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Case No: CO/454/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2021

Before:

MR JUSTICE SWIFT

- -

Between

THE QUEEN

on the application of

SM **Claimant**

- and –

LORD CHANCELLOR **Defendant**

-and-

BAIL FOR IMMIGRATION DETAINEES **Intervener**

- -
- -

Chris Buttler & Ali Bandegani (instructed by **Duncan Lewis**) for the **Claimant**
Catherine Dobson & Ruth Keating (instructed by **GLD**) for the **Defendant**
Laura Dubinsky, Daniel Clarke & Eleanor Mitchell (instructed by **Allen & Overy LLP**) for the **Intervener** (written submissions only)

Hearing dates: 25th and 26th November 2020

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Approved Judgment

Covid 19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts Tribunals Judiciary website. The date and time for hand down is deemed to be 10:00am 25 February 2021.

Mr JUSTICE SWIFT:

A. Introduction

1. Persons detained under Immigration Act powers in Immigration Removal Centres have access to legal advice under the Detained Duty Advice Scheme ("the DDAS"). The DDAS was established by the Lord Chancellor in exercise of his powers under the Legal Aid Sentencing and Punishment of Offenders Act 2012 ("LASPO"). Has the Lord Chancellor acted unlawfully by failing to make similar provision for those detained under Immigration Act powers who are held in prisons? The Claimant in this claim contends that the lack of provision equivalent to the DDAS for Immigration Act detainees held in prison amounts to unlawful discrimination contrary to the requirements of ECHR article 14 read together with articles 2, 3, 5 and 8.

(1) The Claimant

2. The Claimant is an Afghan national who entered the United Kingdom illegally in April 2008. Although his claim for asylum was rejected, he was granted discretionary leave to remain in the United Kingdom until June 2011. On various occasions since 2012 he was detained under Immigration Act powers; in 2014 he was granted leave to remain in the United Kingdom on Human Rights grounds until July 2017. Since September 2013 he has been convicted of some 22 criminal offences. On 29 October 2018 he was sentenced to 5 months' 17 days' imprisonment. He served that sentence at HMP Moorland. Following that conviction he was served with a decision to deport. In response to that decision the Claimant made a further claim for asylum. That claim remained live until July 2020 when the Claimant withdrew his appeal against Home Secretary's refusal to grant asylum. The Claimant completed serving his sentence of imprisonment in January 2019. He was then transferred HMP Leeds where, to date he has been detained under Immigration Act powers.

(2) The Detained Duty Advice Scheme

3. The Detained Duty Advice scheme is available to persons detained under Immigration Act powers who are held in Immigration Removal Centres. (There are six IRCs in England and Wales.) The bulk of Immigration Act detainees are held in IRCs. As at 31 December 2019 there were 1,231 people held in IRCs. That number has now significantly reduced as a result of steps taken by the Home Secretary in the face of the covid-19 pandemic. As at March 2020 the number of persons detained in IRCs was 529; by 30 June 2020 the number had fallen to 300.

4. The DDAS is provided for in the Standard Civil Contract 2018, made by the Lord Chancellor in exercise of his powers under LASPO. The contract sets out the arrangements for provision of civil legal services (as defined by section 8 LASPO), which includes legal services provided in relation to immigration detention (see paragraph 25 of Schedule 1 to the Act). The terms of the contract fall broadly into two parts: general rules, and category-specific rules. Section 8 of the category-specific rules concerns legal services that may be provided in connection with immigration and asylum claims. This section sets out the terms of the DDAS (see at paragraphs 8.109 to 8.117). DDAS work is undertaken only by providers of legal services having "schedule authorisation", i.e. who have been authorised to carry out this specific work. The DDAS work is undertaken in accordance with the terms of a

rota. The work is undertaken at IRCs and operates in the manner of a legal advice surgery. Anyone detained at an IRC can sign up for a 30-minute appointment. The material parts of the specification are as follows.

> "8.111 During each IRC Rota week you will be informed by the IRC of the number of Detained Duty Advice Surgeries required during that week. The IRC will provide you with information as to the:
>
> - Number of Detained Duty Advice Surgeries required during the week at the IRC;
> - Time and date of the Detained Duty Advice Surgery;
> - Location; and
> - Details of Clients you are required to see at each Detained Duty Advice Surgery.
>
> 8.112 You may provide a maximum of 30-minutes advice to a Client at a Detained Duty Advice Surgery without reference to the Client's financial eligibility.
>
> 8.113 The purpose of the advice session is to ascertain the basic facts of the Matter and to make a decision as to whether the Matter requires further investigation or whether further action can be taken.
>
> 8.114 When attending a Client the Case Worker must always advise the Client in relation to Temporary Admission and Bail and record the outcome of this advice on the file.
>
> 8.115 On the conclusion of the Client's 30-minute advice session you must make a determination as to whether the Client qualifies for civil legal services in accordance with Legal Aid Legislation and any Authorisation made under it to ascertain whether you are able to continue to advise the Client under Controlled Work in accordance with this contract.
>
> 8.116 You must record the time spent with each Client at a Detained Duty Advice Surgery on the Contract Report Form specified by us
>
> 8.117 You must ensure the client is given adequate information in a written format at the end of the Detained Duty Advice Surgery whether or not the matter requires further investigation. This information should sufficiently address the outcome of the Detained Duty Advice Surgery with details of the name of the Case Worker who has advised the client."

