Judicial Communications Office

13 May 2024

COURT RULES PROVISIONS OF THE ILLEGAL MIGRATION ACT ARE INCOMPATIBLE WITH ARTICLE 2(1) OF THE WINDSOR FRAMEWORK AND SHOULD BE DISAPPLIED

Summary of Judgment

Mr Justice Humphreys, sitting in the High Court in Belfast, today ordered the disapplication of provisions of the Illegal Migration Act 2023 in Northern Ireland and declared others to be incompatible with the European Convention on Human Rights.

THE APPLICANTS AND THE APPLICATIONS

The applications were brought by the Northern Ireland Human Rights Commission ("NIHRC") and a 16-year-old asylum seeker ("JR 295") from Iran who arrived in the UK as an unaccompanied child. He had travelled from France by small boat and claimed asylum on 26 July 2023. His application is not yet determined. He is currently residing in NI and made the case that he would be killed or sent to prison if returned to Iran.

The applicants challenged certain core provisions of the Illegal Migration Act 2023 ("IMA") on two discrete bases:

(i) That the statutory provisions are incompatible with article 2 of the Ireland/Northern Ireland Protocol or Windsor Framework ("WF"), as implemented by section 7A of the European Union (Withdrawal) Act 2018 ("EU(W)A 2018"); and

(ii) That the same provisions are incompatible with articles 3, 4, 5, 6 and/or 8 of the European Convention on Human Rights ("ECHR") and section 4 of the Human Rights Act 1998.

The provisions of the IMA under challenge in the NIHRC proceedings were as follows:

- Section 5(2) relating to admissibility of protection or human rights claims.
- Section 5(2) and section 54 concerning effective remedy.
- Sections 2(1), 5(1) and 6 which require removal from the UK in specified cases.
- Sections 2(1), 5(1) and 6 in relation to the principle of non-refoulement.
- Section 13(4) concerning the court's ability to review detention.
- Sections 22(2) and 22(3) which require the removal of victims of trafficking in certain circumstances.
- Sections 2(1), 5(1) and 6 insofar as they relate to the removal of children and children's claims.

JR295 challenged the following additional provisions:

- Section 4 in relation to unaccompanied children.
- Sections 16-20 relating to accommodation and support for unaccompanied children; and
- Section 57 concerning age assessments.

The disapplication of primary legislation and the Windsor Framework

In the period when the UK was a member of the EU, EU law was supreme and in the event of a conflict existing between EU and relevant domestic law, the former would prevail. A piece of national law found to be inconsistent with directly enforceable EU law would be "disapplied" in the sense that it would remain on the statute book but have no legal effect. Section 7A EU(W)A 2018 provides that "all rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the WA" are given legal effect without further enactment. This is the "conduit pipe" through which the WA provisions flow into UK domestic law.

By article 4 of the EU Withdrawal Agreement ("WA"), its provisions and those of EU law "made applicable" by the WA shall produce in the UK the same legal effects as those which they produce in EU Member States. Furthermore, legal or natural persons will be able to rely directly on the provisions contained in or referred to in the WA (including the WF) "which meet the conditions for direct effect under Union law". Article 4(1) therefore differentiates between two types of measure: (i) the provisions of the WA; and (ii) the provisions of EU law made applicable by the WA. Furthermore, by article 4(2), the UK is obliged to ensure compliance with article 4(1), including by giving judicial authorities the power through domestic primary legislation to disapply inconsistent or incompatible provisions. The domestic primary legislation takes the form of section 7A EU(W)A 2018. As a result, the rights and obligations under the WA must prevail over any inconsistent domestic law.

