Neutral Citation Number: [2020] EWCA Civ 657

Case No: C4/2019/1058

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Murray J
[2019] EWHC 758 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2020

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE HICKINBOTTOM
and
LADY JUSTICE SIMLER DBE

- -

Between :

R (on the application of: **Shola BADMUS [1]** **GW [2]** **Okwudili CHINZE [3]** **Granville MILLINGTON [4])**	**Appellants/ Claimants**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent/ Defendant**

- -
- -

Hugh Southey QC and **Nick Armstrong** (instructed by **Duncan Lewis Solicitors**) for the **First, Second, and Fourth Appellants**
David Blundell QC and **Richard Turney** (instructed by **the Government Legal Department**) for the **Respondent**
The **Third Appellant** did not appear and was not represented

Hearing dates : 29 April & 1 May 2020

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Approved Judgment

COVID-19 PROTOCOL

This judgment was handed down remotely by circulation to the parties' representatives by email, and by release to the British and Irish Legal Information Institute (BAILII) for publication. Copies were also made available to the Judicial Office for dissemination. The date and time of handing down shall be deemed for all purposes to be 10:30am on Wednesday 20 May 2020.

Sir Terence Etherton MR, Lord Justice Hickinbottom, and Lady Justice Simler DBE :

Introduction

1. This is an appeal from the judgment of Mr Justice Murray, sitting in the Administrative Court of the Queen's Bench Division, who refused permission to apply for judicial review of decisions of the respondent, the Secretary of State for the Home Department, to fix and subsequently to maintain a flat rate of payment for paid activity carried out by detainees in immigration detention, and to fix and subsequently to maintain that rate at £1.00 (or £1.25 for special projects).

Legal and Policy Background

2. At the material times each of the appellants was subject to immigration detention and was detained in an Immigration Removal Centre ("IRC"), where they undertook paid activities for which they were remunerated under the fixed payment regime. The Secretary of State is empowered to make rules for the regulation and management of IRCs under section 153(1) of the Immigration and Asylum Act 1999 ("the 1999 Act"). Section 153(2) of the 1999 Act provides that these rules may, among other things, make provision with respect to the safety, care, activities, discipline, and control of detained persons. The Secretary of State has contracted out the management of most IRCs to private companies.

3. IRCs are, therefore, regulated and managed in accordance with rules, guidance, and orders by the Secretary of State including: the Detention Centre Rules 2001 (SI 2001/238) ("the 2001 Rules"); Detention Services Orders ("DSOs"), which give guidance on a range of issues relating to IRCs; and the Detention Services Operating Standards manual, which builds on the 2001 Rules.

4. The purpose of IRCs (previously known as "detention centres") is set out in Rule 3 of the 2001 Rules, the relevant part of which is as follows:

> "3 Purpose of detention centres
>
> The purpose of detention centres shall be to provide for the secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible, consistent with maintaining a safe and secure environment, and to encourage and assist detained persons to make the most productive use of their time, whilst respecting in particular their dignity and the right to individual expression."

5. The provisions governing the welfare and privileges of a detained person are set out in Rules 12 to 19 of the 2001 Rules. Rule 17 governs activities that are to be made available to a detained person, including the possibility (in Rule 17(3) and (4)) of undertaking paid activity, where such an opportunity is provided:

> "17 Regime and paid activity

> All detained persons shall be provided with an opportunity to participate in activities to meet, as far as possible, their recreational and intellectual needs and the relief of boredom.
>
> Wherever reasonably possible the development of skills and of services to the centre and to the community should be encouraged.
>
> Detained persons shall be entitled to undertake paid activities to the extent that the opportunity to do so is provided by the manager.
>
> Detained persons undertaking activities under paragraph (3) shall be paid at rates approved by the Secretary of State, either generally or in relation to particular cases.
>
> Every detained person able to take part in educational activities provided at a detention centre shall be encouraged to do so.
>
> Programmes of educational classes shall be provided at every detention centre.
>
> Arrangements shall be made for each detained person to have the opportunity of taking part in physical education or recreation, which shall consist of both sports and health-related activities.
>
> A library shall be provided in every detention centre, which will meet a range of cultural, ethnic and linguistic needs and, subject to any direction of the Secretary of State in any particular case, every detained person shall be allowed access to it at reasonable times."

6. The opportunity for paid activity was not introduced until 2006 due to a concern that payment would attract the application of the national minimum wage. That risk was removed by the Immigration, Asylum and Nationality Act 2006. Paid work was then made available in some, but not all, IRCs. Where paid work was available, there was inconsistency in pay levels, with work often being paid at £1.00 per hour but some work being paid at 25p per hour.

7. In 2008 the Secretary of State decided to implement a "Paid Work Strategy" across all IRCs. This was given effect by DSO 15/2008, which was issued on 5 December 2008 ("the 2008 DSO"). It set out conditions under which detained persons could be provided with paid activities, including the following:

> "A detained person should not be offered more than 15 hours paid work per week without special approval by the responsible Home Office official.
>
> Paid work should only be offered to detainees who were actively co-operating with the Home Office in relation to resolution of their immigration case, and only to those on the

> "enhanced level" of the enhancements scheme operated by the removal centre operator, the latter being a scheme intended to incentivise co-operative and constructive behaviour by detained persons. Examples of failure to co-operate would include a refusal to complete application forms, a failure to attend an interview without good reason and disruptive behaviour but would not include mounting a legal challenge to an immigration decision.
>
> Any payment for paid work would be in addition to the allowance paid to detainees (then and now, 71p per day or £5 per week).
>
> There would be two tiers of pay rate, routine work to be paid at £1 per hour and specified projects to be paid at a rate of £1.25 per hour.
>
> Pay rates would be reviewed annually by the Secretary of State."

8. The Secretary of State made a policy decision to adopt a standard rate of pay for a number of reasons. It was thought that variable or locally agreed rates of pay at different IRCs or within an individual IRC could favour or discriminate against detainees on an arbitrary basis depending on their place of detention. It was also thought that distinguishing between detainees might cause resentment, particularly if work at higher rates was not available, and might present a risk of non-compliance with transfers between IRCs (that is to say, from an IRC with a higher rate of pay to one with a lower one) or demands to be transferred from an IRC with a lower rate of pay to an IRC with a higher rate. The strategy was intended to standardise pay rates and cap the amount of work that could be undertaken by an individual detainee, to maximise opportunities for the greatest number of detainees.

9. The standard rate was fixed at £1.00 because the position of prisoners, who were generally paid around 20p per hour for work, could be distinguished; and, although an hourly rate of 75p was preferred, it was rejected because work was already being paid at £1.00 per hour or higher, and setting the rate at a lower level would result in pay cuts for many detainees which would present operational risks.

10. Following a review of the paid work regime in 2012, a new DSO governing paid work, DSO 01/2013 ("the 2013 DSO"), was issued on 26 March 2013. It was broadly consistent with the 2008 DSO. The rates of pay remained the same but the cap on working hours was increased to 30 hours per week.

11. In January 2016 the Secretary of State published a report that he had commissioned from Mr Stephen Shaw, a former Prisons and Probation Ombudsman, entitled "Review into the Welfare in Detention of Vulnerable Persons – A report to the Home Office" (CM 9186) ("the 2016 Shaw Report"). Mr Shaw made 64 recommendations, including as to pay rates. Recommendation 31 was as follows:

> "I recommend that the Home Office reconsider its approach to pay rates for detainees in light of my comments on the benefits of allowing contractors greater flexibility."

12. On 30 April 2018, following the recommendations of the 2016 Shaw Report, the Director of Detention and Escorting Services, Immigration Enforcement, commissioned a review into the pay within IRCs ("the Pay Review"). The terms of reference included the following:

    i) Whether the minimum pay rates needed to be revised.

    ii) Whether there was still a requirement for a maximum pay rate and any potential impacts of this being removed.

    iii) Tiers of pay for different types of work.

    iv) Comparison with Prison Service paid work procedures and pay rates.

13. The report resulting from the Pay Review ("the Pay Review Report") included, at paragraph 17, the following summary of the types of paid activity available:

> "Paid activities provide detainees with the opportunity to earn extra money before they depart from the UK, and some types of paid activities require training and certification (e.g. in food hygiene) which detainees can use in their home countries. Examples of paid activities are wide ranging and including wing orderly, sports hall assistant, safer community orderly, refectory cleaner, music room orderly, library orderly, kitchen orderly, gym assistant, interpreter, diversity orderly, classroom assistant, chapel assistant, barber and activities assistant. Where possible detainees are encouraged to undertake relevant work-related certification which detainees can use in their home countries. For example, detainees undertaking paid activities as a kitchen assistant in [an IRC] must have obtained a level 1 catering certificate for their first 8 weeks work and a level 2 catering certificate for continued employment beyond the initial 8 weeks."