Advice under the DDAS is available to any person, both following arrival at an IRC and thereafter if some new matter arises during detention.

5. For present purposes one point of significance is that under the DDAS the detained person can receive up to 30 minutes of advice regardless of whether he meets the requirements for financial eligibility to receive legal services. Under section 11 LASPO the usual position is that a person only qualifies to receive civil legal services if they meet both the financial resources criteria (see section 21 LASPO and the Civil Legal Aid (Financial Resources and Payments for Services) Regulations 2013) and the merits test (see the Civil Legal Aid (Merits Criteria) Regulations 2013). What is made clear by paragraph 8.112 above is that, as permitted by Regulation 5 of the 2013 Financial Resources Regulations, the need to consider financial eligibility has, to the extent necessary for the 30-minute advice session, been waived. Miss Dobson counsel for the Lord Chancellor also informed me that the DDAS operates on the basis of an assumption that the merits tests is met again so far as is necessary for the purposes of the 30-minute advice sessions provided. The 30 minutes will be sufficient to gather information and provide initial advice on any claims or applications that may be available to the detained person. As explained at paragraph 8.114, the Advisor is required to provide advice on applications for temporary admission and for bail. Thus, the DDAS allows all persons detained in IRCs to get advice on whether or not that detention ought to continue[1].

(3) Immigration Detainees in Prison

6. The circumstances in which a person detained pursuant to Immigration Act powers will be held in prison are set out in Chapter 55 of the Enforcement Instructions and Guidance document ("the EIG") published by the Home Secretary. The EIG contains guidance and information for immigration officers dealing with matters of immigration enforcement. Chapter 55 is the part of the EIG concerning the use of powers to detain. Paragraph 55.10.1 is headed "Criteria for detention in prison". It refers to the existence of an agreement between the Home Office and the National Offender Management Service under which a number of prison beds are made available to hold immigration detainees. Ordinarily those spaces are filled by foreign national offenders who have completed sentences of imprisonment and are awaiting transfer to an IRC pending removal from the United Kingdom. There is what is described as a "normal presumption" that foreign national offenders within three specific classes will remain in prison when detained under Immigration Act powers (which are then described as follows)

- **National Security –** for example, where there is specific, verifiable intelligence that the person is a member of a terrorist group or has been engaged in or planning terrorist activities.

- **Criminality** – those detainees that have been involved in serious offences involving the importation and /or

[1] The importance of advice in respect of any possible bail application is emphasised by paragraphs 8.34-8.38 of the category-specific rules. These paragraphs are in Part C of the rules which lists the work that must be undertaken by any practitioner allowed to perform immigration and asylum work. They require advice on bail applications to be given and consideration to be given to whether or not a bail application should be made.

supply of Class A drugs and or/those convicted of sexual offending involving a minor.

- **Specific Identification of Harm** - those detainees who have been identified in custody as posing a risk of serious harm to minors, and those identified in custody as being subject to harassment procedures (that is, individuals subject to the formal procedures under Prison Service Order 4400, preventing them from contacting their victim(s) whilst in custody)."

The EIG then states as follows concerning other Immigration Act detainees who may be held in prison.

> "In the case of the following individuals, they will usually be transferred to, or remain in, prison accommodation, subject to some exceptions:
>
> - **Criminality** – those detainees who are subject to notification requirements on the sex offenders register. Exceptions to this category would include individuals sentenced to less than 12 months for a sexual offence, who may be considered for transfer to an IRC on a case by case basis or individuals subject to notification requirements on the sex offenders register who have otherwise been assessed by the Home Office as being suitable for transfer.
>
> - **Security** – where the detainee has escaped from prison, police or immigration custody or escort or planned or assisted others to do so.
>
> - **Control** – engagement in or planning or assisting others to engage in or plan serious disorder, arson, violence or damage while in prison, police or immigration custody.
>
> The following individuals may be unstable for transfer to an IRC and DEPMU staff must assess their suitability for transfer on a case by case basis:
>
> - **Behaviour during custody** – where an immigration detainee's behaviour whilst in either an IRC or prison custody makes them unsuitable for the IRC estate. For example, numerous proven adjudications whilst in prison for violence or incitement to commit serious disorder, which could undermine the stability of the IRC estate, or clear evidence of such conduct whilst in an IRC. (Detainees who were originally convicted of a violent offence may never the less be considered for transfer to an IRC depending on the nature of that

offence and provided their behaviour whilst in prison custody has not given rise to concerns.)

