" for these purposes.

D/48 [31] p1821

D/06A p1708

59. The Secretary of State's consistent position in these proceedings has been that physical incarceration (e.g., incarceration in a prison cell, or locked in private house) is not required in order for a person to be "*detained*" for the purposes of the issue of a writ of habeas corpus pursuant to CPR Part 87. As is set out in further detail below, both the Deputy Judge in the Administrative Court and the Court of Appeal also proceeded on the basis that physical incarceration was not required for the writ to issue.

KB/07 p132

60. The key question however is what degree of curtailment of liberty, short of physical incarceration, is sufficient to constitute detention and so to justify, in principle, and subject to the points made above on Issue 3, the use of the writ. Although there are

authorities in which writs have been issued on facts falling short of incarceration, they do not answer that question, as they do not identify a threshold or explain why the facts before the court satisfy it. As Farbey and Sharp put the position in 2011:[2]

X/05 p2476

> "The authorities do not define with precision the degree of confinement that will justify the issue of a writ of habeas corpus. It has probably been assumed from the very nature of the remedy that there must be some form of physical restraint before the writ can issue.
>
> …
>
> There has, however, been virtually nothing in the cases to suggest a test which could be applied to determine whether a prospective applicant is sufficiently restrained to be entitled to relief on habeas corpus."

61. In the present case, the Court of Appeal was content to assume that the concept of detention extends beyond actual incarceration, holding that "*on any view*" the Appellant's bail conditions fell short of the kind of restriction of liberty that warranted an application for habeas corpus: Court of Appeal judgment, [36]. The Court of Appeal was plainly correct to reach that conclusion, and it would be open to this Court to determine this aspect of the appeal on the same basis. However, the Court of Appeal did not express a view on the precise threshold beyond which a curtailment of liberty becomes significant enough to constitute detention for the purposes of the writ. In case this Court wishes to address that point, the Secretary of State sets out a fuller position below, which rests on three basic propositions:

    a. The test covers, at a minimum, circumstances amounting to false imprisonment at common law;

    b. The historic use of the writ suggests that its reach is in fact wider;

    c. However, the curtailment of liberty must be "*significant*" in order for the writ to issue.

62. The Secretary of State's position is that, at a minimum, a person is detained for the purposes of the issue of a writ of habeas corpus if he or she is imprisoned within the

[2] Farbey and Sharp "*The Law of Habeas Corpus*" (3rd edt., Oxford, 2011), p 194.

meaning that the common law gives that term in the tort of false imprisonment. The Secretary of State is not aware of any authority stating that proposition in terms. It would, however, appear to be a natural consequence of the relationship between the two remedies. The writ and the tort are complementary means of vindicating the liberty of the subject, and the courts have consistently treated them as such: see, for example, *Jalloh v Secretary of State for the Home* Department [2021] AC 262 (“***Jalloh***”), [1]:

D/20 p1875

> “1. The right to physical liberty was highly prized and protected by the common law long before the United Kingdom became party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”). A person who was unlawfully imprisoned could, and can, secure his release through the writ of habeas corpus. He could, and can, also secure damages for the tort of false imprisonment. This case is about the meaning of imprisonment at common law and whether it should, or should not, now be aligned with the concept of deprivation of liberty in article 5 of the ECHR.” (emphasis added).

63. The meaning of “*imprisonment*” at common law was considered by this Court in *Jalloh.* In that case the appellant had been served with a notice of restriction under which a curfew was imposed on him pending his deportation, purportedly pursuant to paragraph 2(5) of Schedule 3 to the 1971 Act. The curfew provided that he was required to be present at a particular address between the hours of 11pm and 7am every day. In parallel, in another case, the Court of Appeal concluded that paragraph 2(5) of Schedule 3 to the 1971 Act did not empower the Secretary of State to impose a curfew. The appellant sought damages for false imprisonment in respect of the 2 1/2 years during which he had been subject to an unlawful curfew.

LEG/07 sch3 p1557

64. In that context, this Court determined that the curfew requirement amounted to imprisonment for the purposes of the tort of false imprisonment. The test was articulated as follows:

> “24. As it is put in *Street on Torts*, 15th ed (2018), by Christian Witting, p 259, “*False imprisonment involves an act of the defendant which directly and intentionally (or possibly negligently) causes the confinement of the claimant within an area delimited by the defendant.*” The essence of imprisonment is being made to stay in a particular place by another person. The methods which might be

used to keep a person there are many and various. They could be physical barriers, such as locks and bars. They could be physical people, such as guards who would physically prevent the person leaving if he tried to do so. They could also be threats, whether of force or of legal process. A good example is *R v Rumble* (2003) 167 JP 205. The defendant in a magistrates' court who had surrendered to his bail was in custody even though there was no dock, no usher, nor security staff and thus nothing to prevent his escaping (as indeed he did). The point is that the person is obliged to stay where he is ordered to stay whether he wants to do so or not.

