decisions are nullities. In *Rwanda* Lord Carnwath suggested that the principle of issue estoppel would have replicated the result of *Draga* had the Home Secretary relied upon it. He developed his thinking, without reaching a concluded view, and one can therefore expect it to be raised in future cases. He reasoned that because the claimant had "failed" to raise the illegality of the 2004 Order in his deportation appeal it was "relatively clear" that he should have been estopped from raising it in subsequent proceedings other than prospectively (at [58]). The other justices considered it "unwise" to express even tentative views on this issue (at [28]).

Many judicial doubts have been expressed about applying issue estoppel in public law, but the more flexible concept of abuse of process, shorn of the hard edges of procedural exclusivity, continues to play a role in limiting collateral or repeat challenges to the legality of decisions. It is nonetheless hard to see that denying the claimant damages for a period of unlawful immigration detention would have been just in this case or that the claim was an abuse. Liability for false imprisonment is, after all, strict: in detaining people the state assumes the risk that the detention may later be shown to be unlawful even if this could not have been known at the time. The fact that an immigration officer acted reasonably in relying on the dismissal of an appeal, or expiry of time for an appeal, is not a factor that can be given weight because false imprisonment is insensitive to unfairness to the gaoler.

Nor is the suggestion that the claimant was to blame for not raising the vires of the 2004 Order in his deportation appeal very persuasive. No evidence was cited that he was ever aware of the possibility. And prior to the Court of Appeal's judgment in *EN (Serbia)* it was highly uncertain whether the AIT had jurisdiction to consider the vires of statutory instruments. Even in that case, the court stated that it was far more appropriate for such issues to be raised by judicial review rather than in an appeal (*EN (Serbia)*, at [87]).

Private law doctrines rarely transplant successfully into public law and such considerations show the complexities that arise in using issue estoppel principles to curb the unravelling effect of nullities. The upshot is that the Supreme Court in *Rwanda* succeeded in both clarifying and complicating the law concerning the legal effect of ultra vires decisions.

Tom Hickman

Address for Correspondence: Blackstone Chambers, Temple, London, EC4Y 9BW, UK. Email: TomHickman@blackstonechambers.com

REGULATORY CONSTRUCTION, DISCRIMINATION AND THE COMMON LAW

UNDER the common law, statutes are to be construed in conformity with constitutional principle and the rule of law. Regulations deriving from an

Act of Parliament are intra vires only to the extent that they also conform to common law principle. It should therefore not be possible for ministerial regulations, properly understood, to demand or permit unreasonable conduct on the part of public officials. Yet, this seems to be exactly what the Court of Appeal held in *Secretary of State for Work and Pensions v Johnson* [2020] EWCA Civ 778. Additionally, the court missed the opportunity to explore common law conceptions of wrongful discrimination, focusing almost exclusively on Article 14 of the European Convention on Human Rights.

This case concerned the application of the Universal Credit Regulations 2013 to claimants whose pay date fell at the end of the month. The Regulations introduced a scheme whereby a claimant's earned income is calculated for each monthly assessment period to determine what benefit they were entitled to for that period. The dispute arose because the system used to implement the Regulations failed to account for changes in recorded payment dates caused by the usual payment date falling on a weekend or bank holiday. This sometimes resulted in two monthly salary payments falling within one assessment period, leading to a dramatically reduced universal credit award, reflecting the apparently high level of income received. In the next assessment period, there will not typically be a recorded salary payment, resulting in a much higher credit award. These fluctuations in income have a particularly detrimental impact upon persons claiming universal credit, forcing them to incur additional costs such as overdraft fees or high interest on short term loans. Claimants will also lose the opportunity to receive work allowance for the assessment periods when they appear to have no income. This was challenged as unreasonable and unlawfully discriminatory.