- **Health Grounds** – where a detainee is undergoing in-patient medical care in a prison. Transfer will only take place when an IRC health care bed becomes available, provided the individual is medically fit to be moved and their particular needs can be met at the IRC in question. Separately to issue of transferring individuals held in prison, detainees held in IRCs who are refusing food and /or fluid may be transferred to prison medical facilities, if this is considered necessary to manage any resulting medical conditions.

(Note: The existence of any of the above risk factors indicates that a detainee should be held in prison accommodation rather than an IRC but the list is not exhaustive and DEPMU staff should also satisfy themselves that no other risks exists that would make it inappropriate for the detainee to be held in an IRC, rather than a prison.)"

7. In summary, therefore, the number of immigration detainees held in prison will at all times be limited by the maximum number of spaces available under the agreement between the Home Office and the National Offender Management Service. Those held in prisons will either be foreign national offenders who fall into any of the "national security", "criminality" or "specific identification of harm" categories, and others (who may or may not be foreign national offenders) who need to be held in prison for health reasons, or for reasons of security or control or past criminality.

8. I am told that immigration detainees could be held in any of the 110 prisons in England and Wales that hold adult prisoners. The number of immigration detainees held in prison will vary from time to time. The numbers held prison by prison will also fluctuate. As at 31 March 2020, 66 prisons held one or more immigration detainees. In 53 of those prisons there were less than 10 immigration detainees; there were more than 20 immigration detainees in only 2 prisons. One reason why immigration detainees tend to be thinly spread between prisons is that if held in prison they are entitled to be held in conditions that mirror those for remand prisoners and be held at local Category B prisons. Space at these local prisons is tight because their primary function is to hold prisoners who are awaiting trial close to the trial court. Thus the considerations that govern the general management of the prison population would not permit any scheme that sought to consolidate immigration detainees into a small number of prisons[2].

9. There is no equivalent to the DDAS for immigration detainees held in prison. Immigration detainees are provided with information. For example the induction

[2] For these reasons it is not possible for immigration detainees to be gathered together in particular prisons in the way that foreign national offenders ("FNOs") are held together. There are two FNO-only prisons (HMP Huntercombe and HMP Maidstone) and four other so-called "FNO Hub Prisons" (HMP High Point, HMP The Mount, HMP Risely and HMP Moorland) which hold both foreign national prisoners and other prisoners.

procedures set out in PSI 07/2015 include a requirement to give information about "active providers" of civil and criminal legal aid services. Copies of *"Inside Time"* are also available in all prisons. This publication regularly includes adverts from law firms including ones which provide publicly-funded services on immigration and asylum matters. PSI 52/2011 sets out further details of the facilities to be made available to immigration detainees in prison. This includes (at paragraph 2.17) the requirement that "prisoners who wish to seek legal advice relating to immigration documents should be provided with the facilities to do so". Generally, immigration detainees held in prison will be subject to the same regime as remand prisoners (assuming they are held in Category B local prisons), and in that way will have some access to phones to contact solicitors to obtain legal advice.

10. I accept the evidence relied on by the Lord Chancellor on all these matters. Nevertheless, a person detained in prison under Immigration Act powers is less well placed than his counterpart in an IRC to access legal advice. The particular advantage of the DDAS is that 30 minutes of advice is available regardless of whether the person detained meets the financial criteria for assistance and on the basis of an assumption that the merits test is also met. I accept the Claimant's contention that the 30-minute advice appointments are sufficient to permit basic instructions to be taken and advice to be given on matters such as bail applications. The 30-minute appointments also permit the legal advisors to obtain the information necessary to assess whether the financial and merits requirements are met for the provision for further legal advice. These later points are important to facilitate the availability of legal advice; the legal advisor is not required to act at his own risk to the extent that he spends time gathering the information necessary to determine whether the criteria are met for access to legal services at public expense. Compare the position of the immigration detainee held in prison. Even once he has identified a solicitor to telephone (and assuming his English is good enough so that any need for interpretation can be dispensed with), he still needs to persuade that solicitor to spend time speaking to him, time for which the solicitor may not be paid, to decide if the eligibility criteria are met.