25. In this case there is no doubt that the defendant defined the place where the claimant was to stay between the hours of 11.00pm and 7.00am. There was no suggestion that he could go somewhere else during those hours without the defendant's permission. …" (emphasis added)

D/20 p1875 65. The effect of *Jalloh* is that imprisonment is not confined to physical incarceration. It captures measures which require a person to be in a specified place at specified times, including a curfew. However, *Jalloh* does not set out precisely where the line is to be drawn between detention and non-detention as a matter of law. And it does not decide that any curfew of any kind will ipso facto constitute detention.

66. In Jalloh the Court referred to the judgment of the House of Lords in *Secretary of*
D/22 p2345 *State for the Home Department v JJ* [2007] UKHL 45; [2008] AC 385 ("***JJ***"). In *JJ* the appellants were the subjects of "control orders" made under the Prevention of Terrorism Act 2005. Pursuant to the control orders, the controlled persons were subject to a curfew monitored by electronic tagging; were obliged to stay at a specified address save between the hours of 10am and 4pm; were obliged to inform the monitoring service when they left and returned to their residences (within the parameters of the curfew); were limited to restricted urban areas when they did leave their residences; and could only receive visitors with the express permission of the Home Office, for which photographic ID was required to be supplied ([20]). These conditions were described in the speech of Lady Hale as "classic detention or confinement" ([59]).

67. The writ has, however, been issued in a range of circumstances that would not appear to satisfy the "*essence"* of "*imprisonment*" described in *Jalloh* (namely, being made to stay in a particular place by another person), which suggests that the test for the

writ is, at least historically, broader than the common law test for false imprisonment. Those uses are various, and the line of development between them is not an obviously principled one. For example, the writ has issued:

a. To release an apprentice from indentures: *Davis* (1794) 101 E.R. 397; *Eden* (1813) 2 M&S 226. In both cases the applicants had attained the age of 21 and wished to be released from their respective indentures, which were, by custom, entered into where a child was above the age of 14 but below the age of 21.

b. To gain custody of infants where "*a question… of nurture, control and education"* arose (*Barnardo v McHugh* [1891] 1 QB 194 at 204, ("***Barnardo***"). In *Barnardo*, the mother of an "*illegitimate*" child had left her son in the care of Dr Barnardo's home for children. After 18 months she converted to Catholicism and wished for her son to be brought up in a Catholic institution, a religious community to which Dr Barnardo had the "*strongest objection"*. The writ was granted; the child was brought before the court and examined, and the mother's preferred (Catholic) guardian of her son was duly appointed by the court. In the Court of Appeal in a factually similar case, *Re Carroll* [1931] 1 KB 317, the use of the writ in these cases was described as "*being used not for the body, but for the soul of the child…"*.

D/09A 204 · p1706

D/09B p1735

c. To set a minor free from "improper" (meaning, indecent) restraint: in *R v Delaval* (1763) 97 E.R. 913 a writ was issued for the purposes of inquiring into the circumstances of a young woman who had allegedly been "*removed"* from her apprentice-master "*without the knowledge or approbation"* of her father and placed "*in the hands of a gentleman of rank and fortune, for the purpose of prostitution"*. It is clear that a key concern of the court was the idea that articles of indenture had been confected in order to provide cover for a relationship "*contrary to decency and morality"* between the young woman and the respondent (that she was a "*kept mistress"* and "*resided in his house, and publicly rode out on his horses, attended by his servants*"), not that she was "detained" by the respondent.

d. To determine whether a person was being threatened with forced marriage and to ascertain her wishes: *Re SK* [2004] EWHC 3202 (Fam); [2006] 1 WLR 81; *Re SA* [2005] EWHC 2942 (Fam); [2006] 1 FLR 867.

