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FOR IMMEDIATE RELEASE – 23 MARCH 2011

'A serious abuse of power': UK Supreme Court rules against secret Home Office detention policy

A secret Home Office policy of detaining foreign prisoners who had been released from prison was unlawful because the government had deliberately concealed its existence, the UK Supreme Court ruled this morning in a landmark ruling that opens the way for damages claims against the Home Office. By a majority of 6 to 3, the Supreme Court ruled that two foreign prisoners who had been detained under a secret policy operated by the Home Office between April 2006 and September 2008 were entitled to damages for false imprisonment.

The legal challenge concerned the Home Office's policy of detaining foreign prisoners following the discovery in April 2006 that more than 1000 foreign prisoners had been released without being considered for deportation. Between April 2006 and September 2008, the Home Office's official stated policy was that a foreign prisoner who had been released from prison would not normally be detained pending their deportation unless it was necessary to do so.

But the Supreme Court found that, contrary to its published policy, the Home Office had operated a secret,'near blanket ban on release, regardless of whether removal can be achieved and the level of risk to the public' (see paragraph 5 of judgment). However, the majority found that the prisoners would be entitled to only nominal damages since it was likely they would have been detained in any event, even if a lawful policy had been applied.

Lord Dyson said:

> [T]here was a deliberate decision taken at the highest level to conceal the policy that was being applied and to apply a policy which, to put it at its lowest, the Secretary of State and her senior officials knew was vulnerable to legal challenge. For political reasons, it was convenient to take a risk as to the lawfulness of the policy that was being applied and blame the courts if the policy was declared to be unlawful. [para 166]

Lord Hope, deputy President of the Supreme Court, said:

> [T]he history of this case shows that there was here a serious abuse of power which was relevant to the circumstances of the appellants' detention. If the rule of law is to be sustained, the detention must be held to have been unlawful. [para 175]

See below for additional key quotes from the judgment. Eric Metcalfe, JUSTICE's director of human rights policy, said:

> **This ruling is not just about compensation for false imprisonment. It sends a message that the Home Office is not above the law, and cannot hope to evade it by operating a secret policy of detention.**
>
> **This judgment shows how seriously our courts take the right to liberty, that even a foreign prisoner may be entitled to damages when they are unlawfully detained.**

For further comment, please contact Eric Metcalfe, JUSTICE's human rights policy director, on 020 7762 6414 (direct line) or emetcalfe@justice.org.uk.

Notes for editors

1. JUSTICE was granted leave to intervene before the Supreme Court by way of both written and oral submissions. An electronic copy of the written submissions is available on request. JUSTICE was represented pro bono by Rabinder Singh QC and Elizabeth Prochaska of Matrix Chambers and Freshfields Bruckhaus Deringer LLP.

KEY EXTRACTS FROM THE SUPREME COURT JUDGMENT IN WL (CONGO)

Lord Dyson:

> The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements [para 34]
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> [T]he right to liberty is of fundamental importance and that the courts should strictly and narrowly construe general statutory powers whose exercise restricts fundamental common law rights [para 53]
>
> [T]here was a deliberate decision taken at the highest level to conceal the policy that was being applied and to apply a policy which, to put it at its lowest, the Secretary of State and her senior officials knew was vulnerable to legal challenge. For political reasons, it was convenient to take a risk as to the lawfulness of the policy that was being applied and blame the courts if the policy was declared to be unlawful. [para 166]

Lord Hope:

> [T]he history of this case shows that there was here a serious abuse of power which was relevant to the circumstances of the appellants' detention. If the rule of law is to be sustained, the detention must be held to have been unlawful. The appellants were being detained without regard to the purpose for which the Secretary of State was authorised to exercise it by the statute. The court must insist that powers of detention are exercised according to law. If they are not, those who have abused their powers must accept the consequences. It is no answer for them to say that they could, had they put their mind to it, have achieved the same result lawfully by other means.[para 175]

> [T]he conduct of the officials in this case amounted, as Lord Walker says (see para 194, below), to a serious abuse of power and it was deplorable. It is not enough merely to declare that this was so. Something more is required, and I think that this is best done by making an award of damages that is not merely nominal. [para 176]