B. Decision

(1) The legal basis of the claim

11. The Claimant's claim is that the lack of an equivalent to the DDAS for immigration detainees like him who are held in prison is in breach of his rights under ECHR article 14 not to suffer discrimination in the enjoyment of Convention rights on grounds of "other status"[3]. The Claimant's Statement of Facts and Grounds relied on ECHR articles 2 and 3 (on the basis that access to legal advice affected the ability to advance claims for protection as a refugee or that a person should not be removed from the United Kingdom by reason of a serious risk of treatment contrary to those Convention rights); ECHR articles 5 and 6 (because of the impact on his ability to challenge the legality of his detention, or apply for bail); and ECHR article 8 (because of the adverse impact on his ability to apply for leave to remain in the United Kingdom by reason of interference with rights guaranteed under that article). In his Detailed

[3] The Claimant's detailed points are at paragraphs 5 and 11 – 12 of the Statement of Facts and Grounds. All these matters were canvassed at the hearing, and I have considered all of them. However, the essence of the matter from the point of view of persons such as the Claimant who are detained in exercise of Immigration Act powers in a prison, is access at public expense to initial/brief legal advice on matters affecting continuation of their detention.

Grounds of Defence, the Lord Chancellor accepted that the Claimant's complaint about the availability of access to publicly funded legal services falls within the ambit of both EHCR article 5 and article 8. In her Skeleton Argument for this hearing, Miss Dobson conceded that the complaint also fell within the ambit of ECHR articles 2 and 3. Neither party made any detailed submissions on any of these matters. The wide-ranging basis on which the claim is put and defended covers any and all benefit that could accrue from the DDAS (and conversely any disadvantage arising from lack of access to an equivalent provision).

12. The claim is not therefore advanced or defended by reference to the Claimant's specific circumstances. Nevertheless, I accept there is sufficient in what happened to the Claimant for the claim to be considered on this broad basis. He was detained in prison under Immigration Act powers from 20 January 2019 when he completed the sentence of imprisonment imposed on him. Although he was able to make an application for bail (on 22 January 2019, refused by the First-tier Tribunal on 28 January 2019), he was without legal representation, and he did not gain solicitors until November 2019 following pro bono assistance given by Bail for Immigration Detainees (the Intervener in these proceedings); and it was only from then that he received legal advice on his appeal against the Home Secretary's decision of June 2019 to refuse the claim for asylum he had originally made in November 2018. For the purposes of this judgment therefore I will proceed on the basis agreed by the parties that the complaint falls within the ambit of any/all of ECHR articles 2, 3, 5 and 8.

(2) "Other status"

13. The Lord Chancellor submits that the difference of treatment afforded to Immigration Act detainees who are held in prison is not by any reason of other status. The Claimant's submission to the contrary rests heavily on the judgment of the European Court of Human Rights in *Clift v United Kingdom* (application 7205/07, Judgment 13 July 2010) and the judgment of Lady Black in *R(Stott) v Secretary of State for Justice* [2020] AC 51.

14. For my purposes it is necessary to start a little further back. In its judgment in *Kjeldsen, Busk, Madsen, and Pedersen v Denmark* (1976) 1 EHRR 711 the European Court of Human Rights described discrimination on grounds of other status as being discriminatory treatment having as its basis or reason as personal characteristic (see Judgment at paragraph 56). This approach prompted lines of authority considering personal characteristics as either innate or acquired: see, for example the judgment of the House of Lords in *R(RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311. A difference of treatment by reason of either an innate or an acquired personal characteristic was treatment on grounds of "other status".

15. The issue that was often controversial was the assessment of whether the matter relied on amounted to an acquired personal characteristic. In her judgment in *Stott* Lady Black summarised the position prior to the judgment of the European Court of Human Rights in *Clift v United Kingdom* as follows

> "56. Reviewing these decisions, together with *R(Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, I think it can be said (although acknowledging the danger of

> over-simplification) that prior to the decision in *Clift v United Kingdom* …, the House of Lords had adopted the following position on "other status".
>
> (i) The possible grounds for discrimination under article 14 were not unlimited but a generous meaning ought to be given to "other status".
>
> (ii) The *Kjeldsen* test of looking for a "personal characteristic" by which persons or groups of persons were distinguishable from each other was to be applied.
>
> (iii) Personal characteristics need not be innate, and the fact that a characteristic was a matter of personal choice did not rule it out as a possible "other status".
>
> (iv) There was support for the view that the personal characteristic could not be defined by the differential treatment of which the person complained.
>
> (v) There was a hint of a requirement that to qualify the characteristic needed to be "analogous" to those listed in article 14 , but it was not consistent (see, for example, Lord Neuberger's comment in *R(RJM) v Secretary of State for Work and Pensions* [2009] AC 311, para 43) and it was not really borne out by the substance of the decisions.
>
> (vi) There was some support for the idea that if the real reason for differential treatment was what someone had done, rather than who or what he was, that would not be a personal characteristic, but it was not universal.
>
> (vii) The more personal the characteristic in question, the more closely connected with the individual's personality, the more difficult it would be to justify discrimination, with justification becoming increasingly less difficult as the characteristic became more peripheral."