14. The Pay Review Report contained a number of recommendations, including the following on the rate of pay:

> "Ministers should be invited, subject to financial affordability, to decide between the following options:
>
> Option 1: To bring the pay rates and weekly allowance for detainees in [IRCs] up to be in line with inflation, with an estimated annual cost to the Home Office of £290,000 per annum;
>
> Option 2: To bring the weekly allowance up to be in line with inflation, with an estimated annual cost of £145,000 per annum, but leave pay rates unchanged;

> Option 3: To bring the pay rates up to be in line with inflation, with an estimated annual cost of £145,000 per annum, but leave the weekly allowance unchanged; or
>
> Option 4: To leave the rates unchanged."

15. On 3 May 2018 Home Office Ministers decided to adopt Option 4 and leave the rates unchanged ("the 2018 Review Decision"). On the same day the Treasury Solicitor wrote to Duncan Lewis, who had been acting since 2017 for various persons detained in IRCs undertaking paid activity, and now act for the appellants, confirming the 2018 Review Decision.

The Appellants

16. Each of the appellants was subject to immigration detention following their release from sentences of imprisonment.

17. The first appellant, Shola Badmus, a Nigerian national, became subject to immigration detention on 3 June 2018, the release date of his custodial sentence at HMP Erlestoke. He was transferred from there to Brook House IRC on 5 June 2018 and transferred to Harmondsworth IRC on 9 July 2018. He was released on immigration bail on 9 October 2018. In light of his level of education, he was able to undertake paid activity at Harmondsworth IRC as a welfare "buddy", helping fellow detainees with a range of problems.

18. The second appellant, GW, a Jamaican national, became subject to immigration detention on 28 April 2018, the release date of his custodial sentence at HMP Chelmsford. He was transferred from there to Brook House IRC in July 2018. He was released on immigration bail on 8 November 2018. He had experience prior to his detention as a specialist cleaner and undertook cleaning as a paid activity while at Brook House IRC.

19. The third appellant, Okwudili Chinze, a Nigerian national, became subject to immigration detention on 21 December 2017, the release date of his custodial sentence at HMP Wandsworth. He was detained there until 12 January 2018, when he was transferred to Campsfield IRC. A few days after he arrived at Campsfield IRC, he started paid activity as a cleaner. He was then promoted to cleaning supervisor. On 24 January 2018 he was transferred to Colnbrook IRC. In light of his ability and level of education, he was eventually able, like Mr Badmus, to undertake work as a welfare "buddy". His work included organising legal advice surgeries and Home Office interviews for other detainees, as well as helping detainees with a range of other issues.

20. The fourth appellant, Granville Millington, a Trinidad and Tobago national, became subject to immigration detention on 18 July 2017, the release date of his custodial sentence at HMP High Point. He was transferred to The Verne IRC in August 2017, where he initially worked in the servery. His responsibilities included collecting food from the kitchen and cleaning. In November 2017 he was transferred to Brook House IRC, where he initially undertook paid activity as a cleaner. After a couple of months, he was able to undertake paid activity as a barber. That was an occupation for which he had trained in Trinidad and Tobago, and which he had carried on when he first

came to the UK and therefore in which he had considerable skill. He was released on bail on 1 October 2018, by which time he had completed 14 months of paid activity.

Procedural Background

21. The judicial review claim form in the present proceedings was issued on 5 October 2018. In section 3 of the claim form the "Details of the decision to be judicially reviewed" were as follows:

> "1. Decision of the Defendant to fix a flat rate of payment for work carried out by the Claimant whilst in immigration detention.
>
> 2. Decision of the Defendant to fix that rate at £1, or £1.25 per hour for special projects".

22. The "Date of the decision" in the same section was said to be "Continuing".

23. The "Details of remedy" in section 7 of the claim form were:

> "1. Declaration that fixing a flat rate of £1/£1.25 for paid work in immigration detention is unlawful.
>
> 2. Declaration that fixing a flat rate, and fixing it at that level, breaches the Claimant's ECHR rights.
>
> 3. Declaration that there has been a breach of the Public Sector Equality Duty.
>
> 4. Such other declaratory relief as may be necessary to give effect to the Court's judgement.
>
> 5. Damages for breach of ECHR rights.
>
> 6. Costs"

24. Paragraph 1 of the Detailed Statement of Facts and Grounds, which accompanied and bore the same date as the claim form, was as follows:

> "1. This is a challenge, brought by four immigration detainees, to two decisions of the Defendant concerning rates of pay for those who work whilst in immigration detention. Those decisions are (a) to fix a flat rate of payment; and (b) to fix that rate at £1 (or £1.25 for special projects, though that rate is only very rarely used). Those decisions were originally taken in a Detention Services Order from March 2013 (though the rates themselves were set as long ago as 2008, so ten years ago) but they were reviewed and retaken on 3 May 2018, and applied to the Claimants on various dates between August 2017 and July 2018 and continuing."

25. Paragraph 2 of the Detailed Statement of Facts and Grounds referred to other pending proceedings – *R (Morita) v Secretary of State for the Home Department* (Claim No CO/1296/2018) ("the Morita proceedings") - which were listed for trial as a rolled-up hearing on 4 and 5 December 2018. The appellants stated that they adopted the grounds for judicial review in that case. The claimant in those proceedings, who was also represented by Duncan Lewis solicitors, had issued his claim form on 28 March 2018 for judicial review of the decision of the £1.00 per hour flat rate in the 2013 DSO. Following the publication of the Review Report and the 2018 Review Decision to maintain the flat rate of £1.00 and £1.25, Mr Morita amended his Detailed Statement of Facts and Grounds to challenge that decision and the review which led to it. On 14 September 2018 Mr Morita had filed an application seeking to have the appellants added to his claim but that application was dismissed by Cockerill J on 21 September 2018. In paragraph 9 of the Detailed Statement of Facts and Grounds in the present case the appellants stated that the grounds in the Morita proceedings were adopted in full and they asserted the same legal errors.

26. In the claim form and the Detailed Statement of Facts and Grounds the appellants applied to link these proceedings to the Morita proceedings, and to substitute themselves for Mr Morita in the Morita proceedings, and for there to be a rolled up hearing on 4 and 5 December 2018 at the same time as the rolled up hearing in the Morita proceedings.

27. On 26 October 2018 Lang J ordered that these proceedings be linked with the Morita proceedings and that the appellants be added as claimants in the Morita proceedings. She refused the appellants' application to be substituted for Mr Morita in the Morita proceedings. She ordered both sets of proceedings to be listed for a rolled up hearing on 4 and 5 December 2018.

28. Both sets of proceedings came on for hearing before Murray J on 4 December 2018 for a "rolled up" hearing to consider whether permission should be granted and, if granted, the substantive claim for judicial review.

<u>The hearing before Murray J and his judgment</u>

29. Mr Morita having lost his legal aid funding following an award of damages made to him by the Secretary of State in respect of unlawful detention, on 13 November 2018 the parties signed a consent order seeking to stay the Morita proceedings until after the outcome of these proceedings. The Judge approved the consent order on the first day of the hearing.

30. In his judgment, handed down on 27 March 2019, the Judge summarised as follows (at [69]) the six grounds on which the appellants were seeking to apply for judicial review of the pay regime for paid activity in IRCs (based doubtless on the claim form and the Detailed Statement of Facts and Grounds as elaborated in the course of written and oral submissions):

    i) Setting and maintaining a flat rate of £1.00 per hour for paid activity, with a rarely applied exception of £1.25 per hour for special projects, is contrary to the statutory purpose of the paid activity regime set out in the 2001 Rules.

ii) The setting of a flat rate, with no meaningful exception, prevents the furtherance of the statutory objectives set out in the 2001 Rules and therefore is an unlawful fetter on the discretion of decision-makers required to apply the paid activity regime to individual detained persons.

iii) The 2018 Review Decision to maintain a flat rate at £1.00 per hour, with the rarely applied exception of £1.25 per hour for special projects, is irrational in the sense of Wednesbury unreasonable (Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223).

iv) The differential treatment of prisoners and immigration detainees in respect of pay for work undertaken in custody/detention contravenes the prohibition on discrimination in article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR");

v) The Secretary of State failed to comply with his duty under section 149 of the Equality Act 2010 to have due regard to relevant matters in reaching the 2018 Review Decision.

vi) The Pay Review frustrated the appellants' legitimate expectation that all matters raised by their solicitors in correspondence with the Secretary of State would be addressed "in full".