D/38 p2291

68. It is helpful to bear in mind the long history of the writ, which accounts for some of the flexibility the earlier cases appear to show. As is explained by Farbey and Sharp in their account of the development of the writ:[3]

X/05 p2476

a. *"Habeas corpus proved to be a useful device in the struggle for control between the central courts of the Crown and the local courts. There can be little doubt that its use in this contest fostered the concept of the writ requiring cause to be shown for the imprisonment. It was directed by the central courts against the local inferior jurisdictions and helped to channel the litigation, and the fees, towards a central administration. ... habeas corpus was used by both the courts and by the Chancery in their efforts to centralise the administration of justice…".*

b. The writ continued as "*one of the principal weapons in the struggle between common law and equity… Chancery often granted injunctions to restrain the enforcement of a common law judgment which violated the principles of equity, and the common law courts fought back by releasing on habeas corpus anyone committed for breach of an injunction*";

c. In the course of the struggle between the common law courts and other jurisdictions habeas corpus was used to "*challenge the wrongful exercise of jurisdiction"* by prerogative courts and developed to "*achieve a broad form of jurisdictional review"*.

d. In the eighteenth and nineteenth centuries "*the power of justices in summary matters was considerable, and the common law courts were eager to assert control over its exercise. The reason for the extensive use of certiorari and habeas corpus to question these proceedings was simply that no other method of challenge was available"*.

69. Many of the specifics are now of historical interest only, but the important point for present purposes is that habeas corpus did not develop along a single principled course directed to defined categories of incarceration. The use and scope of the writ developed in large part as an instrument in a struggle for control between competing

[3] Farbey and Sharp "*The Law of Habeas Corpus*" (3rd edt., Oxford, 2011), pp. 4 – 6; 23.

jurisdictions. What appears to be flexibility in the writ is therefore at least partly explained by the incoherence of its historical application.

70. Even leaving the historical context aside and taking the older authorities at face value, they are difficult to interpret. They do not generally articulate any threshold for "*detention*" or "*restraint*" etc., nor do they explain why the facts before the court satisfied whatever threshold was being applied.

71. One notable attempt to define the concept was made by Munby J (as he then was) in
D/38 p2291 *Re SA* [2006] 1 FLR 867 ("*SA"*) [78]:

> "The applicable threshold must be a significant curtailment of the freedom to do those things which, in this country, free people are entitled to do"

72. *Re SA* concerned the inherent jurisdiction of the High Court in relation to vulnerable adults. It concerned such an adult, SA, who had, as a child, been subject to the wardship jurisdiction of the High Court in order to prevent an "*unsuitable arranged marriage"*. SA attained her majority and was determined to have capacity to marry. The question for the court was whether the inherent jurisdiction could be exercised "*… for the protection of vulnerable adults who do not, as such, lack capacity…"* in order to prevent a further arranged marriage ([2]). Munby J concluded that it could.

73. In reaching that view, Munby J referred to the judgment of Eastham J in *Re C (Mental Patient: Contact)* [1993] 1 FLR 940, a case in which an adult daughter was said to be prevented by her father from having contact with her mother. The preliminary issue that came before the court was whether the court had jurisdiction to grant an order for contact with the adult daughter, and to enable the mother to enter the father's home to take the daughter for contact. Eastham J concluded that the court did have the requisite jurisdiction. In *Re SA,* Munby J recorded the key aspects of the position thus:

> "50. I do not for present purposes need to examine all the various reasons why Eastham J came to that conclusion. What are of immediate importance are certain views he expressed about habeas corpus and its possible relevance to the inherent jurisdiction.
>
> 51. Eastham J recorded at page 944 a submission of counsel that:

> "although in the normal habeas corpus case the applicant for relief is totally incarcerated, the cases reveal that it is not limited to such cases and if it prevents someone being at liberty freely to go at all times to all places whither he will or amounts to a significant curtailment of the freedom to do those things which in this country free men are entitled to do then the writ will run."

That formulation, I should add (though this does not appear from the report), was in fact derived from certain passages in Sharp, The Law of Habeas Corpus (ed 2) at pages 165, 175, and from what the Supreme Court of the United States of America had said in Jones v Cunningham (1963) 371 US 236 at page 243.

52. Having recorded that submission, Eastham J continued at page 944:

> "It is submitted on this principle that interference by a custodial parent with the other parent's access to a child is capable of being remedied by habeas corpus. That is a view with which I agree, and if this is a case in which either contrary to the will of C if she is able to express her will, or, if contrary to her best interests as found by the court she is not being allowed to see her mother and not being allowed to have access and is otherwise being restrained, then habeas corpus would definitely be available."

He added at page 945:

> "I have come to the conclusion that if the plaintiff had wished there was material, if her contentions are right, to found an application for habeas corpus, and I am inclined to agree with the submission that if the grounds apply for relief in that drastic form it does support very much the contention that there should be relief available by way of the lesser declaration."[4]

[4] The "*submission of counsel*" referred to in paragraph 51 is a reference by Munby J to his own submission, as he appeared as leading counsel for the mother in *Re C* and could thus explain the genesis of the formulation.