16. In its judgment in *Clift v United Kingdom* the European Court of Human Rights said as follows (at paragraph 60)

> "The question whether there is a difference of treatment based on a personal or identifiable characteristic in any given case is a matter to be assessed taking into consideration all of the circumstance of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective … It should be recalled in this regard that the general purpose of Article 14 is to ensure that where a State provides for rights falling within

> the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified."

17. The one matter that becomes clear reading the judgments of the Supreme Court in *Stott* is that this passage of the judgment in *Clift* has something of a Delphic quality. In her judgment, Lady Black summarised the post-*Clift* position at paragraph 63.

> "63. Returning to the list of propositions derived from the House of Lords' decisions which is to be found at para 56 above, it seems to me that the subsequent authorities in the Supreme Court could be said to have continued to proceed upon the basis of propositions (i) to (iii), which have also continued to be reflected in the jurisprudence of the ECtHR. Proposition (iv) lives on, in *R v Docherty* [2017] 1 WLR 181, but perhaps needs to be considered further, in the light of its rejection in *Clift v United Kingdom*: see further, below. The "analogous" point, which features at proposition (v), is reminiscent of the *ejiusdem generis* argument advanced in *Clift v United Kingdom* …, but not addressed head-on by the ECtHR. That court's answer to the argument was, it will be recalled, to give quite wide-ranging examples of situations in which a violation of article 14 had been found. With the continued expansion of the range of cases in which "other status" has been found, in domestic and Strasbourg decisions, the search for analogy with the grounds expressly set out in article 14 might be thought to be becoming both more difficult and less profitable. However, that should not, of course, undermine the assistance that can be gained from reference to the listed grounds, taken with examples of "other status" derived from the case law. It may not be helpful to pursue proposition (vi) abstract; whether it assists will depend upon the facts of a particular case. Proposition (vii) comes into play when considering whether differential treatment is justified, rather than in considering the "other status" question, and need not be further considered at this stage."

18. The other members of the Supreme Court adopted a range of different positions. Lord Hodge came closest to simple agreement with Lady Black's analysis: see at paragraphs 184 and 185. But it is notable that while accepting that Mr. Stott had an "other status" relevant for article 14 purposes "because he has been sentenced to a particular sentence of imprisonment", he was careful to avoid any general statement as to the state of the law post-*Clift*. Lord Carnwath disagreed with Lady Black. His view was that the passage in *Clift* provided no reliable indication that any change in the law had occurred: see his judgment at paragraph 179. Taking a step back from the jurisprudential debate he observed that if Mr. Stott was regarded as having a relevant

"other status" by reason of the type of sentence imposed on him (an extended determinate sentence) that amounted to recognition that dangerousness was a characteristic meriting article 14 protection (see his judgment at paragraph 178). To my mind this is a powerful point. The limits of article 14 protection ought not to be set only by dry logic. Some qualitative element is required; the other status must be something which, in a society governed by principles of liberal democracy, merits protection.

19. The emphasis in the judgments of Baroness Hale and Lord Mance was a little different from that of Lady Black's judgment. Baroness Hale agreed that the type of sentence imposed on Mr. Stott gave rise to an article 14 "other status", but emphasised that other status could not be defined solely by the difference in treatment complained of (see her judgment at paragraph 210). Lord Mance made the same point as Baroness Hale. He pointed out that a simple difference in treatment could not be equated with a difference in status for article 14 purposes. This, on his reckoning, was the point of importance arising from the judgment in *Clift* (see his judgment at paragraphs 231 and 233).

20. Drawing this together I consider the Claimant is correct to submit that the judgment in *Clift v United Kingdom* supports a more flexible approach to the scope of other status under article 14. The only clearly identifiable limit is that the status relied on must exist independently of the treatment complained of. All this being so, if the notion of other status is that flexible, that must have consequences in terms of the criteria which then govern whether treatment claimed to be contrary to article 14 is to be considered lawful or unlawful. If the scope of other status is flexible, the same must go for the justification requirement. In some cases what will be required in terms of justification is likely to seem little different from the general requirement that decisions taken by public authorities should be fair, in the sense of consistent such that any decision that favours one class of persons over another should be explained by sufficient reason and in that sense, be justified.

21. Even on the basis that the approach to "other status" is now more flexible, Miss Dobson for the Lord Chancellor submits that the difference between detention under Immigration Act powers in prison or an IRC is not a difference comprising other status because there is no link between that difference and anything capable of being described as a personal characteristic either inherent or acquired, or with anything else that might be descriptive of a class of persons. She submits that conclusions reached in other cases which might on a first look seem to rest on arbitrary distinctions: for example *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 (whether there was an article 14 other status of disabled child in need of lengthy in-patient treatment that was distinct from the other status of being a severely disabled child); and *RJM v Secretary of State for Work and Pensions* [2009] 1 AC 311 (living in a flat rather than a house other status; homelessness also other status), are in reality proxies for matters that are personal characteristics either inherited or acquired. I agree: this is a purposive and valid analysis. Yet although this approach avoids the risk of seeing recent case law on other status as a bewildering series of one-off decisions, it tends to underline the increasingly slim nature of the other status requirement. Whatever might be said in support of the approach advocated in *Stott* by Lord Carnwath that is not presently where the law on this point stands.