31. In his judgment the Judge described (at [44]-[49]) the evidence that was before him as follows.

32. He said that he was provided with a number of witness statements from the appellants and other detained persons concerning the work they undertook while detained in an IRC, and that a common theme was that the level of pay for the work done made them feel exploited. He quoted, as an example, the following paragraph in the witness statement of a Czech national detained at Yarl's Wood IRC:

> "I just want pay that recognises the job that I do within the detention centre and to feel that my work is valued."

33. The Judge said that a number of the witness statements focused on the unpleasantness and difficulty of some of the cleaning work they undertook. Some of the detainees had previously had the right to work in the UK and compared their pay and conditions in the IRC unfavourably with the pay and conditions they had previously enjoyed before becoming subject to immigration detention. A number complained about how relatively expensive items were in the shop in the IRC, and set out various reasons why they needed money, including to send to family members. The Judge said that another common theme in the witness statements was that the detainee undertook paid activity because he or she needed the money, rather than simply as a way of passing the time. Exhibited to the witness statements provided by each of the appellants was his account showing recent credits for his paid work and his allowance and debits for his purchases in the shop.

34. The Judge said that he was also provided with evidence relating to the development of the paid work or paid activity policy in IRCs, including excerpts from Hansard, excerpts from the 2016 Shaw report and another report of Mr Shaw, excerpts from the

contracts between the Secretary of State and various operators of IRCs, evidence relating to the regime for paid work in prisons for purposes of comparison, as well as correspondence between the parties and other relevant documents.

35. The Judge said that the principal evidence relating to the pay regime for paid activities included the Secretary of State's original proposal to introduce paid work in IRCs in June 2008, the 2008 DSO, the 2013 DSO, a Policy Equality Statement prepared by the Secretary of State in March 2012 and in November 2017, the Pay Review Report, and a witness statement of Ms Frances Hardy, who was then employed by the Home Office as a Deputy Director in the role of Head of Risk and Assurance since November 2017 and had worked as Head of Operational Practice since November 2014.

36. The Pay Review Report summarised in paragraph 4 the evidence gathered for the Pay Review. It included evidence from questionnaires sent to IRC operators. The questionnaire responses for IRCs at Gatwick, Heathrow, Campsfield, the Verne, Dungavel, and Yarl's Wood were set out in Appendix C. The Judge noted (at [48]) that the IRC operators in general favoured introducing more flexibility into the pay regime, the ability to offer different rates for different work and the ability to offer higher rates, and that they provide reasons for these suggestions.

37. The Judge referred to paragraphs 21 to 25 of the Pay Review Report as setting out the principal features of the payment regime for work undertaken by prisoners in the prison estate. He summarised the position as follows. The rate per hour was in general terms considerably less than £1.00 per hour, but was variable according to a number of factors, in particular to encourage and reward a prisoner's constructive participation in the regime. The Governors of individual prisons had the power to set rates of pay for their particular prisons to reflect regime priorities. The Judge said that, in addition, he had been provided with Prison Service Order Number 4460 on Prisoner's Pay, two reports by the Howard League on Penal Reform on prison work published in 2010 and 2011, and a findings paper by HM Inspectorate of Prisons entitled "Life in prison: Earning and spending money" (January 2016).

Delay

38. The Judge said that the first issue to resolve was whether the claims were out of time. He said (at [55]) that, although the challenge was ostensibly to the 2018 Review Decision, given that the fixing of the £1.00 and £1.25 per hour rates was effected most recently by the 2013 DSO, the relief sought was in substance an order quashing that DSO; and, if that was right, then the challenge was five years out of date.

39. The Judge referred to and considered *R (DSD) v Parole Board* [2018] EWHC 694 (Admin), [2019] QB 285; *R (Cukurova Financial International Ltd) v HM Treasury* [2008] EWHC 2567 (Admin); and *R (TN (Vietnam)) v SSHD* [2018] EWCA Civ 2838, [2019] 1 WLR 2647. He accepted and sought to apply the distinction made by the Divisional Court in *DSD* at [167] between cases where the challenge is to a decision taken pursuant to secondary legislation, where the ground to bring the claim first arises when the individual or entity with standing to do so is affected by it, and where the challenge is to secondary legislation in the abstract.

40. The Judge concluded (at [58]) that the present proceedings fall into the second of those categories. His reasoning was as follows:

> "The application of DSO 01/2013 to each applicant did not involve a separate decision by the defendant to apply the fixed rates in relation to that applicant in any meaningful sense. An immigration detainee may participate in the regime or he may not. He is not required to. He does so voluntarily. If he does participate, the fixed rates apply, with the higher and rarely used rate applying to special projects. The challenge is therefore necessarily to the pay regime, not to any decision of the defendant in relation to an individual applicant."

41. The Judge held (at [58]) that, for those reasons, "these judicial review claims" are out of time. He said (at [59]) that the merits of the claims were relevant to the question of whether the court should consider extending the time for filing the claims and that he would give his views on the merits later in his judgment.

42. The Judge acknowledged (at [63]) that it was arguable that the 2018 Review Decision is amenable to challenge by way of judicial review but, nevertheless, did not consider (at [65]) that the wording of either the claim in the Morita proceedings or the claim in the present proceedings was such as to raise a challenge amenable to judicial review. He further said (at [65]) that, even if the 2018 Decision was amenable to judicial review, the present proceedings are out of time, having been filed on 5 October 2018.

43. The Judge referred (at [68]) to the fourth ground, which was a discrimination claim under the Human Rights Act 1998 ("the HRA"), where it was alleged that the unlawful conduct of the respondent was continuing while the appellants were subject to the allegedly discriminatory policy, and this claim was brought within the one-year time limit laid down by section 7(5)(a) of the HRA. The Judge referred to a dispute between counsel as to the significance in that context of *O'Connor v Bar Standards Board* [2017] UKSC 78, [2017] 1 WLR 4833 (SC(E)) at [39] but merely said that he did not consider that it was necessary for him to resolve that point, and would express no view on it.

Legislative Purpose

44. The Judge rejected the appellants' contention that the setting and maintaining of the flat rate of £1.00 per hour (with the exception of £1.25 per hour for special projects) was contrary to, or frustrated, the legislative purpose of the 2001 Rules because it is inconsistent with the need to respect dignity to impose restrictions on what detainees can be paid for the work beyond what is necessary for safety or security; the pay limit does not encourage the development of skills and services; the setting of a flat rate is incompatible with detainee dignity and is demeaning and exploitative; the lack of flexibility prevents IRCs from developing schemes that might assist the centre and community; and the flat rate of pay is not necessary for reasons of safety and security, as evidenced by the fact that prisons have varied rates of pay.

45. The Judge held (at [73]) that the overarching legislative purpose of section 153(1) of the 1999 Act and of the 2001 Rules is to provide for "secure but humane accommodation" of persons detained on immigration grounds. He said (at [74]) that it

is not inhumane to set a fixed rate for paid activity that a detained person is not compelled to do, and (at [75]) that it is not part of the legislative purpose of the 2001 Rules to ensure that detained persons have the opportunity to earn money to meet their basic or other needs (for example, to assist their family members), and (at [76]) that the key point is that detainees are not required to work. He said (at [78]) that, while he accepted that some detainees may feel "compelled" by their circumstances to undertake paid activity, and he had sympathy for them, he was not persuaded that the feeling or perception amounted to compulsion, properly speaking, and it was not part of the legislative purpose of the scheme governing IRCs that detained persons should be provided a means of earning an income: the paid activity regime is solely concerned with meeting "recreational and intellectual needs and the relief of boredom" (Rule 17 (1) of the 2001 Rules).

46. As to the "positive duty" on the Secretary of State under Rule 17 (2) to ensure, "wherever reasonably possible", that IRCs strive as far as possible to encourage the development of skills and of services both to the IRC and the community, the Judge said (at [84]) that this is aspirational language that applies to the entirety of Rule 17 and not merely in respect of paid activity and is far too weak to bear the weight which the appellants wished it to bear, bearing in mind that the core purpose of an IRC is to provide secure but humane accommodation.