74. Munby J concluded that the inherent jurisdiction was at least as broad as that available on habeas corpus. That is the relevance of the discussion of habeas corpus in that case.

75. That formulation has not been approved in terms by this Court, and it is not without difficulty, not least as it purports to define *detention* by reference to a significant curtailment of (in effect) *freedom*, but without defining the concept of *freedom*. Nevertheless, the basic proposition that an interference with a person's liberty must be significant before the writ will issue is clearly correct. Habeas corpus is not a general remedy for restraint of any kind.

D/48 p1812 76. That can be seen from *Worcestershire* itself, in which the appellant sought a writ of habeas corpus to seek the "*release*" of his children from what he contended was their detention by the respondent local authority, into whose care the children had been placed under a care order made pursuant to section 31 of the Children Act 1989.

77. This Court concluded that the children were not detained. In reaching that view, the
D/38A p2282 Court cited with approval a different decision of Munby J, in *Re S (Habeas Corpus); S v Haringey London Borough Council* [2003] EWHC 2734 (Admin), [2004] 1 FLR 590:

> "… *Habeas corpus ad subjiciendum* (which is the form of the writ with which I am concerned) is a remedy protecting the citizen or subject against an unlawful detention or imprisonment. Detention need not be at the hands of the state or public authority. Even a domestic house may for this purpose be a prison: see *R*
> D/29A p1872 *v Jackson* [1891] 1 QB 671, [especially] per Lord Esher MR at p 682. That was the celebrated case where a wife who had been detained by her husband in his house, being given the full run of the house short of leaving it, was freed on a *habeas corpus*, the Court of Appeal denying that a husband has in law any right either to imprison or to confine his wife. But there must be a detention. The children in the present case are not in secure accommodation (whether in the sense in which that expression is used in s 25 of the Children Act 1989 or in any other sense). They are not being detained. They are simply living with foster parents in exactly the same type of domestic setting as any other children of their ages would be, whether living at home with their parents or staying with friends or relatives. Habeas corpus does not lie because a parent, or other person in loco parentis, makes it a rule that a child of tender years is not to leave the house

unless accompanied by some suitable person or because an exasperated parent has sent a naughty child to his room and told him to stay there for two hours or because a rebellious teenager has been 'grounded' or subjected to a parentally enforced curfew, any more than habeas corpus lies if the headmaster of a boarding school forbids his charges to leave the school premises except at permitted times and for permitted purposes. And it makes no difference for this purpose that the domestic rule is actually enforced by the turning of a key in a lock." (emphasis added)

78. The Supreme Court went on to consider "*extreme or unusual circumstances*" in which the improper exercise of parental responsibility could result in the deprivation of a child's liberty amounting to detention:

> "Suppose, for example, foster parents locked a child in his or her bedroom for a month: on no view could that treatment be regarded as the proper exercise of parental responsibility vested in the local authority by the care order which has been delegated to the foster parents. In our judgment, a claim for habeas corpus would in principle be available in such a case and there would be no good defence to it. As a matter of legal analysis, it would be the same as if the foster parents had taken a child off the streets and imprisoned him or her. This would be a case falling within the category for which the writ of habeas corpus is an appropriate remedy."

79. What is clear from that is that the restraint has to meet a threshold of significance before the courts will be troubled by an application. That is why the examples articulated by Munby J in *Re S* would not suffice to justify the use of the writ.

D/38A p2282

D/09C p2278

80. *R v Board of Control ex p Rutty* [1956] 2 QB 109 ("***Rutty***") provides a closer parallel to the present case. In *Rutty* the Divisional Court ordered the release of the applicant in circumstances where the applicant was on "*residential licence*" from an "*institution for defectives*". The conditions of that licence provided that she "*should not be allowed out alone, but only with some responsible grown up* (*woman)"*, that she should be prevented from forming attachments with men, and that she should be returned to the institution upon written request of the medical superintendent (at 112). The applicant contended that the order authorising her detention in the institution was unlawful, such that her "*continued detention"* was likewise unlawful (at 112). The

Court agreed that the original order was made without appropriate jurisdiction and ordered her release (at 123).

81. There is no discussion in the judgment of why the licence conditions were considered to amount to detention. However, what is clear is that the conditions were onerous. She was confined to her house save when supervised and could not go anywhere alone. She was not allowed to form associations with men. Those are significant restrictions on personal liberty.