22. On the facts of this case I am satisfied that the class of immigration detainees held in prisons is a relevant other status for article 14 purposes. The criteria set out at paragraph 55.10.1 of Chapter 55 of the EIG are both a sufficient indication of a class of personal or identifiable characteristics (certainly by analogy with the situation considered by the Supreme Court in *Stott*), and do not give rise to a situation in which the status is defined by the treatment complained of.

(*3*) *Analogous position and justification*

23. Miss Dobson's submissions on whether persons detained under Immigration Act powers held in prison are in an analogous position to those held in IRCs substantially overlap with her submissions on justification. The submissions rest on three witness statements made by James Wrigley who is the Head of Civil and Family Legal Aid Policy at the Ministry of Justice. He makes a number of points. First, he refers to the different regimes applicable in IRCs and local prisons, respectively. The relevant comparison is between the rules applicable in IRCs and the rules in prison as they apply to remand prisoners. One important point is that access to mobile phones and the internet is much more limited in prisons. Another point is that remand prisoners (and therefore also immigration detainees held in prison) will be required to spend more time in their cells than their counterparts in IRCs. This is the consequence of matters such as the particular requirements to maintain good order and discipline in local prisons which will contain both remand prisoners and convicted prisoners. These considerations affect the time that may be available to detained persons to speak to lawyers in person or by phone out of their cells. Further, the time that might be available for legal advice sessions is likely to be further limited because prison officers must also ensure that other day-to-day activities such as education and behaviour programmes, work and visits take place and are properly supervised and administered. This points to a further relevant consideration: the deployment of prison staff. Were legal advice surgeries to be operated in prisons, prison officers would need to escort detainees to and from their cells and would need to secure that arrangements were in place to ensure legal advisers could come and go in safety. I acknowledge all these points; it would be entirely unrealistic to assume that there were not material differences in the conditions prevailing for immigration detainees in prisons and in IRCs, respectively.

24. Mr. Wrigley then goes on to explain these operational constraints together with the fact that immigration detainees are spread thinly over a number of prisons rather than held in groups approaching the size present at each IRC, make it unfeasible to provide the legal advice surgery set up that is used for the DDAS. In this context feasibility has two aspects. From the perspective of the Lord Chancellor, acting consistently with his obligations under Part 1 LASPO, the concentration of immigration detainees in each IRC justifies the decision to meet the cost of the 30-minute advice sessions without reference to the financial resources and merits criteria. Mr. Wrigley makes the point that the small number of detainees per prison, and the fact that at any one time there may be no immigration detainees at any single prison, would make it impracticable to let contracts to legal service providers on terms similar to those which underpin the DDAS scheme. The other aspect is the position of the providers of legal services. The DDAS contracts are attractive to legal advisers because the numbers detained at each IRC mean that there can be viable weekly (or more frequent) legal advice surgeries where a number of clients can be seen on each visit. I

accept these points too. If the issue was whether it was lawful not to provide a facsimile of the DDAS, identical in every detail to the facility available to those detained in IRCs, all these matters would be powerful points showing either that those detained under Immigration Act powers in prison were not in an analogous position to those detained in IRCs, or that any differences in treatment between the two groups were justified, or both.

25. But that is not the issue. Both when considering whether relevant groups are in analogous situations and when evaluating evidence on justification, deciding what matters must be driven by the particular complaint that is made. The Claimant's contention in this case is about brief access to publicly funded legal advice that is not conditional on either the financial resources requirement or the merits requirement generally applied under LASPO. The 30-minute surgery-style appointments available under the DDAS are not elaborate affairs. I doubt that in every instance they provide an occasion to give comprehensive advice but they do provide the opportunity for advice on matters that may be of immediate concern, such as the opportunity for a bail application, and may also be a gateway for an immigration detainee to access general advice on his immigration position. So far as concerns these matters Immigration Act detainees held in prisons are in an analogous position to their counterparts held in IRCs.

26. On justification the parties accept that the criterion for legality is whether the difference in treatment was manifestly without reasonable foundation. This follows the reasoning of Laws LJ in *R (Public Law Project) v Lord Chancellor* [2016] AC 1531. In that case the challenge was to the Lord Chancellor's decision, in the exercise of his powers under LASPO, to limit the availability of civil legal assistance in certain instances by reference to a residence test. One ground of challenge was that the decision was contrary to ECHR article 14 read with article 6. Laws LJ's reasoning on justification started at paragraph 32

> "32. In my view the question whether state funding of legal expenses in civil matters should (subject to exceptions) be limited to recipients resident in the United Kingdom is essentially a political question, concerned as it is with the strategic distribution of scarce public resources; and one upon which, as I have said, reasonable people may entertain contrary opinions. In those circumstances one would expect that the law, in setting the criterion by which the discrimination involved may be justified, will allow a very considerable margin of discretion to the elected arms of government. The decision of such questions is their particular responsibility, and it is an important muscle in our democracy that that should be so."