Direct effect under EU Law

The doctrine of direct effect of EU Directives means that, provided the terms of a Directive are sufficiently clear and precise, they could be invoked by citizens in the national courts in actions against the state where there had been a failure to implement the Directive properly or in time. The court said that the rights relied upon by the applicants arising from the EU Directives were clear and precise and therefore had direct effect on 31 December 2020. More contentious was the question of the status of the Charter of Fundamental Rights of the European Union ("CFR"). Section 5(4) EU(W)A 2018 provides that the CFR is "not part of domestic law" after 31 December 2020 however, it continues to have effect in UK law in circumstances where "Union law" continues to be implemented.

Article 2(1) WF – Remedy

Article 2(1) WF provides that the UK shall ensure no diminution of rights, safeguards, or equality of opportunity, as set out in the B-GFA, results from its withdrawal from the EU, including in the area of protection against discrimination. Article 2(1) imposes an obligation on the UK to ensure no diminution of rights whilst article 5 makes certain provisions of EU law in respect of trade apply in the UK in respect of NI. In the event of an adverse finding in this case being made, the respondents invited the court to identify the areas of breach or make declaratory relief which would enable the UK Government to consider whether to rectify the identified issues.

This approach is to be contrasted with the remedy of a declaration of incompatibility under section 4 HRA. This is a discretionary remedy and does not affect the validity of a statute or a particular statutory provision. Where there is a breach of the WF, section 7A mandates disapplication of the offending provision.

ARTICLE 2(1) WF - DIMINUTION OF RIGHTS, SAFEGUARDS OR EQUALITY OF OPPORTUNITY

The applicants submitted that the rights, safeguards and equality ("RSE") provisions of the Belfast-Good Friday Agreement ("B-GFA") provisions contain a specific commitment to the "civil rights … of everyone in the community", which must extend to asylum seekers as well as UK or Irish citizens. The provisions and protections are broad in scope. The UK Government undertook to incorporate the broad sweep of ECHR rights into the law of NI and make them directly enforceable in the courts. The court in *Dillon*[1] held that the concept of "civil rights" encompasses "the political, social and economic rights which are recognised as the entitlement of every member of a community, and which can be upheld by appeal to the law." The court said that by this measure, the rights of asylum seekers must come within the definition.

The applicants relied on a number of EU Directives and Regulations as well as the CFR. The court considered it necessary to analyse the following in respect of each of the nine provisions of the IMA under challenge:

(i) The rights created by and enjoyed under the relevant EU law;
(ii) The statutory provisions of the IMA; and
(iii) Whether the latter has caused (or will cause when commenced) a diminution in the rights enjoyed.

1. Effective examination and grant of asylum claims

Section 2(2)-(6) IMA sets out four conditions which, if satisfied, means that any protection claim or human rights claim within the meaning of subsection (5) must be declared inadmissible by the Secretary of State, without any assessment being carried out. The conditions are:

The person arrived in the UK irregularly.
The date of arrival was after 20 July 2023.
The person did not come directly to the UK from a country in which their life and liberty were threatened.
The person requires leave to remain in the UK but does not have it.

When these conditions are satisfied, section 5(2) IMA provides that any protection claim or human rights claim within the meaning of section 5(5) IMA must be declared inadmissible by the Secretary of State without any assessment being carried out.

The court concluded that section 5(2) IMA leads to a diminution of rights under the EU Directives for a number of reasons:

- A person will not have the right to make an application for asylum.
- There will not be the "appropriate examination" of the substance of the application for asylum.
- The UK will not grant refugee status or subsidiary protection to a person who qualifies for it.
- Whilst a third county human rights claim is admissible, it does not suspend removal.

[1] *In re Dillon and others* [2024] NIKB 11.

- A successful suspensive claim is insufficient as it only serves to disapply the duty to remove and does not lead to a grant of international protection status or the rights contingent on it.
- A serious harm suspensive claim applies only to third country removals and will not be granted on the sole basis that the person is at risk of harm in their own country.
- The threshold for a serious harm suspensive claim is higher and more difficult to prove than the test for refugee status or subsidiary protection.
- The inadmissibility provisions in the IMA are broader than articles 25-27 of the Procedures Directive.
- There will be a category of asylum applications declared inadmissible under section 5(2) but where the individual cannot be removed under section 6 it appears this will leave the individual in "limbo". Further there will be a category of asylum seekers who will be removed pursuant to section 6 IMA.