82. Synthesising the relevant authorities (albeit writing before the recent judgment in *Worcestershire*) Farbey and Sharp articulate the position as follows (p. 194):

D/48 p1812
X/05 p2476

> "On the basis of the authorities, there would seem to be little doubt that habeas corpus can be used in several situations where the applicant is not actually incarcerated. The courts have given little consideration to the principles at stake but have allowed the writ to be used to question a variety of non-custodial restraints. … There has, however, been virtually nothing in the cases to suggest a test which could be applied to determine whether a prospective applicant is sufficiently restrained to be entitled to relief on habeas corpus. Any suggested test is purely speculative, but an attempt should be made to define considerations which underlie the question.
>
> The idea of personal liberty – that is, the physical freedom to come and go as one pleases – is considered to possess special value in the common law tradition. The importance which is attached to habeas corpus parallels this value. The writ is considered to provide an assurance that personal freedom will always be protected, and there may be a fear that if used in situations which do not plainly involve a significant curtailment of personal freedom, the force of the writ may be 'watered down'. On the other hand, many restraints which involve less than complete incarceration may still merit the weighty consideration which is symbolised by habeas corpus. It will not weaken the remedy to allow it to be used so long as that which is challenged palpably constitutes a restriction on personal liberty. It is submitted that when the question is raised there should be an assessment of the nature of the control or restriction of rights which is challenged and a determination made as to whether that circumstance would ordinarily be seen as <u>a significant curtailment</u> of personal freedom. If a restraint satisfied that

test, the writ of habeas corpus should be available to question its legality." (emphasis added).

83. Even if the test cannot be refined beyond a "*significant curtailment of personal freedom*", the word that matters in these proceedings is "*significant*". That threshold is appropriate both in light of both the history of the writ and the uses to which it has properly been put, and the need to protect the writ from becoming a general mechanism for challenging conditions of any kind, in any context, said to bear on personal freedom. Habeas corpus is not and should not be permitted to degenerate to a cumbersome and costly complaints procedure.

84. The foregoing sets out the threshold the Secretary of State invites the Court to apply.

85. CHK's case ranges widely over the history and nature of the writ, and out of that material two propositions emerge which are wrong, and which require an answer.

86. The first is that the test is not a test of "*de facto control*" (CHK's written case at paragraph 74). CHK's reliance on the "*de facto control*" test said to be derived from
D/34 p2159 *R (O'Brien) v Secretary of State for Home Affairs* [1923] 2 KB 361 and *R*
D/37 p2228 *(Rahmatullah) v Secretary of State for Defence* [2012] UKSC 48; [2013] 1 AC 614 is misconceived for the reason identified by the Court of Appeal: those cases were concerned with identifying the appropriate public authority to whom the writ should be directed, not with the antecedent question of whether the impugned restrictions amounted to detention.

D/03 p1649 87. Nor is any assistance to be derived from the line of authority (such as *Re Amand* [1941] 2 KB 239) in which a person who had previously been detained and was subsequently released on bail pending determination of a challenge to that detention, was permitted to continue an application for habeas corpus. As the Court of Appeal held, that line of cases says nothing about the threshold for detention; it is, in substance, an example of the use of habeas corpus to challenge the decision underlying prior detention. Nor, in any event, is CHK challenging his previous physical incarceration by his application for the writ.

D/04 p1654 88. It should also be noted that *Amand* was in substance an extradition case: the applicant had been detained for the purposes of his being handed over as a deserter from the Netherlands army: see p. 254 of the report. Much more recent authority suggests that,

for the purposes of a challenge to extradition, an applicant for habeas corpus is to be treated as in custody even if released on bail: see e.g. *Pomiechowski* [2012] UKSC 20, per Lord Mance at [25]. The precise basis for, and scope of, any rule that detention is not required in order to found an application for habeas corpus in the extradition context is outwith the scope of this appeal.

D/30 [25] p2034

(a) Application to the appeal

89. Turning to the facts of this case, and contrary to CHK's case, it is clear that neither the Deputy Judge nor the Court of Appeal imposed any test of physical incarceration in dismissing CHK's application and later appeal:

KB/07 p132

a. Paragraph 14 of the Deputy Judge's reasons in his Order dismissing the application for the writ expressly records the Secretary of State's "*proper*" concession that bail conditions "*might in an appropriate case constitute a 'significant curtailment' of liberty that would justify the use of habeas corpus*", before concluding that "*the curtailment of liberty through bail conditions is not sufficient in my judgment to justify the use of habeas corpus*" on the facts of this case.

b. The Court of Appeal proceeded on the same footing. Zacaroli LJ (with whom Lewis and Peter Jackson LJJ agreed) recorded that the Deputy Judge had correctly noted that the writ might be available notwithstanding that a person is not in fact detained but is on bail, and went on to consider at length the authorities said to support an extended concept of detention before concluding, again as a matter of fact and degree, that "*on any view the bail conditions in this case fall far short of*" any threshold which those authorities might be said to establish.

