and 6. This confirmation in the para. 8 context is to be applauded. Further, C will be protected by indemnity if rectification is ordered. A most welcome consequence of the decision is that it removes the risk (mentioned above) that inability to rectify against C might mean that A loses the land without any indemnity being payable.

A final question is whether the *Gold Harp* reliance on para. 8 means that the other possible means of affecting C are redundant. They may be most important if there are limits to the situations to which para. 8 applies. Two examples will be mentioned. The first is that para. 8 applies only where there is rectification. What happens if B is bound by A's claim, such that there is alteration rather than rectification against B? This might be a severe limitation on the utility of para. 8. However, it would appear on the facts of *Gold Harp* that B would have been bound by A's lease prior to rectification; para. 8 still applied.

The second example concerns the nature of C's title. In *Gold Harp*, C was a tenant. It is clear that para. 8 applies to leases and charges. But what if C has acquired B's title? It is difficult to see how para. 8 can apply where there is no rectification of B's title. Nevertheless, to distinguish between different types of third party (tenant, chargee, purchaser) appears unprincipled: why allow rectification against a tenant of a 999 year lease, but not a purchaser of the freehold?

It may be hoped that para. 8 will be interpreted so as to avoid these problems. Although *Gold Harp* almost certainly settles the position in many cases (in a welcome manner), it is realistic to expect that further litigation will be required.

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THE DEFENCE OF ILLEGALITY IN TORT LAW: BEYOND JUDICIAL REDEMPTION?

IN *Hounga v Allen* [2014] UKSC 47; [2014] 1 W.L.R. 2889, the Supreme Court unanimously upheld a claim in the statutory tort of discrimination by a woman who had been dismissed from her employment. The fact that the woman had been working in breach of immigration laws did not enliven the illegality defence. *Hounga* is one of several recent cases in which the illegality defence has been examined at the ultimate appellate level, the other decisions being *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 A.C. 1339, *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39; [2009] A.C. 1391, and *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2014] 3 W.L.R. 1257. The fact that the defence has been considered so frequently as of late at the apex level seems to confirm that the Law Commission was

wrong in its prediction, made shortly after *Gray* and *Moore Stephens* were decided, that the defence would be brought into a satisfactory state if responsibility for reforming it was left to the courts (*The Illegality Defence* (Law Com 320, 2010), at [3.37]–[3.41]). We are not alone in holding this view. Writing extra-judicially, Lord Mance and Lord Sumption have called for the Law Commission to re-examine the defence (J. Mance, "*Ex Turpi Causa* – When Latin Avoids Liability" (2014) 18 Edinburgh Law Review 175, 192; J. Sumption, "Reflections on the Law of Illegality" (2012) 20 Restitution Law Review 1, 8–12). We argue here that *Hounga* perpetuates (and possibly aggravates) the difficulties from which this area of law suffers.

The appellant in *Hounga* arrived as a child in the UK from Nigeria. The respondents had fraudulently obtained a visitor's visa for her, and the appellant was complicit in this arrangement. Although the appellant had no right to work in the UK, she commenced employment as an *au pair* for the respondents (the conditions of which were highly exploitative). The appellant was eventually dismissed whereupon she sought relief in the statutory tort of discrimination. The Employment Tribunal and Employment Appeal Tribunal found that the illegality defence was inapplicable. The Court of Appeal ([2012] EWCA Civ 609; [2012] I.R.L.R. 685) disagreed.

The appellant succeeded in the Supreme Court, with reasons being delivered by Lord Wilson (with whom Lord Kerr and Lady Hale agreed) and Lord Hughes (with whom Lord Carnwath agreed). Four points of interest emerge from Lord Wilson's reasons. First, His Lordship seemed to be attracted to the reliance test, pursuant to which the defence applies where the claimant's action invokes his or her illegal conduct. This test has usually been applied in cases in contract and equity, but Lord Wilson remarked that the test carries "maximum precedential authority" in the tort context too (at para. [30]). Secondly, Lord Wilson cast doubt on the approach propounded by Lord Hoffmann in *Gray*. In *Gray*, a negligence case, Lord Hoffmann shunned the well-known inextricable link test and suggested that the appropriate question to ask was whether the claimant had caused the damage complained of by his or her own illegal act. If the claimant had brought about his or her own damage by an illegal act, recovery would be denied. In *Hounga*, Lord Wilson was sceptical of this causal approach and suggested that it was no more likely than the inextricable link test "to secure consistency in decision-making" (at para. [36]). Thirdly, Lord Wilson concluded that the inextricable link test was unsatisfied on the facts in *Hounga*, and stated that "the bigger question is whether the … test is applicable" (at para. [41]). However, His Lordship did not seem answer that question, with the result that it is unclear whether or not he placed his decision at least partly on that test. Fourthly, Lord Wilson highlighted that public policy considerations were central to whether the defence applied. His Lordship concluded that there were no

such considerations (such as the need to deter offending or to prevent wrongful profiting) favouring the defence's operation in this case. Conversely, Lord Wilson identified two considerations that militated against its application: the risk that denying the claim might allow employers to discriminate against people such as the appellant with impunity, and the fact that the UK would be in breach of its international obligations to combat human trafficking if recovery was denied. Lord Hughes, in his brief reasons, decided the case on the inextricable link test. He concluded that "there was not a sufficiently close connection between the illegality and the tort to bar [the] claim" (at para. [59]).