2. Lack of effective remedy

Section 5(4) IMA provides that a declaration of inadmissibility (pursuant to section 5(2)) is not a decision to refuse the claim and therefore no appeal lies under section 82(1) of the Nationality and Immigration Act 2002 ('the 2002 Act'). Section 54 IMA forbids any court or tribunal from granting an interim remedy which prevents or delays the removal of a person from the UK pursuant to a decision to remove for any reason.

The court held these provisions lead to a diminution of article 39 of the Procedures Directive and article 47 CFR for harm suspensive claim for the following reasons:

- No appeal or judicial review is available in respect of a decision taken on their application for asylum. Whilst an appeal to the Upper Tribunal is available in respect of a suspensive claim under section 44 IMA, a serious harm suspensive claim is considerably more limited than asylum claims.
- No appeal lies in respect of a decision to consider an application inadmissible. Whilst judicial review is available for a declaration that a claim is inadmissible under section 5(2) IMA, the conditions for that declaration are very different and far broader than the criteria for inadmissibility in the Procedures Directive.
- The lack of any power in a court or tribunal to grant interim relief that prevents, or delays removal infringes the principle laid down by the ECJ.
- The Grand Chamber held that when an individual seeks to appeal against an order removing him from a Member State when enforcement of this order may expose him to a real risk of serious and irreversible deterioration in his health, then he must be entitled to an appeal against such an order with suspensive effect.

3. Removal

Except in the case of unaccompanied children, section 2(1) IMA imposes a duty to remove a person when specified conditions are met. That removal duty applies regardless of whether: (a) the person makes a protection claim; (b) the person makes a human rights claim; (c) the person claims to be a victim of slavery or a victim of human trafficking; or (d) the person makes an application for judicial review in relation to their removal from the United Kingdom under the IMA. By section 6(1) IMA, the Secretary of State is required to make arrangements for removal as soon as reasonably practicable. The person may be removed to their country of origin. However, if they make a protection or human rights claim, they may not be removed to that country if it is not a

'safe State' or it is a 'safe State', but the Secretary of State considers there are exceptional circumstances which prevent removal to that country. The person may also be removed to a country from which they embarked for the UK or where there is reason to believe they will be admitted. However, if they make a protection or human rights claim they may be removed to that country only if it is one of the States named in Schedule 1 to the IMA. The are 57 states in the Schedule. The designation as 'safe' in this context requires adherence to the principle of non-refoulement.

The court held that sections 2, 5 and 6 IMA lead to a diminution of the right in article 7(1) of the Procedures Directive for the following reasons:

- Many people will be removed without their asylum claims being individually determined.
- The availability of a serious harm suspensive claim does not cure that problem since it does not lead to a grant of refugee status, or the range of rights that a contingent on that status.
- The duty to remove is inconsistent with the exceptions in articles 25-27 of the Procedures Directive.

4. Non-refoulement

Member States are required to respect the principle of non-refoulement which is defined in article 33 of the Refugee Convention. This extends not only to direct return to the country where persecution is feared but also indirect return via a third country. The court held that there is a diminution of the right of non-refoulement by sections 2(1), 5(1) and 6, notwithstanding the limitations in section 6 IMA.

5. Detention

Sections 11 and 12 IMA empower an immigration officer to detain an individual who satisfies, or is suspected of satisfying, the conditions in section 2 for such period as, in the opinion of the Secretary of State, is reasonably necessary to enable the decision to be made or directions to be given. Section 13 concerns immigration bail. Section 22 sets out provisions in relation to modern slavery. The effect of these provisions is that a person so detained "must not be granted immigration bail by the First-tier Tribunal until after the end of" 28 days from when the detention began. A 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", including by way of an application for judicial review. The only exceptions are if it is suggested the Secretary of State acted in bad faith or in fundamental breach of the principles of natural justice, or an application for habeas corpus.