47. For those reasons the Judge concluded (at [85]) that this ground of the claim was not arguable. The basic needs of the detainee are met by the removal centre, and the detainee is paid a weekly allowance which is independent of any paid activities they may undertake. The Judge found that, because it is a voluntary choice to undertake paid activities, a detained person's dignity is not infringed by the lower wage as they could simply choose to not take part. No part of the legislative purpose was to facilitate detainees making an income, and the payment to detainees for services rendered was in recognition of the benefit that the service conferred on the removal centre and its occupants.

Unlawful fetter on discretion

48. The Judge said (at [87]) that, given his rejection of the first ground, there was nothing substantial in this ground and that it was not arguable.

Irrationality

49. The appellants submitted that the 2018 decision to maintain (and the earlier decisions reflected in the DSOs to fix) a flat rate of £1.00 per hour, subject only to the rarely used exception of £1.25 per hour for special projects, was irrational for a variety of reasons, which the Judge set out at paragraph [88].

50. In brief, the Judge's overarching response (at [89]) was that, for the appellants to succeed, they had to show that no rational Secretary of State could have made the same decision about the rates, and that the appellants did not come close to surmounting that high hurdle.

51. Among a number of points made by the Judge on this ground, he said (at [95]) that the Pay Review Report summarised at paragraphs 10 to 16 the original rationale for the decision set out in DSO 15/2008, which was confirmed, except as to the weekly cap

on hours, by DSO 01/2013 and that, at paragraph 36 of the Pay Review Report, the feedback from removal centre operators regarding their desire for a more flexible regime was acknowledged, but the rationale for the current system was affirmed. As to the 2018 Review Decision, the Judge said (at [96]) that the Home Office Ministers were not under an obligation to give reasons for choosing Option 4 under Recommendation 2, namely maintaining the status quo, and that that rationale was clear from the Pay Review Report and was supported by the evidence of Ms Hardy.

52. The Judge said (at [98]) that this ground was not arguable.

Human rights

53. The basis of the human rights challenge was that the appellants were immigration detainees held in IRCs, which was a relevant status for the purpose of article 14 ECHR, and their rights were engaged by virtue of falling within the ambit of articles 4 and 8 ECHR and within the ambit of article 1 of Protocol 1 to the ECHR ("A1P1"). The appellants submitted that, with respect to pay for work undertaken, immigration detainees were treated less flexibly than prisoners, who were a relevant comparator group, and there was no reasonable and objective justification for this difference in treatment. The Judge held that this ground failed because there is reasonable and objective justification for the difference in treatment. He explained as follows:

> "103. … this ground in any event fails on the basis that there is a reasonable and objective justification for the difference in treatment in relation to pay for work undertaken. The purpose of the prison regime is to punish offenders and to address their offending, for example, with rehabilitative activities, training and counselling. The prison work regime is compulsory, and the prisoner pay regime is designed, against that background, to encourage and reward positive behaviour from prisoners. The purpose of the removal centre regime is to provide immigration detainees secure and humane accommodation pending their removal from the UK. The removal centre paid activity regime is voluntary, and the pay regime rewards detainees for work undertaken, but against the background that the principal purpose of the paid activity regime is to provide meaningful activity and to alleviate boredom. I note in passing that neither regime has as its purpose the provision of an income to the person undertaking the work, although that is a benefit of each regime for the relevant person.
>
> "104. Prisoners are generally paid substantially less for work undertaken, which reflects the fact that they are being punished. Prisoners are paid on a variable basis determined by various criteria, which reflects the fact that they are being rehabilitated, including being incentivised through work. Each of the prison and removal centre work regimes has a different structure, purpose and relevant background. The difference in treatment between prisoners and immigration detainees is objectively and reasonably justified. Accordingly, this ground fails."

Equality Act 2010 (section 149)

54. The Judge held (at [102]) that this ground was also not properly arguable as it did not advance matters for the appellants on its own. He observed that the Secretary of State prepared a Policy Equality Statement 2012 and again while carrying out the Pay Review said that it was rational for the Secretary of State to conclude that there were no adverse impacts from the fixed rate policy on grounds of race.

Legitimate expectation

55. The Judge held (at [104]) that this ground failed because he did not accept that the correspondence created specific legitimate expectations that were capable of forming the basis of a public law claim.

Order

56. For those reasons the Judge refused permission for the appellants to apply for judicial review.

Grounds of appeal

57. The appellants sought permission to appeal on eight grounds. Singh LJ granted permission for the following three:

    i) The Judge was wrong to treat the appellants' claims as being out of time. Alternatively, the Judge was wrong not to extend time.

    ii) The Judge was wrong to dismiss as unarguable the appellants' claim that the setting and maintaining of a flat rate of £1.00 an hour, subject to the one very limited exception, was contrary to and/frustrated the legislative purpose reflected in the 2001 Rules.

    iii) The Judge was wrong to dismiss the appellants' claim that the setting of the flat rate of £1.00 was in breach of article 14 ECHR, read with articles 4, 8 and/or A1P1, as being discriminatory against IRC detainees. The Judge erred in finding that the difference in treatment between IRC detainees and prisoners was justified.

58. On the day before the hearing of the appeal we made an order by consent staying the appeal of Mr Chinze until after determination of the appeal of the other three appellants as an anticipated receipt of damages from the respondent would make him ineligible for legal aid. Accordingly, in the remainder of this judgment, references to the appellants should be read as referring to the appellants other than Mr Chinze.

Discussion

Timeliness

59. So far as relevant to the present claims, CPR 54.5(1) provides that a claim for judicial review must be made "promptly and … in any event not later than 3 months after the grounds to make the claim first arose". The Senior Courts Act 1981 s.31(6) provides that, where there has been "undue delay" in making an application for judicial review,

the court may refuse to grant permission or relief "if it considers that the grant of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration". The expression "undue delay" in that provision is to be read as meaning a failure to act promptly or within three months: *R v Dairy Produce Quota Tribunal ex p. Caswell* [1900] 2 AC 738 at 746.

60. In order to determine when the grounds first arose it is necessary to identify what is sought to be judicially reviewed in the present case. The respondent contends, and the Judge found, that it is the 2013 DSO alone and not, in addition, the 2018 Review Decision. We respectfully do not agree. We consider that it is plain, if the claim form is read together with the Detailed Statement of Facts and Grounds, that both the 2013 DSO and the 2018 Review Decision are being challenged, with the focus being upon the latter. Paragraph 1 of the Detailed Statement of Facts and Grounds states that the decisions originally taken in the 2013 DSO "were reviewed and retaken on 3 May 2018 and applied to the claimants on various dates between August 2017 and July 2018 and continuing". Paragraph 2 states that the grounds of challenge are the same as those advanced in the Morita proceedings and that the appellants adopt the grounds in those proceedings. Paragraph 7 refers to the amendments to the Morita proceedings grounds following the 2018 Review Decision so as "to challenge the new decision, and the review which led to it", and paragraph 9 states that "[t]he Morita grounds are adopted in full by each of the present Claimants. Each of them asserts the same legal errors".

61. Although the Judge appears to have been somewhat equivocal about it, we consider that there can be no doubt that the 2018 Review Decision is one which is capable of being judicially reviewed. In relation to the adoption of the £1.00 flat rate, it involved a clear and considered policy choice between four options.

62. The next disputed issue, which it is necessary to resolve, is the legal test applicable to determine when "the grounds to make the claim" for judicial review of the 2013 DSO and the May 2018 Review Decision "first arose", in the language of CPR 54.5(1). Before us the parties are agreed, as they were before the Judge, that the correct approach is that expressed by the Divisional Court in *DSD* at [167] as follows:

> "167. … We agree with the claimants that there is a distinction between cases where the challenge is to a decision taken pursuant to secondary legislation, where the ground to bring the claim first arises when the individual or entity with standing to do so is affected by it, and where the challenge is to secondary legislation in the abstract. Cases falling into the first category include *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198 (where the point was not taken on behalf of the Secretary of State, but would have been had it possessed merit), *R v Secretary of State for the Home Department, Ex p Saleem* [2001] 1 WLR 443 and *R (T) v Chief Constable of Greater Manchester Police (Liberty intervening)* [2015] AC 49; an example of a case falling into the second category is *R (Cukurova Finance International Ltd) v HM Treasury* [2008] EWHC 2567 (Admin) ."

63. It is convenient to refer to those two categories, as specified in *DSD*, as "the person specific category" and "the abstract category". There is no binding authority, at the level of the Court of Appeal or above, approving or disapproving the distinction made between those two categories in *DSD*.