> There must be some recognition of the gravity of the breach of the fundamental right which resulted in false imprisonment, and account should be taken of the deterrent effect of an award lest there be the possibility of further breaches. [para 180]

Lord Walker:

> The notion that no more than nominal damages should ever be awarded for false imprisonment by the executive arm of government sits uncomfortably with the pride that English law has taken for centuries in protecting the liberty of the subject against arbitrary executive action. [para 181]

> [T]he conduct of officials, including some senior officials, of the Home Office between April 2006 and September 2008 amounted to a serious abuse of power. [para 194]

Baroness Hale:

> The statutory power to detain [prisoners under] the Immigration Act 1971 … is, on its face, very broad. Provided that the detainee has been notified of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained pending the actual making of the order …. Once the deportation order is made, he may be detained pending his removal or departure from the United Kingdom …. However, since at least the case of *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704, it has been recognised that there are limitations implicit in these powers: the detention must be for the statutory purpose of making or implementing a deportation order and

for no other purpose; hence it cannot be continued once it becomes clear that it will not be possible to effect deportation within a reasonable period; the Secretary of State must act with reasonable diligence and expedition to bring this about; and in any event the detention cannot continue for longer than a period which is reasonable in all the circumstances. [para 198]

These limitations were devised long before the Human Rights Act and have been accepted without question ever since. They stem from the long-established principle of United Kingdom public law that statutory powers must be used for the purpose for which they were conferred and not for some other purpose …. They were not inspired by article 5(1)(f) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and it does not follow that, because detention would be permissible under article 5(1)(f), it is also permissible under United Kingdom law. [para 199]

The discrepancy between what the policy said should happen in these cases and what was actually happening is stark. The claimants were being dealt with, not under the published, lawful policy, but under an unpublished, unlawful policy or practice. Yet it is difficult not to have some sympathy for the officials involved. The Government had been hit by a perfect storm in April 2006 when the popular press discovered that foreign national prisoners were being released after serving their sentences without any consideration being given to whether or not they should be deported. It had cost the then Home Secretary his job. The immediate answer was not to let any of them go. This was at odds with the published policy, which presumed against the use of detention powers. Officials knew this and they also knew that the policy needed amendment. But they found it very difficult to devise a policy for publication which would be both lawful and acceptable to ministers. Ministers wanted a near blanket ban on release, whereas the law requires some flexibility to respond to the circumstances of the particular case. So the situation dragged on for many, many months. [para 203]

These are just the sort of circumstances, where both Ministers and their civil servants are under pressure to do what they may know to be wrong, in which the courts must be vigilant to ensure that their decisions are taken in accordance with the law. To borrow from the civil servants' correspondence, the courts must be prepared to take the hit even if they are not. The law requires that decisions to detain should be made on rational grounds and in an open and transparent way and not in accordance with arbitrary rules laid down by Government and operated in secret. One of the most disturbing features of this sorry tale is that the case-handling officials had to give reasons for their decisions which were not what their real reasons were. [para 204]

There is every reason to think that Strasbourg would find a secret policy which presumed in favour of the detention of every foreign national prisoner open to the same objections. The common law is just as respectful of the liberty of the person, and just as distrustful of arbitrary

and secret decision-making by officials acting on behalf of Government, as is the Convention. [para 206]

[N]o-one can deny that the right to be free from arbitrary imprisonment by the state is of fundamental constitutional importance in this country. It is not the less important because we do not have a written constitution. It is a right which the law should be able to vindicate in some way, irrespective of whether compensatable harm has been suffered or the conduct of the authorities has been so egregious as to merit exemplary damages. [para 217]

Lord Collins:

This is a case in which on any view there has been a breach of duty by the executive in the exercise of its power of detention. Fundamental rights are in play. Chapter 39 of Magna Carta (1215) said that "no free man shall be seized or imprisoned … except … by the law of the land" and the Statute of Westminster (1354) provided that "no man of what state or condition he be, shall be … imprisoned … without being brought in answer by due process of the law." That the liberty of the subject is a fundamental constitutional principle hardly needs the great authority of Sir Thomas Bingham MR (see *In re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599, 603) to support it, but it is worth recalling what he said in his book *The Rule of Law* (2010), at p 10, about the fundamental provisions of Magna Carta: "These are words which should be inscribed on the stationery of the … Home Office." [para 219]