90. Those conclusions are unimpeachable. The conditions imposed on CHK are not "significant" within the meaning revealed by a closer consideration of the authorities. CHK's complaint is about bail conditions and a generalised point about living under the cloud of potential deportation. As matters stood before the Court of Appeal they comprised a requirement to report to a police officer fortnightly; a prohibition on

working; [5] and a requirement to comply with digital reporting. These do not surmount the threshold:

a. A requirement to report on a fortnightly basis is not a significant curtailment of CHK's personal freedom. CHK attends a reporting centre once a fortnight, to mitigate the risk that he absconds. After this brief appearance, he may then go wherever he chooses, keep whatever hours he chooses, and associate with whomever he wishes. His liberty is in no sense significantly curtailed by this requirement.

b. A requirement to comply with digital reporting is, likewise, no significant curtailment of CHK's liberty. It requires nothing of CHK but the use of a device he retains in his possession, which requests access to CHK's location data by email, mobile phone or text message. It does not require him to attend anywhere, to be anywhere, or to refrain from being anywhere. It serves the same purpose of confirming his continued presence in the United Kingdom.

c. A prohibition on working does not surmount the threshold either. The ability to work in the UK is an attribute of having specified forms of leave to remain (or being exempt from the obligation to have it). It is not an incident of liberty at large. His position in this respect is no different from that of every other person in the United Kingdom who is subject to an immigration condition prohibiting or restricting employment.

91. CHK also suggests that he is prohibited from travelling internationally. Unsurprisingly, given the point of a Deportation Order – to remove a person from the country - that is not correct. The effect of the Deportation Order would prevent him from returning to the UK if he did leave. CHK may well be choosing to remain because he does not wish to forfeit the possibility of coming back, but he is not prevented from leaving.

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[5] In consequence of CHK's application to the EU Settlement Scheme he was once again permitted to work pending the outcome of his application and any further appeal. CHK appealed the refusal of his application to the EUSS to the FTT, and the lawfulness of that decision is considered in the FTT Decision.

H/07 p1095

KB/07 p132

92. The Deputy Judge and the Court of Appeal were accordingly correct to hold that CHK's bail conditions fall far short of the threshold to found an application for a writ of habeas corpus. That conclusion was a permissible, indeed the only proper, evaluation of the facts.

V. RESPONSES TO THE APPELLANT'S REMAINING ISSUES

93. CHK identifies 13 "Issues" within his SFIs, labelling each issue with a separately numbered "Ground", numbering 15 grounds, there being 16 grounds when including ground 5A. The labelling of grounds is not in sequence with the issues.

94. None of the issues or grounds in CHK's SFI is abandoned within CHK's written case.

95. The Secretary of State responds to each issue and ground raised within CHK's pleadings below, in a manner that is consistent with CHK's structure in his SFI.

CHK Issues 1-4: The meaning of "restrained"

LEG/05 s1 p1528

CHK Issue 1: Does the word "restrained" in section 1 of the Habeas Corpus Act 1816 extend to legally enforceable restrictions on liberty imposed by the State, including immigration bail conditions backed by the threat of criminal prosecution and re-detention; or is it limited to physical incarceration or its near-equivalent?

D/04 p1654

CHK Issue 2: Is the principle established by the House of Lords in *Re Amand* [1943] AC 147 — that a person released on bail remains entitled to seek habeas corpus — still good law; and was the Court of Appeal entitled to declare it "no longer good law" on the basis

D/48 p1812

of *Worcestershire* [2025] UKSC 1, a decision which did not mention *Re Amand* and which expressly reserved the question of administrative detention?

Response

96. The Secretary of State relies upon her submissions under her Issues 1 and 2 as above.

97. The Secretary of State does not accept that *Re Amand* establishes any general, free-standing principle that a person released on bail is entitled to seek habeas corpus. Insofar as it did establish such a proposition, it would no longer be good law for the reasons given by the Court of Appeal. In addition, as noted above, *Re Amand* was (in

substance) an extradition case to which the law has historically taken a different approach.

D/48 p1812 **CHK Issue 3:** Does the reasoning in Worcestershire - concerning the availability of habeas corpus where detention is pursuant to a court order and alternative remedies exist D/25 p1943 - apply to administrative detention under immigration powers; and does the *Khawaja* D/48 [69] p1829 "precedent fact" exception, expressly preserved in *Worcestershire* at [69], apply where the applicant contends the administrative order authorising restraint is void ab initio?