The court held that where an individual who wishes to claim asylum, and otherwise has good grounds to apply under the EU Directives, loses that right by virtue of the IMA and is therefore detained without remedy for 28 days, this must give rise to a diminution in right. It said the IMA deprives an individual of access to a court and to an effective remedy during that period. Whilst there may be a debate around the meaning of 'speedy' on the given facts of particular case, there must nonetheless be diminution in a category of cases.

6. Trafficking

Where the section 2 IMA duty is imposed on the Secretary of State, and there has been a 'positive reasonable grounds decision', i.e. a decision to the effect that there are reasonable grounds to believe a person is a victim of slavery or trafficking, section 22(2) disapplies the modern slavery

provisions of the Nationality and Borders Act 2022 ('the 2022 Act'). As a result, there is no prohibition on removal during the recovery period, defined as the period from the date of the positive reasonable grounds decision until either the conclusive decision or 30 days, whichever is the later. Equally, the requirement to grant limited leave to remain does not apply. Furthermore, by section 25(2) IMA, where the section 2(1) duty applies, and a reference relating to the person has been, or is about to be, made to the competent authority for a reasonable grounds decision, the duty in section 18 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 to provide assistance and support, is disapplied.

The IMA provides exceptions to these disapplication measures where the Secretary of State considers that the person is cooperating with a public authority in connection with an investigation or criminal proceedings in respect of the relevant trafficking; it is necessary for the person to be in the UK to provide that cooperation; and the public interest in that person providing that cooperation is not outweighed by the risk of serious harm to members of the public by that person.

The court was satisfied that there had been a diminution of rights. It said that where the section 2 conditions are satisfied and a positive reasonable grounds decision has been made, victims of trafficking will by default be subject to the duty to remove as, under section 5(1)(c) the duty persists and any claim to be a victim of human trafficking or slavery is to be disregarded even though they have made a trafficking claim. The disapplication of the duty to provide assistance and support also runs contrary to Trafficking Directive.

7. Children

Articles 20(3) and (5) of the Qualification Directive requires Member States to take into account the best interests of children as a primary consideration when implementing the Directive. The provisions of the Qualification and Procedures Directives must be interpreted and applied in accordance with article 24 CFR which states that, "In all actions relating to children … the child's best interests must be a primary consideration."

The court said these rights are diminished as the duty to declare protection and human rights claims inadmissible applies to children on a blanket basis. This means that the child's best interests will not be considered before a claim for international protection is determined. The court also held that whilst a third country human rights claim is admissible, it does not suspend removal. Further the section 2 IMA duty to remove applies to all accompanied children unless the Secretary of State considers there are exceptional circumstances. This means the best interests will not be a relevant consideration before removal of an unaccompanied child.

8. Unaccompanied Children

The Dublin III Regulation requires a Member State to "examine any application for international protection" by a third-country national who applies on their territory (article 3(1)). Article 6(1) of the Regulation further provides that "the best interest of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation." By article 8(4) the Member State responsible for determining an asylum application is the member state where the unaccompanied minor lodged their application.

In the case of JR295, when the statutory provisions come into force, he can be removed from the UK at any time and will become subject to the duty to remove on 5 July 2025. The protection claim which he made on 27 July 2023 will be rendered inadmissible. There will be no right to appeal

against this inadmissibility. The court said this will result in a diminution in the civil right previously enjoyed to an in-country assessment of his asylum application, with his best interests being the primary consideration.