In our view, the Supreme Court was correct to reject the illegality defence. Denying the claim for illegality would not have accomplished anything worthwhile. Lord Wilson convincingly showed, for example, that rejecting the claim could not possibly deter the commission of immigration offences. The difficulties that we perceive in the Court's decision lie elsewhere. We have four main concerns. First, the decision has left it unclear what test governs the defence in discrimination claims. Lord Wilson supported a test involving the balancing of policy considerations, but he also spoke with apparent approval of the reliance test and inextricable link test. What is the relationship between these tests? Are they all potentially relevant? If they are, what happens where they suggest different outcomes?

Secondly, the status of *Gray*, which had been regarded as governing the defence in negligence cases (see e.g. *Joyce v O'Brien* [2013] EWCA Civ 546; [2014] 1 W.L.R. 70), has been left unclear. Lord Wilson doubted the causal approach promoted in *Gray* but he did not state what rule should apply in negligence cases. How should *Gray* now be read? Arguably, *Hounga* has not displaced the principles established in *Gray* given that *Hounga* was not a negligence case. Conversely, Lord Wilson's remarks can plausibly be interpreted as indicating that the rules established in *Gray* should be regarded as suspect. This reading of His Lordship's reasons leaves a lacuna in the law, as they do not say what should fill the gap left by the displacement of the rules adumbrated in *Gray*.

Our third objection concerns Lord Wilson's apparent approval of the reliance test. That test is unworkable in some cases and in others it renders the outcome hostage to luck. Whether or not the claimant needs to rely on a given fact that discloses illegality on his or her part depends on whether the fact concerned is constitutive of the claimant's cause of action. If it is part of the action, the claimant, by virtue of the rule that the claimant must prove facts that show that the elements of his or her action are present, will be required to rely on it. The situation is otherwise if the fact concerned is instead a matter of defence. One difficulty with the reliance test is that courts have often not clearly indicated whether a given issue forms part of particular actions or is a defence. Hence, it is frequently impossible to know whether the claimant needs to rely on his or her illegality. The reliance

test is therefore unworkable. Another problem is that the courts do not have a coherent theory (or, indeed, any theory) as to when a particular issue forms part of the claimant's cause of action or is a defence. Frequently, issues seem to be randomly allocated as between these categories, and, thus, the outcomes produced by the reliance test would generally be a matter of luck. The difficulties with the test do not end here. Most fundamentally, no reason has ever been given for why it should matter that the claimant needs to rely on his or her own illegality. The reliance test should be condemned.

Our fourth concern with *Hounga* relates to the endorsement of the inextricable link test. It is unclear what that test actually involves. Does it entail an enquiry as to whether the claimant caused his or her own damage? Lord Wilson evidently thought that it was separate from a causal enquiry (he supported the inextricable link test and criticised the causal approach). But if the test is not a purely causal one, what does it involve? No answer to this question was given in *Hounga*. Both Lord Wilson and Lord Hughes simply stated that the link between the claimant's offence and the tort committed against her was not inextricable. A further problem with the test is that it has never been explained why it should matter that the claimant's illegality was *inextricably* linked to the damage. Why should not the test be more demanding or less demanding? Indeed, why should it matter whether there was a link at all? We are not suggesting that these crucial questions cannot be given persuasive answers, but, rather, noting that they remain unanswered.

The law concerning the illegality defence in tort is unsatisfactory. Its condition has not been helped by *Hounga*. Arguably, it has been worsened. As such, the Law Commission's prediction that the common law in this area was gradually being rendered more satisfactory has been falsified, or at least is one in which no confidence should be had. We believe that the entire corpus of the law in this area urgently needs to be re-examined *de novo* by the Law Commission. As Diplock L.J. put it in a different context, the illegality defence "has passed beyond redemption by the courts": *Slim v Daily Telegraph Ltd* [1968] 2 QB 157, 179 (CA).

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THE TORTURE EXCEPTION TO IMMUNITY FROM CIVIL SUIT

THE European Court of Human Rights' (ECtHR) judgment in *Jones and others v U.K.* (2014) 59 E.H.R.R. 1 is the latest word on a long-running