Briefing Note
Detention of Immigration Detainees in Prison
R on the application of Idira v Secretary of State for the Home Department
[2015] EWCA Civ 1187 – Article 5 ECHR

1. On 20 November 2015 the Court of Appeal handed down judgment in *Idira v Secretary of State for the Home Department* [2015] EWCA Civ 1187. The claim raised important issues regarding the compatibility with Article 5(1)(f) ECHR of holding immigration detainees (specifically, post-sentence ex-offenders) in the prison estate.

2. The appellant was an Algerian national who was detained under immigration powers in prison from July 2013 to 21 March 2014 despite being assessed as suitable for transfer to an IRC. He was held in prison for this prolonged period as a result of two combined factors:
   (a) First, a change in the Secretary of State's published detention policy in Chapter 55 of her Enforcement Instructions and Guidance (EIG 55) in January of 2012 meant that post-sentence foreign national ex-offenders would be held in the prison estate until all of the prison beds allocated to the Home Office were full, after which appropriately risk-assessed detainees would be transferred to IRCs; and

   (b) Second, an increase in the number of such beds from 600 (as specified in the Service Level Agreement between NOMS and UKBA) to 1,000 (referred to within the Home Office as "Operation 1000") in late 2012 which resulted in all transfers from prisons to IRCs stopping. (Prior to the increase in available beds, the impact of the January 2012 change to EIG 55 had been limited).

3. In the High Court (*R (Idira) v SSHD* [2014] EWHC 4299 (Admin)) Jay J had found that the policy was a blanket policy which was irrational and eschewed any consideration of individual circumstances. He declined to grant relief on the point as it was of only historic concern to the Claimant, and the number of prison beds had been reduced again by the time of the hearing. The judge did, however, conclude that, but for the decision of the Court of Appeal in *Krasniqi v SSHD* [2011] EWCA Civ 1549, he would have allowed the claim by reference to Article 5 ECHR, on the grounds that Article 5(1) required a link of appropriateness between the place and conditions of detention on the one hand, and the reason for detention on the other.

4. Mr Idira appealed, arguing that the judge had not in fact been bound by *Krasniqi* to dismiss the claim, and that his analysis of Article 5 was correct. The Secretary of State argued that he had been right to dismiss the claim by reference to *Krasniqi*, and in any event, his analysis of Article 5 was wrong.

5. The appellant argued that Jay J was correct to find that immigration detention in prison was generally contrary to Article 5 ECHR as there was not a relationship of appropriateness between the reason for the deprivation of liberty and the place and conditions of detention.

6. The Court of Appeal (Lord Dyson, Lord Justice Leveson, and Lord Justice McCombe) held that there was no principle that immigration detention in prison

per se breaches Article 5: [16] & [36], albeit (a) "detention in an IRC is *generally* more appropriate for immigrant detainees than detention in prison", and (b) "[f]or some vulnerable detainees, detention in prison may be seriously inappropriate and on that account arbitrary". Any claim on this basis would turn on its own facts, in particular "the vulnerability of the detainee and the nature of the prison conditions" (see at [61]).

7. Importantly, the Court rejected the Secretary of State's submission that Article 5 was not directly concerned with the appropriateness of place and conditions of detention [40], and reiterated the three criteria identified in *Saadi* at paragraph 74 regarding the prevention of arbitrary detention under Article 5 [40].

8. As to what must be demonstrated to establish a breach of Article 5, the Court concluded that question was whether the conditions of detention were "seriously inappropriate", which equates to "undue harshness". The Court departed from Jay J's analysis of this term in the judgment below, concluding that "it is not to be equated with article 3 ill-treatment" (at [52]).

9. In terms of challenges under Article 5 the decision leaves a window for claims in individual cases, albeit the threshold for establishing a breach is a high one. The Court accepted that past offending was relevant to whether prison was an appropriate place for detention. It was also legitimate to have regard to the practical problems on which the state relied to justify its position. The vulnerability of the detainee and nature of the prison conditions are highly relevant.

10. In our view, there may be viable claims in specific circumstances where the wellbeing of a particularly vulnerable detainee (for example, a victim of torture) is being impacted adversely by the detention regime in prison, and/or where prison conditions are particularly harsh (e.g. lengthy segregation) and there is nothing in the circumstances of the case justifying those harsh conditions. It is important to note, however, that in many cases involving particularly vulnerable detainees there may well be a viable challenge to the legality of detention *per se*, not just to the place of detention.

11. The Court did not engage in detail with evidence about the problems caused to detainees by being in prison, including access to legal advice.

12. The appellant has applied to the Court of Appeal for permission to appeal to the Supreme Court.

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