THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of his family in connection with these proceedings.

26 February 2020

PRESS SUMMARY

R (on the application of DN (Rwanda)) (Appellant) v Secretary of State for the Home Department (Respondent)
[2020] UKSC 7
On appeal from: [2018] EWCA Civ 273

JUSTICES: Lord Kerr, Lord Wilson, Lord Carnwath, Lady Black, Lord Kitchin

BACKGROUND TO THE APPEAL

The appellant, DN, is a Rwandan national who was granted refugee status in the UK pursuant to the 1951 Refugee Convention on 26 October 2000. He was subsequently convicted in the UK of a number of offences, the most serious of which occurred on 22 January 2007 when he pleaded guilty to assisting the unlawful entry of a non-EEA (European Economic Area) national in the UK contrary to section 25 of the Immigration Act 1971 ("**the 1971 Act**"). He was sentenced to 12 months' imprisonment for the Immigration Act offence and two months consecutively for each of three pecuniary advantage offences making a total sentence of 18 months' imprisonment.

The Secretary of State for the Home Department has powers, under the Nationality, Immigration and Asylum Act 2002 ("**the 2002 Act**") to order the deportation of persons convicted of serious offences. Section 72(4)(a) of the 2002 Act provides that a person shall be presumed to have been convicted of a particularly serious crime and to constitute a danger to the community of the United Kingdom if s/he is convicted of an offence specified by order of the Secretary of State. The Secretary of State specified several offences which were said to be particularly serious crimes by way of the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 ("**the 2004 Order**"). Assisting unlawful immigration contrary to section 25 of the 1971 Act was included among them.

At the conclusion of DN's imprisonment on 2 July 2007, the Secretary of State made a decision to deport DN, based on s. 72(4)(a) of the 2002 Act: DN was presumed, on the basis of the 2004 Order, to have been convicted of a "particularly serious crime" and to "constitute a danger to the community". On 31 January 2008, the Secretary of State, using his powers of administrative detention conferred by Schedule 3, paragraph 2(3) of the 1971 Act, ordered DN's detention pending deportation.

DN brought a claim for judicial review of the deportation order. Following a stay and the decision in *EN (Serbia) v Secretary of State for the Home Department* [2009] EWCA Civ 630, [2010] QB 633, which determined that the 2004 Order was unlawful, DN amended his judicial review proceedings to concentrate on the lawfulness of the detention. Following a further stay and the decision in *R (Draga) v Secretary of State for the Home Department* [2012] EWCA Civ 842, where the Court of Appeal ruled detention lawful even where based on an unlawful deportation order, the Court of Appeal dismissed DN's substantive appeal.

JUDGMENT

The Supreme Court unanimously allows the appeal. It holds that the appellant was unlawfully detained and is entitled to pursue a claim for damages for false imprisonment. Lord Kerr, with whom Lord Wilson, Lady Black and Lord Kitchin agree, gives the lead judgment. Lord Carnwath gives a concurring judgment.

REASONS FOR THE JUDGMENT

Lord Kerr, with whom Lord Wilson, Lady Black and Lord Kitchin agree

First, the Court notes that Lord Dyson in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 made it clear that there is no difference between a detention that is unlawful because there was no statutory power to detain and a detention that is unlawful because the decision to detain was made in breach of a rule of public law. Here, as in *Lumba*, there was no statutory power to detain. The 2004 Order upon which the decision to deport was based was ruled unlawful in *EN (Serbia)*. As detention was for the express purpose of facilitating deportation, without a lawful deportation order the occasion for detention simply does not arise **[17]**.

Second, detention is entirely dependent on the decision to deport. DN's detention was uniquely linked to the deportation order. Without a lawful decision to deport, the question of detention cannot arise, much less be legal **[18, 20]**. The lawfulness of detention is always referable back to the legality of the decision to deport, and this is not an instance of a series of successive steps, each having an independent existence. For this reason, the Court does not accept the argument that the independent judicial decision made in statutory appeals (per section 82 of the 2002 Act) is a step "removing the legal error" in question. The rubric, "chain of causation" is inapposite in this context **[19]**.

The Court considers that *Draga* was wrongly decided, for the reasons given by Lord Carnwath. Further, the Court considers that, if and insomuch as *Ullah* suggests that paragraph 2(2) of Schedule 3 of the 1971 Act provides stand-alone authority for lawful detention, no matter what has gone before and irrespective of the fact that the decision to deport lacks legal basis, that decision too was wrong.

Lord Carnwath

Lord Carnwath agrees with Lord Kerr's judgment, but adds his thoughts, particularly on the issue of *res judicata* / issue estoppel, which was not discussed in argument but which to his mind could provide a complete answer in similar cases in the future **[1]**.

Lord Carnwath agrees that the decision to detain in this case was directly dependent on the deportation decision and that, as such, DN's claim for damages comes clearly within the *Lumba* principle, unless excluded by some specific rule of law. No such rule emerges from the reasons of the Court of Appeal in *Draga* or from submissions for the Secretary of State **[9-10]**.

Lord Carnwath considers *Draga* was wrongly decided for two reasons. First, Pill LJ's suggested grounds for distinguishing *R v Governor of Brockhill Prison, Ex p Evans (No 2)* [2002] 2 AC 19 are unpersuasive: it could not be said that the Secretary of State was acting within the four corners of a court order relating to the applicant's detention. Rather, the decision of the tribunal related only to deportation **[11-12]**. Second, Pill LJ's reliance on the "second actor theory" was misplaced: where the Secretary of State is directly responsible for making the order later found to be unlawful, it would be odd if it could rely on it to support the validity of later actions based on it **[12]**.

Finally, Lord Carnwath considers that issue estoppel, if argued, could have provided the answer to this appeal. DN's private law claim for damages depended on the lawfulness of the deportation decision at the time it was made. That issue was conclusively determined by the decision of the tribunal in August 2007 and the decision of the High Court rejecting the application for review. DN had the opportunity to challenge the legality of the original deportation decision by reference to the invalidity of the 2004 Order, but did not do so. Hence, he would be estopped from challenging it at a later date **[30]**. However, since the Secretary of State did not rely on res judicata, it would be unfair to DN for the court to introduce it at this stage **[37]**.

References in square brackets are to paragraphs in the judgment.

NOTE
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
https://supremecourt.uk/decided-cases/index.html