He then considered circumstances in which a more stringent standard of justification would apply. His conclusion on that was as follows (at paragraph 38)

> "38. In light of all these considerations, the "manifestly without reasonable foundation" test for justification constitutes in my judgment the law's default position in any discrimination

> case where the subject matter is one of broad, or strategic, economic and/or social policy. It will however be disapplied, and a more vigorous, intrusive approach adopted, where either the grounds of discrimination or the context of the case call for the law's special protection: the former because of the law's attribution of value to every individual, the latter because of the law's special responsibility in certain areas such as access to justice. And it is no coincidence that these two categories are specially protected. The common law's care for the value of the individual dictates both. The principle that every individual is to be treated as an end and not a means demands, if it is to mean anything in a society lively with dispute and confrontation (as most societies are), a justice system which presumes in favour of liberty and insists on high standards of fairness applicable in every case."

However, on the facts of that case, Laws LJ concluded that the manifestly without reasonable foundation criterion applied.

> "44. Mr. Fordham's better point is the simple one that the context of the case is access to justice. His difficulty, in my judgment, is that there is a profound difference between on the one hand the state's duty to ensure fair and impartial procedures and to avoid undue legal obstacles to access to the courts, and on the other a putative duty to fund legal representation. In *R v Lord Chancellor ex parte Witham* [1998] QB 575, 586 in the Divisional Court, in a judgment with which Rose LJ agreed, I said:
>
> > "Mr. Richards submitted that it was for the Lord Chancellor's discretion to decide what litigation should be supported by taxpayers' money and what should not. As regards the expenses of legal representation, I am sure that is right. Payment out of legal aid of lawyers' fees to conduct litigation is a subsidy by the state which in general is well within the power of the Executive, subject to the relevant main legislation, to regulate. But the impost of court fees is, to my mind, subject to wholly different considerations. They are the cost of going to court *at all*, lawyers or no lawyers. They are not at the choice of the litigant, who may by contrast choose how much to spend on his lawyers."
>
> If I may say so that still seems to me to be correct and I am not aware that it has been contradicted."

The same approach must apply in this case[4].

27. Even applying this standard, the Lord Chancellor has not justified the difference in treatment in issue in this case.

28. *First*, the difference is in respect of an important matter; that importance has been recognised over a number of years. The DDAS has existed in one form or another since 2005; at first in the form of a pilot scheme, and thereafter through arrangements made under Access to Justice Act 1999 and more recently under LASPO. A briefing paper prepared by Ministry of Justice civil servants in 2008 in the context of a procurement exercise for the DDAS, explained that the scheme had been developed

> "… in response to our concerns about the accessibility for legal advice for detainees. The context of detention adds complexity to the provision of public funded advice; while the vulnerability of detained clients is enhanced by lack of easy access to legal advice …".

Those observations apply regardless of whether the person detained is held in an IRC or in prison.

29. A report dated 2015 by HM Inspectorate of Prisons *"People in prison: immigration detainees"*, referred to this disparity.

> "1.21 As there is no duty advice scheme, detainees in prisons have no guaranteed access to a legal adviser. Instead they have to contact lawyers themselves. Many such immigration detainees rely on word of mouth recommendations from other prisoners or the advertisements in the prison newspaper *Inside Time*, to source a lawyer. The terms of the contract with the LAA mean that lawyers may be reluctant to visit immigration detainees in prisons because of the long travel times associated with getting to some prisons. In addition, lawyers will only visit detainees if they know they will get paid by the LAA. However, the LAA will only fund a protection case if it has a 50% chance of success. To assess whether the case meets this threshold a face-to-face interview is required between the lawyer and detainee. In an IRC this assessment can be conducted in the free 30-minute advice slot. But for prisons lawyers find themselves in a catch 22 situation: they are unlikely to risk travelling, sometimes long distances, to take instructions from a detainee if there is a chance they will not be paid.
>
> 1.22 Furthermore, unlike at the LAA-funded advice surgeries in IRCs, lawyers visiting detainees in prisons are not required to keep the prospects of success of a bail application under review. In an IRC advice surgery, if a detainee's bail

[4] Mr. Buttler for the Claimant accepted this conclusion is binding on me, reserving his position in the event this case goes on appeal. The conclusion of the Court of Appeal in *Public Law Project* case was reversed by the Supreme Court but on an issue of vires. The Supreme Court did not address the article 14 claim. For my part, I can see no flaw in Laws LJ's approach or conclusion.