64. The Divisional Court held that the facts of *DSD* fell within the person specific category. The case concerned the direction of the Parole Board on 26 December 2017 that a prisoner should be released on licence. Two former victims of the prisoner, among others, brought proceedings for judicial review of the decision on the ground, among others, that rule 25 of the Parole Board Rules 2016 was ultra vires the enabling legislation, section 239 of the Criminal Justice Act 2003, in that the blanket ban on disclosure of the reasons for the Board's decision imposed by rule 25 abrogated the fundamental principle of, and right to, open justice for which section 239 made no express provision, and such abrogation was not necessarily implied by the express words of the section.

65. It was contended, on behalf of the Secretary of State, that the claimants were out of time to challenge rule 25. The Divisional Court held that the former victim claimants were clearly not out of time as they fell within the victim specific category and had made their claim within three months of the Board's decision on 26 December 2017.

66. Mr Blundell submitted that the present case, by contrast, falls within the abstract category and is analogous to the *Cukurova* case cited in paragraph [167] of *DSD*. In that case Cukurova Finance International Ltd and an associated company (together "Cukurova") sought permission to challenge the vires of the Financial Collateral Arrangements Regulations 2003, SI 2003 No. 3226. The 2003 Regulations, which were intended to implement the Financial Collateral Directive 2002/47 EC, were made in exercise of the power conferred by section 2(2)(b) of the European Communities Act 1972. The 2003 Regulations were made on 10 December 2003 and came into force later that month. Cukorova submitted that the Regulations were ultra vires in that they impermissibly extended the scope of the Directive beyond the confines of the powers conferred by the European Communities Act 1972 s. 2(2)(b).

67. Cukorova's interest in establishing the invalidity of the 2003 Regulations arose out of a commercial dispute in the British Virgin Islands with Alfa Telecom Turkey. In 2005 Alfa loaned Cukurova a sum of US $1.352 billion, the collateral for which was an equitable mortgage over Cukorova's shares. The equitable mortgage included a right to appropriate which depended for its validity on the validity of the 2003 Regulations. On 16 April 2007, in reliance on alleged events of default, Alfa demanded repayment and purported to appropriate the shares. In proceedings by Alfa for repayment in the BVI, on a trial of preliminary issues, the BVI court ruled that it was not open to that court to question the validity of the 2003 Regulations. Cukurova then brought judicial review proceedings in the Administrative Court of the Queen's Bench Division.

68. Moses J held that the claim was out of time. He said (at [29]) that, at the stage the 2003 Regulations came into force in December 2003, Cukurova had no possible reason to question the validity of the 2003 Regulations and no standing to do so, but, in his view, "the date when the grounds to make the claim first arose [for the purposes of CPR 54(5)] must be ascertained by reference to the nature of the challenge and not by reference to the identity or circumstances of the challenger". He said that in *R v*

Customs and Excise Commissioners, ex p. Eurotunnel [1995] CLC 392 Balcombe LJ made clear that the grounds arose when the orders came into force.

69. Moses J held (at [30]) that the grounds for challenging the vires of the 2003 Regulations arose when, as was alleged, the 2003 Regulations were unlawfully made or came into force; and, accordingly, the proceedings were neither made promptly nor in any event not later than three months after the grounds to challenge the vires to the 2003 Regulations first arose. He went on to consider whether the court should extend time pursuant to CPR 3.1, and concluded that, in all the circumstances, it should not do so. In reaching that conclusion he took the view (at [42]) that the fact that the challenge related to legislation, the validity of which had been accepted in commercial transactions for the past five years, was of considerable significance.

70. Mr Blundell said that the critical distinction between *DSD* and *Cukurova* was that, in the former, there had been an individual decision applying the relevant Parole Board Rule, which conferred standing on the former victims to bring judicial review proceedings, whereas, in *Cukurova*, there was no individual decision applying the 2003 Regulations to the claimant companies. He submitted that the present case is analogous to *Cukurova* in that there was no individual decision to apply the £1.00 flat rate to the appellants. They were paid that amount as part of a mere administrative process without any regard to their individual circumstances. We are concerned here, Mr Blundell submitted, with a regulatory scheme in the application of which no individual decisions are taken. Time, therefore, began to run, he contended, when the 2013 DSO came into force and, on our analysis of the ambit of the challenge in these proceedings, when the 2018 Review Decision was made.

71. In support of his submission Mr Blundell emphasised the importance of administrative certainty and the undesirable consequences of holding invalid an administrative practice or policy which has been applied over many years to numerous people, something which concerned Moses J in *Cukurova*. Mr Blundell relied, in particular, on a lengthy statement of Laws J in *R v Secretary of State for Trade and Industry ex p. Greenpeace* [1998] Env LR 415 at [71]-[72], including the following.

> "71. … even if Order 53, r. 4(1) is to be interpreted more conservatively, so that "the date when grounds . . . first ar[i]se" is never earlier than the date when the impugned decision is taken, *Eurotunnel* , *Gooding* , and *Adams* exemplify a common principle, whose nature is not dependent upon an appeal to the rules relating to delay. It is that a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If, after that act has been done, he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late. Mr Pleming did not seek to deny that there exists a discretion to refuse leave, or relief, in such a case whether or not it falls within the terms of Order 53, r. 4(1) or section 31(6). This is an inevitable function of the fact that the judicial review court, being primarily concerned with the maintenance of the rule of law by the imposition of objective legal standards upon the conduct of

> public bodies, has to adapt a flexible but principled approach to its own jurisdiction. Its decisions will constrain the actions of elected government, sometimes bringing potential uncertainty and added cost to good administration. And from time to time its judgments may impose heavy burdens on third parties. This is a price which often has to be paid for the rule of law to be vindicated. But because of these deep consequences which touch the public interest, the court in its discretion—whether so directed by rules of court or not—will impose a strict discipline in proceedings before it. It is marked by an insistence that applicants identify the real substance of their complaint and then act promptly, so as to ensure that the proper business of government and the reasonable interests of third parties are not overborne or unjustly prejudiced by litigation brought in circumstances where the point in question could have been exposed and adjudicated without unacceptable damage. The rule of law is not threatened, but strengthened, by such a discipline. It invokes public confidence and engages the law in the practical world. And it is administered, of course, case by case; where there is bad faith, or a real instance of Wednesbury perversity, a respondent's argument based on delay is likely to get a little shrift. But there is nothing of that here."

72. Mr Blundell's suggested approach was that, for the reasons given by Laws J, a conservative and strict approach should be taken in fixing when time first begins to run for the three-month time period for judicial review claims, which can be tempered to achieve fairness by exercise of the discretionary power of the court to extend time in an appropriate case pursuant to CPR 3.1(2)(a).

73. Mr Blundell distinguished the cases relied upon by the appellants – *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35, [2015] AC 49 and *R (TN (Vietnam)) v Secretary of State for the Home Department* [2018] EWCA Civ 2838, [2019] 1 WLR 2643 - as involving, like *DSD*, individual decisions giving rise to grounds for judicial review.

74. In *T* the claimant filed a judicial review claim on 5 August 2011 seeking declarations, among other things, that the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and the disclosure provisions of Part V of the Police Act 1997, requiring in certain circumstances the mandatory disclosure of all convictions and cautions relating to recordable offences held on the police national computer against an individual, including warnings which were spent under the Rehabilitation of Offenders Act 1974, were incompatible with the claimant's article 8 ECHR rights. The claimant, when aged 11 was issued with two warnings by the first defendant's police force. When, aged 18, he sought to enrol on a sports degree course at a university which involved contact with children, and the university required him to obtain an enhanced criminal record certificate pursuant to Part V of the 1997 Act, which revealed the warnings. No objection was taken by the defendants on the ground of timeliness. The Supreme Court held, among other things, that the disclosure of the data relating to the cautions under Part V was an interference with the claimant's

article 8 rights and the claimant was entitled to a declaration of incompatibility under section 4 of the HRA.

