[277]). The Court rejected an argument that grant of relief would be unnecessary, given that anything which had to be taken into account could be considered when determining a DCO application, it being "incumbent on the Government to approach the decision-making process in accordance with the law at each stage" (at [275]). The Court expressly declined to quash the ANPS, but granted a declaration that it was unlawful and preventing it from having effect until a review is taken into account. Quite why the Court did not quash in these circumstances is unclear.

The most striking thing about the Court's decision is the most obvious: that it found unlawful a major aspect of Government policy, formulated over a number of years. The Supreme Court has granted permission to appeal on the sole issue of whether not taking into account the Paris Agreement was lawful, so the Court of Appeal's consideration of the relationship between international obligations and public law decision-making is unlikely to be the last word on the matter. In the meantime, the Government will need to consider carefully whether its international agreements are relevant to the decisions it must take.

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FALSE IMPRISONMENT VIS-À-VIS DEPRIVATION OF LIBERTY: SMASHING THE OSSUARY

SINCE the enactment of the Human Rights Act 1998 (HRA), the Supreme Court (and its predecessor) has repeatedly seized the opportunity to affirm the role the common law continues to play in protecting rights. The recent decision in *R. (On the application of Jalloh (formerly Jollah)) v Secretary of State for the Home Department* [2020] UKSC 4, 2 W.L.R. 418 emphatically continues this trend. The Supreme Court was asked to determine the meaning of "imprisonment" for the purposes of the tort of false imprisonment and whether it should be aligned with the concept of "deprivation of liberty" in Article 5 of the ECHR. In dismissing the appeal, the court refused to read down the protections afforded by the common law.

The case arose as a result of a curfew imposed on the claimant, Mr. Jalloh, under the Immigration Act 1971 ("1971 Act"). Following a series of convictions and several custodial sentences, Jalloh – who had previously been granted asylum – was subject to a deportation order and detained by the Secretary of State under the 1971 Act. He was released on bail and, after that bail had expired, was issued with a "Notice of Registration" stating that while he was liable to be detained under the 1971 Act, he would not be. Instead, restrictions would be imposed on him, purportedly under paragraph 2(5) of Schedule 3 to the 1971 Act. In addition to being subjected to reporting

requirements, Jalloh was electronically monitored and was required to be at his address between the hours of 11pm and 7am each day. If Jalloh failed to comply with any of the requirements, he was liable to pay a £5,000 fine and/or imprisonment of up to 6 months. The curfew was lifted following the Court of Appeal's decision in *R. (Gedi) v Secretary of State for the Home Department* [2016] EWCA Civ 409, [2016] 4 W.L.R. 93 that paragraph 2 (5) of Schedule 3 to the 1971 Act did not empower the Secretary of State to impose a curfew. A subsequent curfew imposed on the claimant under paragraph 22 of Schedule 2 to the 1971 Act was also ordered to be lifted. At trial and on appeal before the Court of Appeal, Jalloh was found to have been falsely imprisoned and was awarded £4,000 in damages. The Secretary of State appealed to the Supreme Court.

Lady Hale (with whom the rest of the bench agreed) concluded that "[t]he essence of imprisonment is being made to stay in a particular place by another person" (at [24]). Physical restraint is not imperative; compliance can be achieved by a variety of means including threats of force or legal process, as well as physical barriers. The point is that the person is "obliged to stay where he is ordered to stay whether he wants to do so or not" (at [24]). According to Lady Hale, there was no doubt that Jalloh was required to remain in a place defined by the Secretary of State between 11pm and 7am, and his compliance with the curfew was enforced, not voluntary. Jalloh was warned that breaking curfew could lead to a fine and/or imprisonment and he was aware that it could result in his being detained again under the 1971 Act. This led Lady Hale to conclude that "[t]he idea that [Jalloh] was a free agent, able to come and go as he pleased, [was] completely unreal" (at [27]). The fact that Jalloh at times ignored his curfew made no difference to his situation when he was obeying it; he was not imprisoned while he was away, but was imprisoned while he was where the defendant wanted him to be.

The alternative argument made by the Secretary of State that the concept of imprisonment should be aligned with the concept of deprivation of liberty within the meaning of Article 5 of the ECHR was swiftly dismissed by the court. The ECHR distinguishes between the restriction and the deprivation of liberty and the difference is a matter of degree, based on a multifactorial analysis (see e.g. *Guzzardi v Italy* (A/39) (1980) 3 E.H.R.R. 333, at [92]). This "approach is very different from the approach of the common law to imprisonment" (at [29]). As the domestic and Strasbourg judgments in *Austin* demonstrate, there can be imprisonment under the common law without there being a deprivation of liberty under Article 5 of the ECHR (*Austin v Comr of Police of the Metropolis* [2009] UKHL 5, 1 A.C. 564; *Austin v United Kingdom* (Application no. 39692/09) (2012) 55 E.H.R.R. 14).