Response

98. The Secretary of State relies on her submissions under her Issue 3 above. The present case is not one which falls within the "precedent fact" exception. If the validity of the authorising instrument could itself be a precedent fact, the exception would swallow the rule.

CHK Issue 4: Where a person has been physically detained by the State under an administrative order, and is subsequently released on bail conditions deriving their sole legal authority from that same order, does the chain of State custody remain legally continuous for the purposes of habeas corpus?

Response

99. Whether a person is confined or restrained of his liberty is a question of fact and degree. It is answered by reference to the restraint to which the applicant is actually subject when the writ is sought. CHK's incarceration ended on 16 May 2018, more than seven years before his application.

CHK Issues 5-7: "The lawfulness of the Deportation Order"

CHK Issue 5: Where a person subject to restraint of liberty under an administrative order contends that the order is void *ab initio*, and that question has never been determined by any court or tribunal, is the court constitutionally required to determine the lawfulness of

the order in habeas corpus proceedings; or may it decline to do so on the basis that the applicant's conditions of restraint do not meet the threshold for the writ?

Response

100. This Court is not "constitutionally required" to determine the legality of the Deportation Order. The proper forum for CHK's arguments as to the legality of the decision to deport CHK and/or Deportation Order are for the FTT and/or judicial review proceedings. In any event, the fact that CHK is not detained is a sufficient reason for this Court to decline to review the lawfulness of the Deportation Order.

CHK Issue 6: Where a deportation order is made as part of a single integrated decision package with the refusal decision and section 94/94B certifications, and those decisions are later withdrawn following *Kiarie & Byndloss* [2017] UKSC 42, is the deportation order inevitably tainted and void ab initio, or does it survive as an independent instrument?

D/26 p2000

Response

101. The premise of this issue is rejected. A deportation order made under section 5(1) of the 1971 Act, in discharge of the duty in section 32(5) of the 2007 Act, remains in force until it is revoked or quashed (section 5(2) of the 1971 Act; Immigration Rules, paragraph 13.4.2; and *MM* at [56]). This order has been neither revoked nor quashed. It does not need to "survive" anything.

LEG/07 s5 p1552
LEG/12 s32 p1590
D/32 [56] p2087

CHK Issue 7: Where a person who has acquired the right of permanent residence under Article 16(2) of Directive 2004/38/EC is made the subject of a deportation order 8 of 10 without application of the mandatory protections in Articles 27 and 28 of the Directive, in breach of section 3(5A) of the Immigration Act 1971, does the writ of habeas corpus lie to test the lawfulness of the resulting restraint on the ground that the deportation order was made without statutory authority?

EU/01 p1609
LEG/07 s3 p1547

Response

102. The premise of this issue is CHK's assertion that he acquired a right of permanent residence under Directive 2004/38/EC (the Citizen's Rights Directive, or "**CRD**").

That is not accepted. This is a matter CHK pursued at the FTT and his appeal under the CRD was dismissed in the FTT Decision promulgated on 21 September 2026.

H/07 p1095

CHK Issues 8-12: Other issues raised

CHK Issue 8: In habeas corpus proceedings where the applicant demonstrates a *prima facie* case that the order underlying the restraint is void *ab initio*, is the court constitutionally required to compel the detaining authority to discharge the *Khawaja* burden before the application may be dismissed; and does the failure to require discharge of that burden constitute a jurisdictional error?

D/25 p1943

Response

103. The Secretary of State relies on her submissions under her Issue 3 above.

LEG/03 p1514

CHK Issue 9: Whether the availability of a reconsideration procedure under CPR 87.4(2) is capable of curing a failure by the judge to consider material documents filed by the applicant in habeas corpus proceedings; and whether the court was required to determine the pending application to amend before ruling on the habeas corpus application.

Response

104. The premise of this argument is that on 17 October 2025, the Appellant filed a"*50-page reply with a supplementary bundle*" and that the order refusing the application was made "*three hours and forty-two minutes later"* (paragraph 176). CHK seeks to infer from this that the Deputy Judge did not read the Reply document. But there is no basis for that inference. There is no evidence that the Deputy Judge failed to consider any document, let alone any material document. CHK, in any event, had no entitlement to rely on any "Reply".

KB/07 p132

105. CHK seeks, further, to suggest that there was a failure to consider his application to amend his application for habeas corpus, made on 29 September 2025. There is, again, no evidence that this application was not considered by the judge below. In any event, CHK had no right to have that application admitted, and no right to have it determined as a precondition to the disposal of the habeas corpus application itself.

