ILPA

Habeas Corpus

Stephanie Harrison KC and David Neale

14 December 2023

Follow us on - @ILPAimmigration

- Section 13 of the Illegal Migration Act 2023 inserts new paragraphs 3(3A)-(3C) and 3A into Schedule 10 to the Immigration Act 2016.
- These are “ouster clauses” which:
  - Prevent the grant of immigration bail by the FTT during the first 28 days of detention under the Act’s new detention powers; and
  - Oust judicial review during the first 28 days of detention, with limited exceptions; but
  - Preserve the ability to seek a writ of *habeas corpus.*

- The exact wording is important. Under paragraph 3A(2), the decision to detain a person *"is final and is not liable to be questioned or set aside in any court or tribunal."*
- Paragraph 3A(3) clarifies that *"the powers of the immigration officer or the Secretary of State (as the case may be) are not to be regarded as having been exceeded by reason of any error made in reaching the decision".*
- But by paragraph 3A(4), the foregoing does *"not affect any right of a person to apply for a writ of habeas corpus".*

- There is doubt about the scope of *habeas corpus.* See De Smith at 17-015: *"It is very difficult to present a coherent and concise account of the extent of judicial review in habeas corpus applications, for the case law is riddled with contradictions."*

- A key case on the scope of *habeas corpus* is *R v SSHD ex parte Muboyayi* [1992] QB 244.
- The applicant was detained under paragraph 16(2) of Schedule 2 to the Immigration Act 1971, following a decision to refuse him leave to enter.
- He sought a writ of *habeas corpus*, arguing that the decision to refuse him leave to enter was unlawful.

- The Court held that, in the *habeas corpus* proceedings, the applicant could not challenge the prior decision to refuse him leave to enter.

“Mr. Jay accepts, and it is clear law, that where the power to detain is dependent upon the existence of a particular state of affairs ("a precedent fact") and the existence of that fact is challenged by or on behalf of the person detained, a challenge to the detention may be mounted by means of an application for a writ of habeas corpus.”

"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… the existence of this precedent fact is not challenged. What the applicant alleges is something quite different, namely that, although he was liable to be examined and was examined and although upon the conclusion of that examination he was refused leave to enter and directions were given for his removal, he should not *have been refused leave to enter and no question of his removal* should *have arisen. In other words there was no challenge to jurisdiction, but only to a prior underlying administrative decision. This is a quite different challenge and, unless and until it succeeds, there are no grounds for impugning the legality of his detention."*

- The effect of the *Muboyayi* judgment is that:
  - You can use *habeas corpus* where you challenge the conditions precedent for your detention. Where the statute says "The Secretary of State may detain a person who is X", you can mount a challenge on the basis that you are not X.
  - But where you accept that you are X, you cannot use *habeas corpus* to challenge the prior administrative decision that led to you becoming X.
- Query whether *Muboyayi* is still correct after *R (DN (Rwanda)) v SSHD* [2020] AC 698 – in at least some circumstances detention pursuant to an unlawful decision will itself be unlawful.

- The statutory conditions precedent for the new powers of detention are:
  - The immigration officer/SSHD suspects that the person meets the four removal conditions;
  - The immigration officer/SSHD suspects that the SSHD has a duty to remove the person;
  - The SSHD has a duty to remove the person;
  - The person meets the four conditions but is an unaccompanied child and is detained pending a decision.

- The latter two conditions are matters of precedent fact – the lawfulness of detention depends on whether the person meets the four conditions/whether there is a duty to remove. Not merely whether the immigration officer/SSHD thinks so. So *Muboyayi* does not prevent a person challenging the assertion that they meet the four conditions.
- However, *Muboyayi* would prevent *habeas corpus* being used to challenge a prior decision that was material to the exercise of the power – e.g. a decision to refuse leave to enter or remain to a person who (without such leave) meets the four conditions.

- Unclear how paragraph 3A(2) interacts with paragraph 3A(4).
- Where paragraph 3A(2) says that the decision to detain for the first 28 days *"is final and is not liable to be questioned or set aside in any court or tribunal,"* does this mean that the court on a *habeas corpus* is limited to determining whether the immigration officer or Secretary of State has made a decision to detain, and can't review whether that decision is vitiated by public law error?
- If so, this would mean that paragraph 3A(4)'s retention of *habeas corpus* is of very little practical use.

- Unclear how *habeas corpus* will now interact with the statutory codification of the *Hardial Singh* principles in section 12 of the IMA.
- Previously it was clear that *Hardial Singh* principles could be applied on *habeas corpus. Hardial Singh* was itself a *habeas corpus.*
- *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 (also a *habeas corpus*) makes clear that it is for the court and not the detaining authority to decide whether the *Hardial Singh* principles have been breached.

- But section 12 of the IMA makes the Secretary of State or immigration officer the primary decision-maker as to whether the length of detention is reasonable, subject to review on conventional public law grounds – reversing *Tan Te Lam*.
- Therefore there is uncertainty as to how the courts might now approach the application of *Hardial Singh* principles in an application for *habeas corpus.*

- *R v SSHD ex parte Cheblak* [1991] WLR 890
- *"Since the foundation for an application for a writ of habeas corpus is the fact that he is being detained otherwise than in legal custody, it is necessary to inquire whether these conditions are met. If they are, there is no room for the issue of a writ of habeas corpus."*

- *Habeas* and judicial review are:
- *"essentially different: a writ of habeas corpus will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful. The remedy of judicial review is available where the decision or action sought to be impugned is within the powers of the person taking it … In such a case the decision or action is lawful, unless and until it is set aside by a court of competent jurisdiction."*

- *Muboyayi* at p 257:
- *"the evolution of the new and extended system of judicial review under R.S.C., Ord. 53 with its in-built safeguards would, I think, justify us in confining the ambit of the writ of habeas corpus in the way in which I held that it was confined in my judgment in Cheblak's case."*
- At p 268 per Taylor LJ:
- *"I do not consider that applications for habeas corpus, which require no leave, can be admitted to attack such administrative decisions provided that other effective means for challenging the basis of the detention are available."*

"Habeas Corpus—A New Chapter", ALBA Annual Lecture 1999, 23 November 1999: "*In short, I can think of no circumstances today in which relief obtainable by habeas corpus would not also be available by judicial review*."

