27 April 2016

PRESS SUMMARY

R (on the application of O) (by her litigation friend the Official Solicitor) (Appellant) v Secretary of State for the Home Department (Respondent) [2016] UKSC 19
On appeal from [2014] EWCA Civ 990

JUSTICES: Lady Hale (Deputy President), Lord Wilson, Lord Reed, Lord Hughes and Lord Toulson

BACKGROUND TO THE APPEAL

The appellant ("O") is a Nigerian woman aged 38. After arriving in the UK illegally in 2003, her claim for asylum or discretionary leave to remain in the UK was refused and her appeal was dismissed. She was charged with an offence of child cruelty, but absconded on bail. In 2007 she was arrested and charged with another offence, for which she was later convicted and imprisoned. She later pleaded guilty to the outstanding child cruelty charge, and was sentenced to 12 months' imprisonment and made the subject of a recommendation for deportation. Upon her release from prison in August 2008, the respondent ("the SSHD") detained O, first under para 2(1) of Schedule 3 to the Immigration Act 1971 ("the 1971 Act") pending the making of a deportation order and then, once the deportation order was made, under para 2(3) of Schedule 3 to the 1971 Act pending deportation. O was detained at Yarl's Wood Immigration Removal Centre until 6 July 2011, when she was released on bail.

O has suffered from serious mental ill-health, including episodes of self-harm, and has been the subject of several medical reports. In 2008 she was diagnosed with a recurrent depressive disorder and an emotionally unstable personality disorder. In 2009 a consultant psychiatrist instructed by O recommended that she be transferred from Yarl's Wood to hospital. Following a suicide attempt in March 2010, O was admitted to hospital but was subsequently discharged, the hospital's consultant psychiatrist concluding that her needs would be met adequately at Yarl's Wood. In February 2011 a report on O was prepared by another clinical psychologist instructed by O ("the Report"). The Report concluded in particular that: O suffered from not only a depressive disorder but a severe form of post-traumatic stress disorder; O could not access the necessary mental health services at Yarl's Wood and that release from detention would greatly benefit her mental health; O needed a long-term structured package of mental health services; O needed to be referred to a specialist trauma-focussed clinic for phased treatment; and that such a referral was in accordance with the National Institute for Health and Care Excellence ("NICE") guidelines.

In the present proceedings, O challenges the lawfulness of the period of her detention from 22 July 2010 (and in particular from 4 March 2011, the date of the first review of O's detention following the SSHD's receipt of the Report) until 6 July 2011 (the date of her release on bail). The object of these proceedings is to secure a declaration that O's detention during this period was unlawful and an award of damages. In April 2012 Lang J refused permission for the claim to proceed and in July 2014 the Court of Appeal dismissed O's appeal. O now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses O's appeal. Lord Wilson gives the leading judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

This appeal requires the Court to consider the SSHD's policy relating to the detention of mentally ill persons pending deportation ("the Policy") and the effect of any failure by the SSHD to apply that Policy, in the light of the Court of Appeal's decision in *R (Francis)* [**4**].

The Policy obliges the SSHD to conduct monthly reviews of detention pending deportation [**18**]. Para 55.10 provides that those suffering from "serious mental illness which cannot be satisfactorily managed within detention" will normally be considered suitable for detention "only in very exceptional circumstances", including for example where there is a risk of further offending or harm to the public [**19**]. In O's detention reviews between 4 March and 4 July 2011, only the briefest reference was made to the Report, and O's most recent diagnosis was incorrectly identified as being in March 2010 [**24**]. Although the Report was submitted to the SSHD expressly in support of O's application to challenge her deportation [**22**-**23**], on any view it bore some relevance to the Policy and should have been addressed properly in the detention reviews [**25**]. Therefore, as the Court of Appeal concluded (and the SSHD now accepts), the SSHD unlawfully failed to apply her Policy when deciding to continue to detain O between March and July 2011 [**26**-**27**]. The refusal to release O during this period was procedurally flawed [**37**]. Given that conclusion, this case does not afford the opportunity to consider the nature of the court's review of the legality of the SSHD's application of her Policy [**28**, **37**].

The question is then how the SSHD would have reacted to the Report, had she applied her Policy correctly. It is for the Court to determine the meaning of the Policy for itself [**28**]. "Satisfactory" is a word which catches the various different factors to which the SSHD may be required to have regard. The discussion of "satisfactory management" in *R (Das*) is approved, save that treatment (available to a detainee only if released) which would be likely to effect a positive improvement in his or her condition might be relevant; the burden would be on the SSHD to inquire as to its availability. While "satisfactory" does not mean "optimal" management, a narrow construction of "management", meaning no more than "control" of the illness would lack principled foundation [**30**].

The Policy mandates a practical inquiry by the SSHD, in the light of the context of immigration detention [**31**]. The SSHD should have made inquiries and obtained answers to a number of questions as to whether, in the light of the Report, O's illness could satisfactorily be managed at Yarl's Wood [**32**-**33**]. The Court cannot predict the result of those inquiries, most of which seem never to have been made. The SSHD would also have had to consider whether there were very exceptional circumstances which nonetheless justified O's detention. Even on the assumption that the proper application of the Policy should in due course have led the SSHD to direct O's release, it is unrealistic to consider that the conditions necessary for her release would have been in place prior to 6 July 2011, when she was released on bail [**34**-**35**]. Were O's claim for judicial review permitted to proceed, it would result in no more than a declaration that her detention was unlawful and an award of only nominal damages [**38**-**40**]. The lower courts were entitled to refuse O's application for permission [**50**].

R (Francis)

R (Francis) was wrongly decided. The power to detain conferred by para 2(1) of Schedule 3 to the 1971 Act (pending the making of a deportation order) and by the words in parenthesis in para 2(3) (pending deportation) is a mandate subject to two conditions: first, there must be a prospect of deportation within a reasonable time; and second, the SSHD must consider in accordance with the Policy whether to exercise the power to detain. If either condition is not satisfied, the mandate to detain ceases and detention becomes unlawful [**42**-**49**].

References in square brackets are to paragraphs in the judgment