> application is deemed not to have a 50% chance of success, the lawyer cannot apply for bail. However, the lawyer is obliged to review this merits assessment at a later stage. These funding arrangements mean that detainees held in prisons have less access to justice than those held in IRCs."

That report recommended that arrangements should be made to provide a telephone advice service to immigration detainees in prison that was comparable to the DDAS.

30. A further report in January 2016 by Stephen Shaw (the former Prisons and Probation Ombudsman for England and Wales) *"Review into the Welfare in Detention of Vulnerable Persons"* also noted the difference in treatment of immigration detainees in prison. It recommended that those detained under Immigration Act powers should be subject to a uniform policy. Mr. Shaw repeated this point in his follow-up report published in July 2018.

31. The same point was also noted in December 2018 by the Senior Coroner for Liverpool and Wirral in a report to the Home Secretary made pursuant to paragraph 7 of Schedule 5 to the Coroners and Justice Act 2013 (the provision which requires coroners to report if they consider that action should be taken to eliminate or reduce the risk of deaths). In a letter dated 13 February 2019 in response to that report, HM Prison and Probation Service referred to a review in progress to consider "how immigration detainees in prison are able to access immigration legal advice". I am not aware of the outcome of that review.

32. Lastly, on this point, since August 2020 a review on behalf of the Lord Chancellor has been in progress with the aim of identifying

> "… the best way to provide equal access to high quality specialist immigration and asylum advice to immigration detainees in both prisons and non-prison detention locations in order to continue to meet the Lord Chancellor's statutory duty under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) to secure the availability of legal aid, and his general duty to ensure access to justice. It will consider how this objective can be achieved while providing the best value to the tax payer."

It is notable that these terms of reference are framed in terms of achieving equality of access not in terms of whether such equality of access is possible. This is a practical acceptance that there is a difference of treatment on a significant matter that needs to be addressed. I consider this practical acceptance also represents the position at law.

33. *Second*, Mr. Wrigley's evidence seeking to explain the reasons for the difference in treatment misses its target. He explains the different operational conditions and requirements in prisons. He points out that the smaller concentration of immigration detainees per prison and the fact that the numbers detained in any particular prison will vary from time to time also militates against face-to-face sessions in the manner of the DDAS. The cumulative effect is that the legal advice surgery scheme which has been designed to exploit economies of scale in IRCs (economies that justify the dis-application of the financial and merits test eligibility criteria to the extent of the 30-

minute advice sessions), could not be replicated in prisons holding Immigration Act detainees. However, the target is not the form the DDAS takes, but the function it provides: initial access to publicly-funded legal advice, in particular on the availability of bail and on any matter going to the legality of the person's detention. That function could be achieved in a range of ways none of which need mimic the particular arrangements of the DDAS.

34. *Third*, it is apparent to me that the question of whether arrangements can be established to permit access to publicly-funded legal advice remotely rather than in person (for example by phone) for Immigration Act detainees that are comparable to the DDAS system, has yet to be properly addressed.

35. Mr. Buttler submitted that some form of arrangement such as advice by phone could address the existing difference in treatment. Mr. Wrigley's evidence explained that in 2019 consideration had been given to some form of adaptation of the Civil Legal Advice Operator System ("CLAOS"), but that this did not prove successful. I cannot see that this comes close to concluding consideration of whether or not access to publicly-funded legal advice is possible (and the present difference in treatment justified), not the least: (a) because CLAOS is not designed to provide legal advice rather, it is aimed at allowing people to establish whether they meet the financial and merits criteria for eligibility for civil legal aid; and (b) because CLAOS appears to work by way of a call-back system which would be obviously unsuited to assisting any person (such as those detained in prisons) without unrestricted access to a phone.

36. Taking access to legal advice by phone as the example, I accept that access to phones in prisons will be subject to restriction, but the evidence available does not, for now, identify obstacles that justify the disadvantage that immigration detainees in prison presently suffer. I suspect that these are precisely the sort of matters that the review now in progress, will consider. It is possible that the present review might result in evidence which does justify the present difference in treatment, but given the terms of reference I have referred to above, it is just as if not more likely that the review will identify the means by which some form of satisfactory equivalent or near-equivalent provision can be made.

37. What needs to be justified is not the absence (from the point of view of immigration detainees in prison) of arrangements that reproduce the DDAS but rather the absence of a functional equivalent to the DDAS, i.e. an arrangement under which initial legal advice on matters such as entitlement to bail is available without charge and without reference to the financial or merits eligibility criteria. For now, the evidence available does not make good a justification of the present difference in treatment.

38. For these reasons the Claimant's case succeeds. Subject to representations counsel wish to make on remedy I am minded to make a declaration to the effect that the failure to afford immigration detainees held in prison access to publicly-funded legal advice to an extent equivalent to that available to immigration detainees held in IRCs under the DDAS, is in breach of Convention rights.