In the Divisional Court, the Regulations were construed to include a general requirement of flexibility so as not to frustrate the purposes of the enabling Act – to encourage people to work without being penalised by the social welfare system. To that end, the Divisional Court rejected an overly rigid understanding of the Regulations, drawing on textual and common law arguments to conclude that the Regulations require payments to be based on, but not wedded to, the actual amounts received in an assessment period. Consequently, the amount of earned income to be deducted is not necessarily the amount actually received in the assessment period.

In the Court of Appeal, Rose L.J., with whom Irwin L.J. agreed, rejected this interpretation, concluding that "the provision cannot bear the meaning [the Divisional Court] gave to it without substantially undermining the scheme as Parliament intended it to operate" (at [35]). On her view, the requirement for flexibility undermined the need for predictable guidance and frustrated the intention to automate the universal credit system (at [38]–[39]). As such, the Regulations cannot be construed to require or permit flexibility in how income is assessed. Nevertheless, Rose L.J. held

that the Regulations, construed in this manner, were not ultra vires, contrary to the *Padfield* principle, because the concern here was with the combined effects of the Regulations amounting to *Wednesbury* unreasonableness, and not the exercise of a specific rule-making power (at [105]). This was so, even though the court also held that the Regulations operate "in a way which is antithetical to one of the underlying principles of the overall scheme" (at [106]).

Rose L.J. concluded *both* that the Regulations, properly construed and intra vires, permitted a rigid and inflexible scheme *and* that implementing that scheme without putting in place a flexible solution to this problem was unreasonable and unlawful. This conception of *Wednesbury* unreasonableness was quite unusual, focusing on an omission which produces an undesirable outcome rather than unlawful acts. This is made all the odder when read in conjunction with the court's rejection of the *Padfield* principle, indicating that a public official could *act* lawfully (given that they followed Regulations which were themselves lawful) but produce unlawful *effects*. To Rose L.J., it was the failure to prevent these effects which was unreasonable and so unlawful, not the Regulations themselves. Furthermore, the main justifications for a narrow reading of the Regulations were themselves undermined by these conclusions. First, she held that a requirement of flexibility conflicts with the need to automate the system, but also that a flexible solution to this problem (demanded by the common law) could be achieved *through* automation. How then would the Regulations, construed to require this flexibility, frustrate the desire for automation? Second, Rose L.J. was of the opinion that an interpretation of the Regulations which included flexibility would provide no guidance as to when a more flexible approach is needed. Yet, in holding that a failure to find a flexible solution was unreasonable, the court signalled that officials should follow intra vires Regulations which require this rigid approach but also signalled that following their intra vires regulatory obligations would itself be unlawful in some circumstances. This approach does not provide any more guidance to officials than would be the case according to a more flexible reading of the Regulations. In both instances, officials are expected to depart from a rigid reading of the Regulations: the difference here is not between clarity and unclarity, but between the executive taking the initiative to act lawfully or the court enforcing obligations where the executive has failed to do so.

It might seem that the disagreement here is trivial: either way the failure was unlawful, and the law requires flexibility. But it matters whence unlawfulness comes. In so sharply segregating proper interpretation of law from the common law principles of judicial review, the court is undermining our constitutional fundamentals by creating an artificial conflict between statutory obligation and the common law. It cannot be the case that both statute and derived Regulations permit a rigid scheme but that the common law

prohibits it. To hold as such is to presume that Parliament *does* legislate in a vacuum, unconnected to the common law which breathes life into its enactments. Accordingly, the judgment of Underhill L.J., drawing upon both irrationality and *Padfield*, is to be preferred. He resists any hard division between the grounds of review and affirms the central connection between judicial review, parliamentary intention, and the common law (at [115]). The statute, properly construed, cannot require or permit unlawfulness on the part of public officials. The Regulations must also be construed appropriately or voided as ultra vires.

Regarding discrimination, Rose L.J. held that, because the irrationality ground succeeded, the alternative ground that the Regulations discriminate contrary to Article 14 ECHR did not arise for consideration. Nevertheless, the SSWP denied that being a person paid monthly wages on a non-fixed monthly date was a valid status for consideration of discrimination. This is because the status in question was merely a comparison made by reference to the differential treatment complained of. In most statutory and international law frameworks, unlawful discrimination is determined by reference to the ground that less favourable treatment is based on: a duty-bearer treating someone less favourably because they are a woman, for example. This is not necessarily the case for the common law, where discrimination can be presented in its neutral form of less favourable treatment on the basis of some ground. Underhill L.J., invoking a more expansive use of the term "discrimination", noted that "in order to be workable any such system may have to incorporate bright-line rules and criteria which do not discriminate fully between the circumstances of different individuals" (at [113]). Used in this way, discrimination is not an inherently wrongful concept; it is simply a form of action which may or may not be justified.

These differing understandings reveal the potential for a common law conception of unlawful discrimination, embodied within the existing grounds of review. On this account, virtually all instances of governmental or administrative action discriminate; what matters is whether it is justified. Crucially, the justifiability of discrimination at common law is not tied so closely to the ground on which the act is based but to the reasonableness of the act itself.

It is no surprise then that the courts have a long history of appealing to the ordinary standards of judicial review to assess this justifiability. Thus, Regulations may be deemed unlawful "[i]f, for instance, they were found to be partial and unequal in their operation as between different classes" (*Kruse v Johnson* [1898] 2 Q.B. 91, 99 (Lord Russell)). Under the common law, differences in treatment on the part of public officials must be adequately justified if they are to be lawful, that justification determined by reference to parliamentary intention and the rule of law. Of course, this means that wrongful discrimination will be deemed to be unlawful through the ordinary processes of judicial review: a separate ground of

review is unlikely to be needed because a finding of unreasonableness necessarily entails a finding of wrongful and unlawful discrimination in exactly the manner complained of in this case.

Such a conclusion only reinforces the broader point that judicial review is best conceived harmoniously, with no sharp distinctions between the various grounds of review. Similarly, the principles of statutory and regulatory construction are not meaningfully different: the presumption of legality must necessarily obtain and hold for all aspects of administrative action. The court must interpret Regulations so as to be lawful and reasonable and it must not sharply distinguish interpretation from common law principle, for fear that we will see more decisions that threaten to artificially set the common law into conflict with legislative intention.

MICHAEL FORAN

Address for Correspondence: School of Law, University of Strathclyde, Glasgow, G1 1XQ, UK.
Email: michael.foran@strath.ac.uk

CONSENT IN RAPE: FACT, NOT LAW

WHERE a man is accused of rape, the effect of section 1(1) of the Sexual Offences Act 2003 is that a man rapes a woman if (a) he intentionally penetrates her; (b) she does not consent to the penetration; and (c) he does not reasonably believe that she consents. Where there has been violence or coercion, requirements (b) and (c) present few problems. It is otherwise when what appears from the outside to have been a normal sexual transaction is alleged to have been non-consensual. Such cases are problematical because, quite apart from the general issues of any case that involves word on word, it may be difficult to establish the extent and certainty with which the woman manifested lack of consent; and whether that lack of consent was adequately conveyed to the defendant.

No such difficulties existed in *Lawrance* [2020] EWCA Crim 971. From the exemplarily clear route to verdict that Mr. Justice Jeremy Baker provided to the jury we know exactly what they found to have passed between the victim [V] and the accused [L]. V told L that she did not wish to risk becoming pregnant, and asked him to repeat his previous assurance that he had had a vasectomy. L said that he had. That was a lie. They had intercourse without contraceptive protection, and V became pregnant. L was charged with rape. In commonsense, and in the ordinary use of language, there might seem to be only one answer to the question whether V had consented to the intercourse. V had made it clear that intercourse could only take place on condition that L had had a vasectomy, and L could not have believed otherwise. Consent that is only given on the basis of a condition that is not fulfilled is not consent at all. However, the Court of