9. Age Assessment

Section 57 IMA prohibits a person who meets the four criteria in section 2 from appealing an age assessment under sections 50 or 41 of the 2022 Act (which themselves are not yet in force). By section 57(4), if a person seeks to bring a judicial review of their age assessment, this will not prevent their removal and the Court or tribunal hearing that challenge may not consider the age assessment on the facts but could only grant relief if the decision was wrong in law.

Conclusion

The court held that each of the statutory provisions under challenge in this case infringe the protection afforded in the B-GFA. Section 7A EU(W)A 2018 therefore applies.

THE INCOMPATIBILITY CLAIM

The applicants also contended that elements of the IMA are incompatible with relevant Convention rights and that the court should make a declaration of incompatibility pursuant to section 4 HRA.

1. ***Removal***

Article 3 ECHR states that, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". The IMA provisions, at sections 2 and 6, mandate removal to a country listed in Schedule 1 even where the person concerned has made a third country human rights claim (see section 5(1)). This has the following consequences:

- Such claims may not be determined prior to removal and the assessments required by article 3 will not occur.
- A suspensive claim will not, in a number of cases, determine whether there are substantial grounds to believe the individual will be at a real risk of treatment contrary to article 3, directly or indirectly, if removed, or the asylum claim is well-founded.
- A serious harm suspensive claim concerns the risk of serious harm in a third country in the removal notice. By contrast, an asylum claim may be upheld based solely on risk in the country of origin.
- In a serious harm suspensive claim, the harm must arise within the "relevant period" whereas there is no such requirement in article 3 claim or an asylum claim.
- A person must supply "compelling evidence" to establish a suspensive claim, whereas that is not required for the purpose of article.
- To establish that removal would breach article 3, it is not necessary for the applicant to show a "real, imminent and foreseeable risk of serious and irreversible harm if removed" in the third country (as a suspensive claim requires). It is sufficient for there to be a "real risk" of treatment contrary to article 3, or a real risk of the asylum seeker being denied an adequate and reliable asylum procedure in the third country.
- "Serious and irreversible harm" is more limited than treatment which would infringe article 3. For example, it appears that it does not include a risk that the third country would not adequately and reliably deal with the asylum claim, whereas that will breach article 3.

- Section 39(5)(c) IMA excludes from the definition of 'serious and irreversible harm' any harm resulting from differences in the standard of healthcare, which could potentially breach article 3.
- The very short time limit for a suspensive claim will in many cases inhibit the person's ability to obtain legal advice and the required compelling evidence of serious harm, and to produce an effective claim.
- States may establish lists of "presumed safe" states but, in doing so, this must be sufficiently supported at the outset by a rigorous assessment of the relevant conditions in that country and, in particular, of its asylum system. Furthermore, whilst there is a significant evidential presumption following such an assessment, it remains a presumption and where there is evidence that the state is not safe in an individual case, there should be an examination of whether removal will breach article 3 prior to removal.
- The duty imposed by sections 2 and 6 IMA will require removal of a person to their country of origin if it is one of the 'safe States', unless the person has made a protection claim or a human rights claim and the Secretary of State considers there are exceptional circumstances which prevent the person's removal to that country or territory. The examples given of exceptional circumstances in section 6(5) are limited. Furthermore, by section 39(2), a serious harm suspensive claim is not available when the country in the removal notice is the country of origin.

2. *Trafficking*

Article 4 ECHR prohibits slavery and forced or compulsory labour. It entails a procedural obligation to conduct an effective official investigation into situations of potential trafficking. These duties must be construed in light of the Council of Europe Convention on Action against Trafficking in Human Beings ("ECAT"), which provides for a scheme whereby a person is not removed following a "reasonable grounds" decision until a final decision that a person is a victim. During this time, he or she must receive a 'basic level' of assistance. IMA requires leave to remain to be granted if the victim's stay in the UK is "necessary owing to their personal situation". This includes where the victim is pursuing a protection claim based on their fear of being re-trafficked. Such duties arise whether or not the victim is co-operating with a criminal investigation.