75. In *TN* the claimant's appeal against the Secretary of State's refusal of the claimant's asylum claim was determined and dismissed by the First-tier Tribunal under the detained fast track procedure laid down by the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005, made pursuant to section 106 of the Nationality, Immigration and Asylum Act 2002. The claimant brought a claim for judicial review, seeking declarations that the 2005 Rules were unfair, unjust and ultra vires and an order setting aside the Tribunal's decision as a nullity. The Court of Appeal affirmed the decision of the High Court judge, who allowed the claims in part, holding that the 2005 Rules were ultra vires but that decisions made under the detained fast track procedure were not automatically nullities and that an application to set them aside was therefore required in order to determine whether there had been unfairness on the facts of the particular case. No issue was taken by the respondent Secretary of State on timeliness but Singh LJ, with whose judgment the other two members of the Court of Appeal agreed, said as follows (at [94]:

> "… In theory a very strict view might be taken: that time begins to run from the date when secondary legislation is made or at least when it comes into force. However, that would be contrary to both principle and authority. It is unnecessary to go into that in detail since, at the hearing before this court, Mr Tam made it clear that the Secretary of State accepts that time for judicial review begins to run not from the date of the legislation (the 2005 Rules) but from the date when that legislation was applied in a particular case (in other words here the relevant appeal decisions in 2014). "

76. It is fair to observe that Singh LJ did not cite any authority in support of his view, and it would appear that neither *DSD* nor *T* nor *Cukurova* nor any other authority bearing on it was cited in argument.

77. We consider that none of *DSD*, *T* and *TN* support Mr Blundell's submission that the appellants fall within the abstract category because, by contrast with those cases, no individualised decision was made to apply the £1.00 flat rate to them but rather it was merely applied as part of an administrative process. On the contrary, we consider they support Mr Southey's alternative analysis that the correct principle is that the grounds for making a judicial review claim first arise when a person is affected (in the language of paragraph [167] of *DSD*) by the application of the challenged policy or practice. In each of *DSD*, *T* and *TN* the legislation under challenge was, like the £1.00 flat rate in the present case, mandatory and involved no independent consideration by anyone as to whether or not it should be applied in the particular case. The blanket ban on disclosure of the reasons for the Parole Board's decision imposed by rule 25 of the Parole Board Rules 2016 in *DSD*, the requirements of the disclosure provisions of Part V of the Police Act 1997 in *T*, and the fast track procedure laid down by the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 for the appeal in *TN*, were just as much long established and automatically applied as the £1.00 flat rate in the present case.

78. In each of those cases, as in the present case, it was only when the claimant first became affected by the measure or policy that he or she had sufficient status or standing to bring the judicial review claim. So far as the claimant was concerned, the grounds to make the claim cannot have arisen before then. As Mr Southey observed, there is in general equivalence between standing and a claimant being affected by the challenged legislation, policy or practice. Precisely when a person first becomes affected for this purpose will depend upon the facts and circumstances of each case. In the present case, the appellants were not affected by the £1.00 flat rate rule until they were detained in an IRC in which that rule applied. It was only then that they had the standing and the grounds to bring their claim; and that is when time started to run.

79. In addition to *T*, two other cases were mentioned in paragraph [167] of *DSD* as falling within the person specific category: *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198 and *R v Secretary of State for the Home Department, Ex p Saleem* [2001] 1 WLR 443. They are consistent with our analysis of that category.

80. In *Leech* the applicant was a prisoner who was engaged in and contemplating various civil actions. He applied for judicial review to quash the prison governor's power, under rule 33(3) of the Prison Rules 1964, to censor a prisoner's correspondence, in so far as it included letters between the prisoner and their legal adviser concerning legal proceedings not yet commenced, as being ultra vires section 47(1) of the Prison Act 1952. His claim succeeded before the Court of Appeal. No objection was taken as to timeliness even though his claim was not based on any particular incident when rule 33(3) was applied to his correspondence. Indeed, his evidence was that he did not know whether his correspondence was being copied and forwarded to the Home Office.

81. In *Saleem*, the applicant for judicial review was an asylum seeker who appealed to the special adjudicator from the rejection of her asylum application by the Secretary of State. She did not receive notices from the authority relating to her appeal as these had been sent to an address from which she had moved without informing the authority. The special adjudicator dismissed her appeal on 11 July 1997 without her appearing. A copy of the special adjudicator's determination was sent to her old address and her solicitors informed her that she had a right to apply for leave to appeal to the Immigration Appeal Tribunal but warned her that, in accordance with rules 13(2) and 42(1)(a) of the Asylum Appeals (Procedure) Rules 1996, her application had to be made within five working days of the deemed receipt date, 28 July 1997. On her application for judicial review of the Tribunal's decision, the Court of Appeal, affirming the decision of the judge, held, among other things, that rule 42(1)(a) was outside the rule-making power in section 22 of the Immigration Act 1971 as it went beyond regulating the exercise of the rights of appeal conferred by section 20(1) in that it might deny the chance to appeal to a party who through no fault of their own had failed to comply with the five-day rule. As in the other cases cited above, notification to the applicant in *Saleem*, in accordance with the rules, that she had to apply for leave to appeal to the Tribunal within five working days of the deemed receipt date, was well established standard practice which did not involve any conscious decision to apply rules 13(2) and 42(1)(a) with her specifically in mind.

82. Although *DSD* is the only one of the person specific category of cases cited above in which the defendant raised the issue of timeliness, *T*, *Leech* and *Saleem* were given in *DSD* at [167] as examples of cases falling within that category. Importantly, they all

show a consistent pattern over decades in which it has been assumed that the grounds to make a claim for judicial review first arise, not when there was a conscious decision to apply a particular measure to the claimant in question, but rather when the claimant first became affected by the measure and so acquired standing to make the claim. For the sake of completeness, we would observe that this is also consistent with the decision of the Divisional Court in *R. v Customs and Excise Commissioners Ex p. Eurotunnel Plc*, [1995] C.L.C. 392, when considering the standing of Eurotunnel to bring judicial review proceedings, at that "the grounds for Eurotunnel's application first arose when they were first in a position to challenge the UK orders." We do not agree, therefore, with the suggestion in the respondent's skeleton argument that references to *Eurotunnel* in the judgment of Moses J in *Cukurova* and in the judgment of Laws J in *Greenpeace* support the respondent's case on timeliness.

83. We do not consider it is necessary to express a view about the correctness or otherwise of *Cukurova*, the facts of which were unusual and arose in a purely commercial setting, with no public body involved. More obvious, and better, examples of cases which do not fall within the person specific category, are challenges in principle by activist and non-governmental organisations to legislation or policy which affects them in that the challenge falls within their objects.

84. As we have stated earlier, in advancing the submission of the Secretary of State that the person specific category applies only to a decision in an individual case and not to something which is merely part of an administrative process, Mr Blundell emphasised the detriment of delay to good public administration, in particular because of the consequent legal uncertainty arising from the ability of a claimant to undermine a long established rule, policy or practice which has been applied to many persons in the interim. In the context of the present case he emphasised that the £1.00 flat rate has been applied over many years to large numbers of detainees. It is in that context that he cited the passage in the judgment of Laws J in *Greenpeace*. Leaving aside that the rigour of what Laws J said there was qualified in an important respect in *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] UK HL 23, [2002] 1 WLR 93 at [44] ff, the fact is that Laws J was not concerned with our task of identifying a principle for distinguishing between the person specific category of cases and other cases, nor does mere resort to accepted considerations of the adverse impact of delay on good administration identify any such principle. All the cases cited in *DSD* at [167] as falling within the person specific category, as well as *DSD* itself and *TN*, were ones where there was a considerable lapse of time before the rules were challenged by judicial review and many people had been subjected to the same rules in the interim. The objection is met by the fact that the three-month time limit for judicial review applications and the one year time limit for bringing proceedings under section 7 of the HRA will in practice constrain the number of former detainees who could pursue proceedings if this ground of appeal were to succeed.

85. Mr Southey submitted that time began to run against the appellants when the £1.00 flat rate was applied to them. We consider, however, that the appellants were affected by, and had standing to challenge, the £1.00 flat rate rule, from the time they were detained in an IRC. We conclude, therefore, that GW was within the three-month time limit in bringing these judicial review proceedings. Mr Millington and Mr Badmus were late, by one month in Mr Badmus' case. As GW's case can proceed in any event, time should be extended for them pursuant to CPR 3.1(2).

86. For the sake of completeness, we would add that, had we found that the appellants' claims did not fall within the person specific category, we would nevertheless have extended time pursuant to CPR 3.1(2) for bringing the judicial review application in respect of the 2018 Review Decision. It was clear well before October 2018 that the appellants and Mr Morita were seeking to have their claims heard together.

87. Finally, on this ground of the appeal, it follows there is no issue as to whether the appellants' claim for compensation under the HRA was made in time.