CHK Issue 10: Where a person subject to immigration bail holds subsisting indefinite leave to remain, does paragraph 1(8) of Schedule 10 to the Immigration Act 2016 operate automatically to terminate that bail; and does section 3(1)(c) of the Immigration Act 1971 confine the power to impose conditions to persons with limited leave, such that conditions imposed on a person with ILR are void?

LEG/08 para1(8) p1564

LEG/07 s3 p1547

Response

106. The legal framework applicable to immigration bail, leave to remain, and deportation orders is set out at paragraphs 38 to 47 above.

107. Paragraph 1(8)(b) of Schedule 10 to the 2016 Act brings bail to an end when the person "is granted leave to enter or remain in the United Kingdom". That describes a triggering event: a grant of leave made while the person is on bail. It does not extend to pre-existing leave preserved by section 79(4). Paragraph 1(8)(b) therefore does not operate to automatically terminate CHK's bail.

108. Immigration bail is based on liability to detention. Under paragraph 2(3) of Schedule 3 to the 1971 Act ("**paragraph 2(3)**"), a person may be detained where a deportation order is in force against him. Section 36(2) of the 2007 Act goes further for section 32(5) orders: the Secretary of State *shall* exercise that power unless the person is granted immigration bail. Paragraph 2(3) is engaged by the order being in force, and on *MM* the order remains in force.

LEG/07 sch3 p1557

LEG/12C s36 p1602

D/32 p2073

109. Section 78 of the 2002 Act prevents removal while the appeal is pending but does not operate to prevent detention, and section 78(3) expressly contemplates a deportation order being made. CHK therefore remains liable to detention under paragraph 2(3), which is a provision listed in paragraph 1(1)(b) of Schedule 10 to the 2016 Act.

LEG/10 s78 p1573

LEG/08 para1 p1563

110. Section 3(1)(c) of the 1971 Act governs a different subject: it concerns conditions attached to grant of limited leave. It does not operate to restrict bail conditions imposed under paragraph 2 of Schedule 10 to the 2016 Act, which attach to the grant of bail, not to the person's leave.

CHK Issue 11: Where the State imposes ongoing restraint on the basis of a decision asserting compliance with Article 8(2) ECHR that has never been independently

adjudicated, does the Article 8(2) burden remain undischarged; and is the automatic deportation framework under section 32 of the UK Borders Act 2007 structurally incompatible with Article 8(2)?

LEG/12 s32 p1590

Response

111. Issue 11 does not properly arise in these proceedings. CHK's claim that his deportation would breach his rights under Article 8 ECHR is the subject of the FTT Decision and the ongoing appeal in those proceedings.

H/07 p1095

CHK Issue 12: In *habeas corpus* proceedings where a person is subject to restraints imposed pursuant to an administrative order alleged to be void, does the writ require the court to examine the lawfulness of the underlying order; or is the court's inquiry confined to the immediate conditions of restraint?

Response

112. The Secretary of State relies on her submissions under her Issue 3, above.

CHK Issue 13: Whether habeas corpus proceedings may properly be approached by analogy with the permission stage of judicial review; and whether the exercise of the statutory right of appeal under section 15 of the Administration of Justice Act 1960 can be characterised as an "abuse" of the habeas corpus remedy.

LEG/01 p1507

Response

KB/07 p132

113. The Court of Appeal's description of the Deputy Judge's decision as "refusing permission" at [14] was a matter of description rather than any mistake as to the applicable framework. Under CPR Part 87, the application was considered initially on the papers and the Court declined to issue the writ at that stage.

LEG/03 p1514

114. The observation made by Peter Jackson LJ at the Court of Appeal [56] that, *"if permission to appeal to this court had been required, it would have been refused and the application would have been certified to be totally without merit"* was commentary and did not carry any legal consequence for the disposal of the application before the Court.

115. As to the second limb, the exercise by CHK of his statutory right of appeal under section 15 of the Administration of Justice Act 1960 was an exercise a right expressly conferred by statute and he exercises this right lawfully. However, the expression of the Court of Appeal that, on the facts of this case, this constitutionally significant remedy has been "*abused*" [54], was a fair characterisation of these proceedings.

LEG/01 p1507

VI. CONCLUSION

116. This is the second occasion within two years on which this Court has been asked to determine applications for a writ of habeas corpus brought by applicants who could not establish a detention and who could and should have proceeded by way of appeal or judicial review. The procedural history of this appeal demonstrates well why the concept of detention must be properly construed, and why applicants should be required to use those alternative procedures, which are better suited to their complaints.

117. The Secretary of State accordingly invites the Supreme Court to dismiss the appeal, for the following reasons:

a. There is lawful authority for any "detention"; and

b. CHK is not detained.

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6 October 2026