Wrongly decided or not decisive:

- The Wells Note states contrary to *ex parte Armah* [1968] AC 192 and *ex parte Khawaja* [1984] AC 74 (but rejected in *R v Oldham Justices, ex parte Cawley* [1997] QB 1)
- Analysis in Farbey et al, recognised as leading academic text book e.g. Chapter 2
- *Cheblak* and *Muboyayi* expressly refer to availability of the other remedy of judicial review and this has ben repeated in subsequent case law.

- IMA 2023 creates a radical departure in the legal context – jr is not available for the first 28 days.
- Habeas is a common law remedy to protect liberty it has and can evolve to meet the current context where jr is no longer available.
- *Lumba v SSHD* [2012] 1 AC 245 rejected any distinction between jurisdictional error and flawed exercise of discretion – the existence and exercise of the power – each are a nullity.
- Modern scholarship has established that habeas corpus was a much wider jurisdiction than previously acknowledged. See Paul Halliday, Habeas Corpus, Belknapp Press 2012.

- Compatibility with Article 5(1). The Explanatory Notes to the Bill, para 34 state “the courts will secure compliance with Article 5…”. Unlawful exercise of the power to detain including contrary to published policy is a breach of Article 5: *Lumba* and *Nadarajah v SSHD* [2003] EWCA Civ 1768.
- Requirements of Article 5(4).
- Article 3 conditions of detention - particularly important for Vulnerable Adults and can create overall inhuman conditions : see October 2020 IMB Report on Brook House and the damning findings of the Brook House Inquiry published in September 2023.

- The UK remains internationally and domestically obliged to comply with Article 5 ECHR.
- In the past, *habeas corpus* has been held (in the context of detention of persons of unsound mind) to be an inadequate remedy for the purposes of Article 5(4): see *X v United Kingdom* (1982) 4 EHRR 188 at [55]-[59]; *HL v United Kingdom* (2005) 40 EHRR 32 at [137]-[140].
- Given that *habeas corpus* will now be the only remedy during the first 28 days of immigration detention, the courts may have to develop the scope of the remedy to ensure that Article 5(4) is complied with.

- Where a person is detained pursuant to Article 5(1)(f) ECHR, the Strasbourg case law requires that *"the length of the detention should not exceed that reasonably required for the purpose pursued," A v United Kingdom* (2009) 49 EHRR 29 at [164] among other authorities.
- If the court on a *habeas corpus* can no longer apply the *Hardial Singh* principles because of section 12 of the IMA, Article 5(1)(f) is likely to be breached.

- A *habeas corpus* application is made by filing a Part 8 claim form and a witness statement or affidavit (CPR 87.2(1)). It must be filed in the Administrative Court (CPR 87.2(4)).
- The witness statement or affidavit must state that the application is made at the instance of the person being detained, set out the nature of the detention, and be made by the detained person (CPR 87.2(2)).
- If the detained person is unable to make the witness statement or affidavit, it may be made by some other person, but must state the reason why (CPR 87.2(3)).

- The application is considered initially by a single judge. They may consider it on paper; if not considered initially on paper, it may be considered by a judge sitting in court, or if no judge is sitting in court, by a judge otherwise than in court (CPR 87.3).
- Applications by a protected party must initially be considered by a judge otherwise than in court (CPR 87.7).

- When considered on paper, the judge can make an order for the issue of the writ, adjourn the application to a hearing, direct that the application be considered by a Divisional Court, direct that the application continue as a judicial review, give other directions, or dismiss the application (CPR 87.4).
- If dismissed, the detained person can request that the application be reconsidered at a hearing (CPR 87.4(2)).

- When considered at a hearing, the judge can make an order for the issue of the writ, adjourn the application to a further hearing, direct that the application be considered by a Divisional Court, direct that the application continue as a judicial review, give other directions, dismiss the application, or order that the detained person must be released (CPR 87.5).
- An order for release is sufficient authority to release the detained person (CPR 87.6).

- If the writ is issued, it must be in Practice Form No 89 (CPR 87.8(1)). The judge must give directions as to the court or judge before whom, and the date on which, the writ is returnable (CPR 87.8(2)).
- The writ must be served on the respondent personally. If it is not practicable to serve the writ personally, or if the respondent is the governor of a prison or other public official, the applicant must serve the writ by leaving it with an employee or agent of the respondent at the place where the detained person is being held (CPR 87.9(1) and (2)).

- The return to the writ must be “indorsed on or annexed to the writ” and must “state all the causes of the detention of the detained person” (CPR 87.10(1)).
- The return may be amended, or another return substituted for it, by permission of the court or judge before whom the writ is returnable (CPR 87.10(2)).
- The return must be filed and served on the applicant in accordance with directions (CPR 87.10(3)).
- At the hearing of the writ an application may be made to discharge or remand the detained person or to amend or quash the return (CPR 87.11).

- In conclusion, there are significant uncertainties over whether *habeas corpus* will be an effective remedy in practice for unlawful detention.
- It is clear that all these issues will be explored in litigation – significantly increasing the workload of the Administrative Court!