Frustration or undermining of the legislative purpose

88. The appellants' starting point on this ground is that detainees in IRCs carry out extensive work, as did the appellants, the value of which has not been properly assessed or taken into account in fixing the flat rate of payment either in 2008 or subsequently or on the 2018 review. The evidence shows that a wide range of work is undertaken by detainees. Paragraph 17 of the Pay Review Report, set out in [13] above, summarises the types of paid activity available. In the case of an activity like cleaning, the evidence shows that detainees can spend literally tens of thousands of hours undertaking the work over the course of the year. In the case of Harmondsworth IRC, for example, nearly 55,000 hours of cleaning is recorded as having been undertaken by detainees during 2016. The Judge found (at [36]) that a person undertaking the activities described in paragraph 17 of the Pay Review Report outside an IRC would be unlikely to undertake such work without payment, unless it was being done for personal, family or charitable purposes.

89. Mr Southey submitted that, from the detainees' perspective, the work carried out by detainees is of real value, whether to the private operator of the IRC or the respondent, and there is no reason why that should not be reflected in what is paid to detainees. In the case of at least two IRCs, questionnaire responses provided as part of the Pay Review, leading to the Pay Review Report, indicated that the operators were receiving benefit from the work undertaken by detainees.

90. The appellants contend that a flat rate payment of £1.00, which has remained unchanged for more than ten years, is, in those circumstances, exploitative of detainees and an affront to their dignity. The Judge summarised the evidence on that issue, to which we have referred at [32]-[33] above. An important point in the evidence is that many detainees considered that they had to undertake the work, even if it was unpleasant, in order to be able to make various payments, including purchasing relatively expensive items in the shop in the IRC, making telephone calls and caring for family members. The Judge said (at [78]) that he accepted that some detainees may feel "compelled" by their circumstances to undertake paid activity. The inadequacy of the flat rate payment to meet the increasingly high cost of items in the shop is something borne out by at least one operator's questionnaire response we were shown.

91. The appellants complain that there has been no assessment at all of the value of the work being done by the detainees and so the issue was never addressed as to how the value could be measured or paid back in some way.

92. Reliance is placed by the appellants on paragraphs 6.145 and 6.146 of the 2016 Shaw Report. Mr Shaw said in paragraph 6.145 that, if it was correct that the Home Office

had no present plans to review the rates of pay, he thought that should be reconsidered. In paragraph 6.146 he said that some contractors had indicated to him that they would be willing to pay more but were restricted by current rules, and he shared their view that there should be greater flexibility to encourage innovation. Recommendation 31 of the 2016 Shaw Report was that the Home Office reconsider its approach to pay rates to the detainees in light of Mr Shaw's comments on the benefits of allowing contractors greater flexibility.

93. We were shown an operator's questionnaire response which pointed to the difficulty created by a flat payment rate of filling positions which were more intense or unpleasant than others, suggesting, Mr Southey submitted, the need for, or benefit of, a more flexible payment system. The Pay Review Report itself stated in paragraph 36 that the ability to pay additional bonuses was something that suppliers would like to see introduced.

94. An important element of the appellants' complaint in relation to this ground of appeal is their criticism of a justification for the imposition of a standard rate of pay given by Ms Hardy to the effect that distinguishing between detainees may cause resentment. The appellants maintain, as they did before the Judge, that flexible payment rates and bonuses work perfectly well in prisons, and that all that is required is consistency of policies to ensure fairness.

95. Mr Southey pointed out that the letter of 3 May 2018 from the Treasury Solicitor to the appellants' solicitors informing them that Home Office Ministers had decided to leave the rates of payment unchanged (i.e. Option 4 of Recommendation 2) contained no substantive reasoning or justification.

96. Weaving all those matters into a legal submission, Mr Southey submitted that Rule 3 of the 2001 Rules, set out in [4] above, is clear that IRCs shall not be penal, and that the intention is that detention involves the minimum restrictions on a detainee for the purposes of security and that the dignity of detainees must be respected. The appellants say that, for the reasons advanced by them and summarised above, the flat rate payment of £1.00 is exploitative and affronts their dignity.

97. Mr Southey submitted that rule 17(1), (2) and (4) are all frustrated or undermined by the matters of which they complain. He described rule 17(2) as mandatory. The appellants' contention is that it is cast in terms of positively striving for new skills and services, which is actively impeded by a flat rate. Mr Southey said that rule 17(4) anticipates a range of rates, and is inconsistent with a single flat rate.

98. We agree with the Judge that this ground is not arguable.

99. It is necessary to observe, at the outset, that the ground is not one of irrationality or the failure to take into account a material consideration or the failure to give reasons. In the absence of any clear articulation by the appellants of the legal principle underlying this ground of appeal, Mr Blundell submitted that it is a *Padfield* argument (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997). Mr Southey did not dissent from that in his oral submissions. As it is not part of the appellants' case that the 2001 Rules were outside the scope of section 153 of the 1999 Act, the criticism must be that, in fixing and subsequently re-affirming the flat payment rate of

£1.00 (or £1.25) the 2013 DSO and the 2018 Review Decision were contrary to the policy and objects of the 2001 Rules.

100. Reduced to its essentials, the ground has two limbs. The first is that a flat rate of payment of £1.00 fails to take account of the true value of the work undertaken by detainees and is, in all the circumstances, exploitative and an affront to their dignity contrary to rule 3(1) of the 2001 Rules. The second is that a flat rate of payment of £1.00 does not allow any flexibility, and hence is a bar to innovation, contrary to rule 17(1), (2) and (4). There are short answers to both limbs.

101. In relation to the criticism that no account has been taken of the value of the work undertaken by detainees, the starting point is that the work regime is entirely voluntary. Paid work is but one aspect of the activities to be made available to detainees pursuant to rule 17. Further, payment for work is in addition to the weekly allowance of £5 per week paid to all detainees.

102. Critically, as Mr Blundell emphasised, the National Minimum Wage Act 1998 s.45B, which was inserted by the Immigration, Asylum and Nationality Act 2006 s.59 (2), disqualifies detainees in IRCs from the national minimum wage. That important legislative context shows clearly that Parliament intended the paid work regime in IRCs is not to be conducted on the basis of any kind of assessment of, or compensation for, the true value of work undertaken, whether from the perspective of the detainee or that of any recipient of the benefit of the work undertaken.

103. Moreover, underlying the allegation of exploitation advanced by the appellants is the notion that another person is obtaining an unfair financial advantage. That suggestion is wholly answered by paragraph 18 of Ms Hardy's witness statement, which makes clear that, although the operator is required to offer paid activities to detainees, subject to various conditions, the operator is not relieved of its obligations if no or insufficient detainees are willing to undertake the relevant work or the quality of the work is below the standard required under the contract. The respondent, for her part, makes no financial gain of any kind from the work carried out by detainees as the operator is entitled to be paid at the contractual rate whether or not detainees undertake work and complete it to any particular standard. Nor is there any evidence that paid work increases the profits of the operators. In paragraph 6.145 of the 2016 Shaw Report Mr Shaw said that nothing he had seen supported the view that paid work was used by contractors to increase their profits. Furthermore, the questionnaires completed by the IRC operators as part of the 2018 Review suggest that the paid activity scheme is operated, by at least some of the operators, on no more than a self-funding basis.

104. There is no indication in the evidence of the appellants, or the submissions made on their behalf, what value or method of valuation the 2001 Rules require the respondent, in those circumstances, to apply to each of the numerous different types of paid work undertaken by detainees in IRCs, whether taking into account, or not taking into account, the quality of the work that may be achieved in any particular case.

105. So far as concerns the second limb of this ground of appeal - that a flat rate of payment of £1.00 does not allow any flexibility, and hence is a bar to innovation - it is impossible to interpret rules 17(1)-(4) as imposing a legal obligation on the respondent to introduce a range of rates merely because Mr Shaw and a number of

operators of IRCs believe that would be desirable. Rule 17(4) confers on the Secretary of State the discretion and right to choose whether there should be one general rate or different rates in relation to particular cases. We agree with the Judge (at [84]) that rule 17(2) cannot fairly be read as imposing a legal obligation on the Secretary of State to have more than one rate merely because that would enable greater flexibility and innovation. The introductory words – "Whenever reasonably possible" - simply cannot bear the weight of that interpretation. That is also consistent with the qualified terms of rule 17(3) that detained persons are only entitled to undertake paid activity "to the extent that the opportunity to do so is provided by the manager".

106. In any event, the comparison with the discretion in prisons to pay different rates and bonuses for work done by prisoners, advanced by the appellants both to show that flexibility can promote innovation and that the respondent is wrong to be concerned that distinguishing between detainees may cause resentment, is plainly untenable for all the reasons cogently given by the Judge (at [100]-[101]).

