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Case Law Database

United Kingdom - R (SM) v Lord Chancellor

An Afghan national held in immigration detention brought a claim contending that the failure to provide access to free (publicly funded) initial immigration advice for immigration detainees held in prisons is discriminatory, as detainees held in Immigration Removal Centres (IRCs) have access to such advice instead. The High Court found that the difference in treatment between detainees in prisons and detainees in IRCs constituted unlawful discrimination contrary to Article 14 of the European Convention on Human Rights (ECHR), read in conjunction with Articles 2, 3, 5 and 8. The High Court rejected the argument that the difference in treatment was justified on the basis that the class of immigration detainees held in prisons is not relevant "other status" for Article 14 purposes, and found that detainees held in prisons are in a sufficiently analogous position to their counterparts held in IRCs to qualify for the same rights.

Case name (in original language) : R (SM) v Lord Chancellor [2021] EWHC 418 (Admin)
Case status: Decided
Case number: [2021] EWHC 418 (Admin)
Citation: R (SM) v Lord Chancellor [2021] EWHC 418 (Admin)
Date of decision: 25/02/2021
State: United Kingdom
Court / UN Treaty Body: High Court of Justice, Queen's Bench Division, Administrative Court
Language(s) the decision is available in: English
Applicant's country of birth: Afghanistan
Applicant's country of residence: United Kingdom
Legal instruments: European Convention on Human Rights (ECHR)
Key aspects: Access to social and economic rights, Detention
Relevant Legislative Provisions:

European Convention for the Protection of Human Rights and Fundamental Freedoms

Legal Aid, Sentencing and Punishment of Offenders Act 2012

Facts

The Lord Chancellor had established the Detained Duty Advice Scheme (DDAS) under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 for immigration detainees held in Immigration Removal Centres (IRCs). The DDAS allows detainees in IRCs to receive up to 30 minutes of advice regardless of whether they meet the Act's financial eligibility requirements or the applicable merits test pursuant to the Act. Immigrants held in prison could not rely on any scheme equivalent to the DDAS.

The applicant was an Afghan national who had entered the UK illegally yet who had been granted leave to remain in the UK on humanitarian grounds. The applicant had subsequently committed several criminal offences and was therefore served with a deportation decision. While the applicant was being held in immigration detention in prison, he was without legal representation for several months before Bail for Immigration Detainees provided pro bono assistance.

Legal arguments by the applicant

The applicant contended that the lack of an equivalent DDAS for immigration detainees held in prisons constituted a breach of Article 14 of the European Convention on Human Rights (ECHR), as the class of immigration detainees held in prisons is a relevant “other status” for Article 14 purposes. To support this point, the applicant mainly relied 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.

The applicant also relied on Articles 2 and 3 ECHR, 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; Articles 5 and 6 ECHR, because of the impact on his ability to challenge the legality of his detention, or apply for bail; and Article 8 ECHR, 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.

Legal arguments by the opposing party

The Lord Chancellor submitted that the difference in treatment afforded to immigration detainees who are held in prison was not by any reason of “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.

Decision & Reasoning

The Court was satisfied that the class of immigration detainees held in prisons was a relevant "other status' for the purpose of ECHR Article 14. The criteria specified in paragraph 55.10.1 of Chapter 55 of the Enforcement Instructions provide a sufficient indication of a class of personal or identifiable characteristics without giving rise to a situation in which the status is defined by the treatment that is complained of. Furthermore, the Court found that no compelling justification was brought by the Lord Chancellor to support the difference in treatment between detainees in prisons and detainees in IRCs. Such difference therefore amounted to unlawful discrimination.

With regards to the application of Article 14, the Court concurred with the applicant’s interpretation of the judgment of the European Court of Human Rights in *Clift v United Kingdom* (application 7205/07, Judgment 13 July 2010) and *R (Stott) v Secretary of State for Justice* [2020] AC 51. These cases support a 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.

Decision documents
R (SM) v Lord Chancellor [2021] EWHC 418 (Admin)
Outcome

Application granted.

Links to other relevant materials related to the case (blogs, analysis, articles, reports, etc.)

Doughty Street Chambers blog

Matrix Chambers blog

Caselaw cited

Clift v United Kingdom (application 7205/07, Judgment 13 July 2010) of the European Court of Human Rights

R(Clift) v Secretary of State for the Home Department [2007] 1 AC 484

Kjeldsen, Busk, Madsen, and Pedersen v Denmark (1976) 1 EHRR 711 the European Court of Human Rights

Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47

R (Public Law Project) v Lord Chancellor [2016] AC 1531

R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening) [2009] 1 AC 311

R (Stott) v Secretary of State for Justice [2018] UKSC 59

R v Docherty [2017] 1 WLR 181

R v Lord Chancellor ex parte Witham [1998] QB 575

Third party interventions

Bail for Immigration Detainees (an independent charity) was given permission to intervene and provided the Court with detailed evidence and submissions, drawing on its experience and research, relating to the importance of legal aid immigration advice, the population of detainees held in prisons and the difficulties faced by them in obtaining advice.