On the issue of whether the common law should be aligned with Article 5, Lady Hale observed that it goes without saying that the court can develop the common law to meet the "changing needs of society" (at [33]). While such

developments may bring the common law closer to the ECHR, sometimes they will not. The appellant was not, however, asking the court to develop the common law; he was asking the court to make the common law take a "retrograde step" by curtailing the protections afforded by the tort of false imprisonment (at [33]). There was no reason for the common law to draw the distinction between the restriction and the deprivation of liberty that the Strasbourg court has adopted under Article 5 and there was "every reason for the common law to continue to protect those whom it has protected for centuries against unlawful imprisonment" (at [33]).

The Supreme Court's findings in respect of both issues are plainly correct. The court confirmed that, to count as false imprisonment, the restraint must be complete – there cannot be an alternative way out – and that a person can be imprisoned without physical force; it is sufficient that a threat, whether of force or legal process, compels the individual to stay in a place defined by the imprisoner. The judgment's significance rests in the court's emphatic refusal to curtail the protections afforded by the common law. As Lady Hale stated at the outset of the reasons, "[t]he right to physical liberty was highly prized and protected by the common law long before the United Kingdom became a party to the [ECHR]" (at [1]). The judgment is proof that the common law continues to resist becoming Lord Toulson's (in)famous ossuary (*Kennedy v Charity Commission* [2014] UKSC 20, [2015] A.C. 435, at [133]).

It is particularly notable that Lady Hale expressly left open the question of whether a deprivation of liberty under Article 5 can occur without an imprisonment arising for the purposes of the tort of false imprisonment (at [34]). There is only one known case in which a deprivation of liberty was found in circumstances where imprisonment was not. The majority House of Lords in *R. v Bournewood Community and Mental Health NHS Trust, ex parte L* [1999] 1 A.C. 458 held that a severely mentally disabled man (L) who had become agitated and was sedated and taken to hospital had not been imprisoned. L had been kept informally in hospital, rather than compulsorily, because he was compliant and showed no signs of wanting to leave. However, if he had wanted to leave, he would have been compulsorily detained. The majority considered that as L was there voluntarily (albeit sedated and not permitted to see his family lest he want to leave with them), he was not detained (or imprisoned) at that time. The fact that he would have been restrained had he tried to leave did not alter that fact. Lord Steyn, in dissent, considered that any suggestion that L was "free to go [was] a fairy tale" (p. 495). The case was decided by the House of Lords before the HRA came into force and a complaint was subsequently lodged with the European Court of Human Rights alleging a violation of Article 5. The Strasbourg court found that L *had* been deprived of his liberty (*HL v United Kingdom* (Application no. 45508/99) (2004) 40 E.H.R.R. 32).

Counsel for Jalloh suggested that *Bournewood* "might well be decided differently today" (at [23]) and the court's judgment provides some support

for that contention. If the essence of imprisonment is being made to stay in a particular place by another, that arguably applied to L's situation. His initial compliance had been secured via sedation and, had he wanted to leave the hospital, he would have been detained. To employ Lady Hale's nomenclature – which bears a striking resemblance to Lord Steyn's reasoning in *Bournewood* – "[t]he idea that [L] was a free agent, able to come and go as he pleased, is completely unreal". The fact that L was not aware of his detention is irrelevant: it is well-established that a person can be imprisoned without their being aware of it (*Meering v Grahame-White Aviation Co. Ltd.* (1919) 122 L.T. 44).

While the question of whether a deprivation of liberty can occur without imprisonment under the common law – and, relatedly, whether the "*Bournewood* saga" as Lady Hale described it would be decided differently today – has been left for another day, the Supreme Court's judgment serves as a timely reminder of the protection offered by the common law.

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A DUTY OF CARE TO BREACH MEDICAL CONFIDENTIALITY?

HUNTINGTON'S disease (HD) is a degenerative, fatal, neurological condition, caused by a genetic abnormality, with symptoms generally beginning in middle age. Anyone with the abnormality inevitably develops HD; each of their children has a 50% risk of inheriting the abnormality and thus developing it. HD is currently incurable, so a positive genetic test provides "the bleakest kind of self-knowledge: the knowledge of our destiny, not the kind of knowledge that you can do something about, but the curse of Tiresias" (M. Ridley, *Genome* (London, 1999), 64). The legal implications for clinicians, privy to such tragic knowledge, were explored in *ABC v St. George's Healthcare NHS Trust and others* [2020] EWHC 455 (QB).

The claimant's father (XX) had killed the claimant's mother and been detained at D's Springfield Psychiatric Hospital. He received care from a multidisciplinary team of D's staff led by Dr. O (consultant forensic psychiatrist), including family therapy sessions also attended by the claimant. From his symptoms, clinicians suspected that XX was suffering from HD, so referred him to the neurology department at St. George's Hospital, which saw him in June 2009 and agreed. XX declined confirmatory genetic testing, and insisted that he did not consent to his daughters being told about the HD diagnosis. Dr. O's team debated the matter and decided not to override XX's patient confidentiality (professional