107. So far as concerns IRCs, there is no requirement of detainees to work at all. There is no absolute obligation to provide paid work for detainees. Paid work is only part of a range of activities required to be provided, and in fact provided, to detainees. Detainees are the subject of an express statutory exclusion from the minimum wage. Detainees receive a weekly allowance whether or not they work.

108. So far as concerns prisons, Governors set the rates of pay for their particular establishment, but, importantly, prisoners are required to work under the Prison Rules 1999, subject to a maximum of 10 hours per day. That fundamental distinction of compulsion provides the context for much lower rates of pay in prisons than in IRCs and for the different objectives of paid work in the two systems. In prisons, as stated in Prison Service Order 4460, it is to encourage and reward the constructive participation of prisoners in the regime of the establishment. In IRCs, it is to encourage and assist detained persons to make the most productive use of their time (in accordance with rule 3(1)) and the provision of opportunities to participate in activities to meet the recreational and intellectual needs of detainees and relief of boredom (in accordance with rule 17(1)). Employable but unemployed prisoners receive a minimum unemployment payment of £2.50 per week based on a five-day week if there is no suitable work available.

109. For those reasons, which partly repeat the analysis of the Judge (at [73]-[84]) and partly elaborate upon them, we agree with the conclusion of the Judge on this ground.

Article 14 ECHR

110. The essence of this claim is that the rights of the appellants under article 14 ECHR are engaged by virtue of falling within the ambit of article 4 or article 8 or A1P1 or all of them; prisoners are a relevant comparator group for detainees in IRCs, prisoners have the benefit of flexible rates of pay and bonuses, which encourage innovation, whereas detainees in IRCs do not, and the respondent has not put forward a reasonable and objective justification for that difference in treatment. The appellants contend on this appeal that the Judge was wrong to find that she had.

111. The Judge was prepared to accept "for the sake of argument", but without deciding, that the appellants rights fall within the ambit of article 4, of article 8 or A1P1 or all

of them and that prisoners are a relevant comparator group for immigration detainees. Both of those matters are in issue on this appeal.

112. There was no dispute before us as to the legal test for determining whether, for the purposes of article 14, a rightfalls within the ambit of another substantive ECHR right. Both counsel accepted the analysis of Hickinbottom LJ in the recent case of *R (Joint Council for the Welfare of Immigrants) v Secretary for the Home Department* [2020] EWCA Civ 542 at [81] ff.

113. Mr Southey also referred to *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484 at [66].

114. So far as concerns whether the appellants' rights fall within the ambit of article 4, which in its express terms concerns slavery or servitude and forced or compulsory labour, Mr Southey relied upon *R (Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] AC 543, which concerned jobseeker's allowance. He relied upon the statement in that case (at [81]) that forced labour is not fully defined and may take various forms, but exploitation is at its heart.

115. We consider it is perfectly clear that the voluntary paid work regime in IRCs falls well outside the ambit of article 4. In *Reilly* (at [83]) it was explained that, in that case, the court was concerned with a condition imposed for the payment of a claim for a state benefit; that jobseeker's allowance was a benefit designed for a person seeking work; that the purpose of the condition was directly linked to the purpose of the benefit; and that "The provision of a conditional benefit of that kind comes nowhere close to the type of exploitative conduct at which article 4 is aimed." The same can be said of the purely voluntary work scheme in IRCs. We have, in any event, rejected the contention of the appellants that the flat rate work regime is exploitative.

116. We also consider that it is perfectly clear that the voluntary paid work regime in IRCs falls well outside the ambit of A1P1. It is well established that the right to a future income stream does not count as a "possession" within the meaning of A1P1: *Breyer Group plc v Department of Energy and Climate Change* [2015] EWCA Civ 408, [2015] 1 WLR 4559 at [43]. The hope of payment for work, if offered, under a voluntary scheme does not have even the most tenuous connection to A1P1.

117. So far as concerns the ambit of article 8, Mr Southey relied upon *Sidabras v Lithuania* (2006) 42 EHRR 6. While we have reservations about the point, we are prepared for the sake of argument, like the Judge, to accept that the appellants' rights fall within the ambit of article 8.

118. We regard it as quite clear, however, that prisoners are not a relevant comparator group for the purposes of article 14 in the present case. We have set out the fundamental differences between the two groups at [106]-[108] above.

119. We also consider that the Judge was correct to find objective justification for the flat rate payment in IRCs. Again, there was no disagreement between counsel as to the legal test for justification under article 14, and they accepted the analysis of Hickinbottom LJ in *JCWI* at [112] ff. The justification was given by Ms Hardy in her witness statement as follows:

> "21. … The reasons for the imposition of standard pay rates (and the level at which they are set) are summarised in internal documents dated June 2008 and 3 July 2008 …. In short, the strategy was required because:
>
> a. Paid work was available in some, but not all, IRCs;
>
> b. Where paid work was available, there was inconsistency in pay levels, with some work being paid at 25p/hour;
>
> c. Detainees who had been provided with paid work might not be able to have paid work if transferred to another centre, which might present a risk of non-compliance with transfers;
>
> d. There was a failure to link compliance with the ability to work.
>
> 22. The decision to impose a standard rate of pay was a policy position taken for operational reasons. Variable or locally agreed rates of pay at different IRCs or within an individual IRC could favour or discriminate against detainees on an arbitrary basis depending on their place of detention. Distinguishing between detainees may also cause resentment, particularly if work at higher rates is not available, and might present a risk of non-compliance with transfers between IRCs (i.e. from an IRC with a higher rate of pay to one with a lower one) or demands to be transferred from an IRC with a lower rate of pay to one IRC with a higher rate. The strategy was intended to standardise pay rates and cap the amount of work that could be undertaken by an individual detainee, to maximise opportunities for the greatest number of detainees. The ability to work was to be linked to compliance.
>
> 23. The reasons for setting the standard pay rate at £1.00 per hour were also explained:
>
> a. The position of prisoners, who are generally paid c. 20p per hour for work, could be distinguished;
>
> b. An hourly rate of 75p was preferred but was rejected because work was already being paid at £1.00 per hour or higher, and setting the rate at this level would result in pay cuts for many detainees which would present operational risks;
>
> c. It was noted that setting the pay rate at 75p or higher would increase the costs of operating the centres."

120. As the Judge said, that explanation has been subsequently reaffirmed since 2008.

121. As Mr Southey observed, what requires to be justified under article 14 is the difference in treatment alleged. In the present case that is the lack of flexibility in the flat payment regime, and the alleged consequences for innovation in the IRCs. The attack by the appellants on the justification advanced by respondent rests solely upon what takes place in prisons. Again, for the reasons we have given, there is no relevant comparison and the difference in treatment is in any event objectively and reasonably justified so the attack plainly fails.

122. For those reasons we consider that this ground is not arguable.

Conclusion

123. For all the reasons we have given above, while we disagree with the Judge on the issue of timeliness, we conclude that he was right to refuse permission to apply for judicial review. We, therefore, dismiss this appeal.

ORDER

BEFORE the Master of the Rolls, Lord Justice Hickinbottom, and Lady Justice Simler DBE

UPON hearing Mr Southey QC for the Appellant, and Mr Blundell QC for the Respondent

AND UPON the handing down on 20 May 2020 of a judgment

IT IS ORDERED THAT:

1. The Second Appellant is to be anonymised and known only as 'GW'. Nobody is to publish, or cause to be published, the name of the Second Appellant or any other means of identifying him.
2. The appeals of the First, Second, and Fourth Appellants are dismissed.
3. The First, Second, and Fourth Appellants shall pay 70% of the Respondent's costs of the appeal, with such costs to be subject to detailed assessment if not agreed, and subject to section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
4. There shall be a detailed assessment of the First, Second, and Fourth Appellants' publicly funded costs.

5. The First, Second, and Fourth Appellants' application for permission to appeal to the Supreme Court is refused.

6. The stay of the Third Appellant's appeal is lifted.

7. The Third Appellant shall liaise with the Respondent and shall by 4pm on 4 June 2020 lodge a draft Consent Order compromising all issues between the parties. In the absence of agreement, the Third Appellant shall by that same time file and serve a written position statement, to which the Respondent shall file and serve a response in writing by 4pm on 16 June 2020, and the Court will give further directions in that appeal on the basis of those statements.

Dated **20 May 2020**