The duty to remove imposed by sections 2, 5 and 6 IMA, read with section 22, will mean that a person in respect of whom a positive reasonable grounds decision has been made will be removed prior to the article 10 ECAT identification process being complete, or before any asylum claim based on the fear of being re-trafficked has been determined. Section 25(2) IMA disapplies the assistance and support duty under the 2015 Act.

The court said the public order exception in article 13(3) ECAT whereby parties are not bound to observe the recovery and reflection period does not entitle a state to disapply the article 10(2) ECAT protection which forbids removal until the process of identification is complete. Furthermore, it cannot conceivably be the case that mere presence in a state alone can trigger the public order exception: "Something more must be required. "

3. *Detention*

Article 5(4) ECHR guarantees everyone deprived of their liberty the right to speedy review of the lawfulness of their detention. Section 13(3) and (4) IMA prohibit a court from determining, in the first 28 days of detention whether a decision as to the lawfulness of detention is required within that period; and in cases where it is so required, whether detention was lawful and release should

be ordered. A decision to detain during this 28 day period is only capable of challenge when the Secretary of State acted in bad faith; acted in fundamental breach of the principles of natural justice; or on an application for habeas corpus. Habeas corpus concerns the existence of a power to detain not whether a power to detain was exercised lawfully.

The seminal case in relation to asylum detention *R v Governor of Durham Prison ex p. Hardial Singh* (1984) 1 WLR 704 was itself a habeas corpus application and whilst the trend in recent years has been to pursue such issues by way of applications for judicial review, the respondents themselves say that the same principles will apply to either remedy. In these circumstances, the court did not consider that the IMA provisions will necessarily result in a violation of article 5(4) ECHR.

4. Children

Article 8 ECHR protects private and family life. The NIHRC did not seek to argue that any of the IMA provisions represent a disproportionate interference with the article 8 rights of children but it was contended that they will render decisions relating to children as being "not in accordance with law". The court agreed that the duty to remove in section 2 and 6 IMA and the duty to declare certain types of claim inadmissible under will mean that the child's interests will not be the primary consideration and, as such, will not satisfy the "in accordance with the law" requirement. It said there was therefore no need to consider the question of proportionality.

5. Age Assessment

An age assessment is a determination of an individual's entitlement to certain rights and welfare benefits. It is therefore subject to the article 6 ECHR entitlement to determination by a court which entails an effective judicial remedy to assert civil rights. Any interference with article 6 must be in pursuit of a legitimate aim and there must be a proportionate relationship between this aim and the means employed. The court said that, on the evidence, it could not be satisfied that the provisions relating to age assessment were in pursuit of a legitimate aim and, as a result, found a violation of article 6. The court also found that there was a breach of article 8 ECHR since, in any case, the deprivation of a right of fact-based assessment would give rise to an interference with the person's article 8 rights and no legitimate aim had been identified.

However, JR295 had been the subject of age assessment which had resolved in his favour and he had not been denied any fact finding judicial remedy. On this basis, the court declined to make any declaration in respect of the age assessment provisions.

CONCLUSION

The respondents submitted that it would be inappropriate to make declarations of incompatibility in respect of uncommenced legislation. However, case law recognises that the remedy can be granted in such instances. Given the significant nature of the violations identified, and the Government's avowed intention to proceed to bring the IMA into force, the court was satisfied that it would be appropriate to exercise its discretion and grant the section 4 HRA declarations of incompatibility sought in respect of:

- Sections 2(1), 5(1), 6(3) and 6(7) insofar as they impose a duty to remove.
- Sections 2(1), 5, 6 and 22 insofar as they relate to potential victims of modern slavery or human trafficking.
- Sections 2(1), 5(1) and 6 relating to children.

For the reasons set out in the judgment, the court concluded that the relevant provisions of the IMA are disapplied in Northern Ireland. It made declarations of incompatibility in respect of those sections of the IMA set out above.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Lady Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk