place abroad and the standard conflict of laws approach is to apply the law where the tort occurred. Brown and Rowe JJ. noted that "Canadian courts have no legitimacy to write laws to govern matters in Eritrea, or to govern people in Eritrea" (at [259]). This is of course true but it also misses the point, since in the present case, a Canadian court would be providing a remedy where *Canadian* corporations are complicit in Eritrea's violation of norms that already bind the state as a matter of international law. Moreover, some of the norms relied on by the plaintiffs, such as the prohibition of slavery, have *erga omnes* and *jus cogens* status: that is, their violation harms the international community as a whole and all states have an obligation to ensure that they are enforced.

That serious questions need to be resolved does not negate the majority's reasoning; it simply highlights that much remains to be worked out in the approach to corporate liability now left open. Ideally this work would be undertaken by legislatures, but they have largely failed to provide effective remedies for business-related human rights abuses abroad. Some domestic courts are now seizing the reins, which may provoke lawmakers into action, or encourage governments to take the draft business and human rights treaty seriously. If that happens, then *Nevsun* will become an example of how international law can be used in domestic courts not only to obtain a remedy, but also to pressure lawmakers into protecting human rights beyond their borders.

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THE CONSEQUENCES OF NULLITIES

IN *R. (DN (Rwanda)) v Secretary of State for the Home Department* [2020] UKSC 7, [2020] A.C. 698, the Supreme Court returned to the vexed question of when ultra vires decisions can have legal effects.

The claimant, a Rwandan refugee, was imprisoned for assisting his niece to travel unlawfully to the UK. At the conclusion of his term of imprisonment in July 2007, the Home Secretary decided to deport him, concluding that he was not protected by his refugee status because the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 ("2004 Order") presumed his offence "particularly serious" and the claimant a "danger to the community" for the purposes of Article 33(2) of the Convention and Protocol relating to the Status of Refugees (1951) (Cmd 9171) and (1967) (Cmnd 3906)). The Home Secretary also detained the claimant pursuant to paragraph 2(2) of Schedule 3 to the Immigration Act 1971, which provides that where "notice

has been given" of a "decision to make a deportation order" a person may be detained.

After the claimant had exhausted his rights of appeal to the Asylum and Immigration Tribunal ("AIT"), on 31 January 2008 the Home Secretary signed a deportation order and detained the claimant under paragraph 2 (3) of Schedule 3, which provides that "[w]here a deportation order is in force" against a person he "may be detained under the authority of the Home Secretary pending his removal or departure".

Meanwhile, the vires of the 2004 Order had been raised in other cases. The claimant, who had changed solicitors, therefore sought judicial review of the deportation order and claimed damages for false imprisonment citing the unlawfulness of the 2004 Order. In *EN (Serbia)* [2009] EWCA Civ 630, [2010] Q.B. 633, the Court of Appeal held that the 2004 Order was indeed unlawful and that deportation decisions applying it were therefore also unlawful. However, in *R. (Draga)* [2012] EWCA Civ 842 the Court of Appeal ruled the Home Secretary could rely on the dismissal of an appeal or the expiry of time to appeal as a lawful basis for detention until the ruling in *EN (Serbia)* established the illegality of the 2004 Order. The Supreme Court in *Rwanda* overruled *Draga* and held that the claimant's detention had been unlawful throughout.

It is orthodox public law that there are no degrees of illegality: where a decision is unlawful for any reason it is void *ab initio* and a nullity. Nullities have no legal effect, but even an unlawful decision can *trigger* legal effects, where a separate rule of law (usually a statutory provision, but not invariably: see *Percy v Hall* [1997] Q.B. 924) has the effect that an act or decision which is premised upon the unlawful decision is valid *irrespective of the legality of the first decision*. In other words, the mere *fact* of the first decision is sufficient to trigger legal consequences. In *Wicks* [1998] A.C. 92, for example, it was held that a person could be prosecuted and convicted for the offence of breaching an enforcement notice where such a notice was formally valid and had not been set aside on appeal or quashed by judicial review.

Rwanda concerned a chain of not two but three impugned acts and decisions: the 2004 Order, the decision to deport and the claimant's detention. The question was whether the illegality of the 2004 Order travelled down this chain even though the decision to deport was subject to a statutory appeal which the claimant had invoked unsuccessfully.

Lord Kerr gave the leading judgment. His reasoning adhered rigorously to the purity of the orthodox approach. He approved comments of Lord Dyson in *R. (Lumba (Congo))* [2012] 1 A.C. 245, at [66], and of Lord Kitchin in *R. (Hemmati)* [2019] 3 W.L.R. 1156, at [49]–[50], to the effect that any species of public law error renders an executive act "ultra vires, unlawful and a nullity" (at [12], [17]–[18]). This is significant, as

Lord Carnwath's judgment in *Privacy International* [2019] UKSC 22, [2020] A.C. 491 had suggested that such orthodoxy might be out of favour.

Lord Kerr then reasoned that where a deportation order is unlawful the unlawfulness of detention founded upon it is "inevitable" (at [19]). The consequence of this reasoning – whilst not spelt out – is that the reference to a decision to make a deportation order in paragraph 2(2) of Schedule 3 must mean a lawful decision, and the reference in paragraph 2(3) to a deportation order must mean a lawful deportation order. The Court of Appeal's judgment in *Ullah* [1995] Imm. A.R. 166, which had indicated that, where notice had been given of the *fact* of a decision to make a deportation order this was sufficient to render detention under paragraph 2(2) lawful, was disproved. Notice of an unlawful deportation decision is not sufficient.

Lord Kerr then considered whether there was any other "specific rule of law" which gave legal validity to the detention of the claimant and found none. The AIT's dismissal of the claimant's appeal did not stamp the detention with legal authority. It could not confer a jurisdiction that had been exceeded. References in *Draga* to an action for unlawful detention "frustrating the statutory scheme" and to the need "to ensure finality" of legal issues could not, he held, supply the missing statutory authority for the detention (at [19]–[20], [38]).

Significantly, Lord Kerr did not ask the question that had been asked in *Draga*, following *Lumba*, whether the unlawfulness of the decision to deport *bore upon or was relevant to* the decision to detain. As Lord Kerr explained, the question was unnecessary because the decisions were inseparable: the decision to detain was founded upon and intended to facilitate the deportation (at [17]). The *Lumba* test remains of relevance, however, where there are two consecutive decisions which are not inseparably connected in this way. The unlawfulness of the first decision might nonetheless infect the second and asking whether the unlawfulness of the first decision bore upon or was relevant to the second decision is a pertinent way of tracing the existence of illegality from one decision to the other.

Following *Rwanda*, the following questions might therefore be formulated to determine whether the consequence of an unlawful decision is that a subsequent related decision is also unlawful:

(1) Where the subsequent decision or act is founded upon the unlawful decision is there a separate rule of law which renders it valid notwithstanding the unlawfulness of the first decision?
(2) If the subsequent decision or act is not founded upon the first, does the unlawfulness of the first decision nonetheless bear upon or is it relevant to the second decision such as to render it also unlawful?

Common law doctrines are sometimes deployed (and occasionally invented) to curb the inconvenience of the public law rule that all unlawful

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.

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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