



Neutral Citation Number: [2025] EWHC 2368 (Admin)

Case No: AC-2024-LON-002960

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19/09/2025

**Before :**  
Mr Justice Dexter Dias

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**Between :**

**The KING on the Application of  
MEDICAL JUSTICE**

**Claimant**

**- and -**

**Secretary of State for the Home Department**

**Defendant**

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**Shu Shin Luh and Grace Capel** (instructed by **Bhatt Murphy**) for the **Claimant**  
**Alan Payne KC** (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 3 April 2025  
*(Judgment circulated in draft: 21 May 2025*  
*Received back: 27 May 2025)*  
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**JUDGMENT**

Remote hand-down: this judgment was handed down remotely at 10.30 am on Friday 19 September 2025 by circulation to the parties or their representatives by e-mail and release to the National Archives.

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<b>THE HON. MR JUSTICE DEXTER DIAS</b>
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Mr Justice Dexter Dias :

1. This is the judgment of the court.
2. This is an application for permission to apply for judicial review. Permission was refused on the papers by Lang J on 23 January 2025. The matter was renewed by the claimant on 29 January 2025 and came before the court again for oral renewal on 3 April 2025.
3. The claimant is Medical Justice and is represented by Ms Shu Shin Luh and Ms Grace Capel of counsel. The defendant is the Secretary of State for the Home Department and is represented by Mr Alan Payne KC. The court is grateful to all counsel for their helpful and focused submissions.
4. This is not therefore a judgment on substantive merits, but in the application for permission in which the claimant raises a matter of potential importance and public concern. It engages questions around access to justice, vulnerability, capacity and reasonable adjustments where mental health and other incapacity from mental health impairment is concerned. I have heard informed and forceful arguments in both directions. The question is whether the grounds advanced are soundly based in public law to meet the expressed concerns and are thus arguable.

**Ground 1: failure to make provision for independent advocacy or other assistance for those in immigration detention who lack capacity**

5. It is now around six years since the Court of Appeal decided *R (VC) v Secretary of State for the Home Department* [2018] EWCA Civ 57 (“*VC*”). The claim here is characterised by the defendant as a “proposed systemic claim” and a form of overreach. It is clear to me that one objection made by the defendant - that the substance of the claim as pleaded is exclusively restricted to the provision of independent advocacy - is misplaced. It is evident throughout that the claimant submits that the public law error arises from the failure to provide either independent advocacy *or* other similar or equivalent assistance to the cohort of vulnerable people in immigration detention and facilities it is concerned about.
6. That said, the claimant has not nominated any identifiable individual who has been harmed. Therefore, the claim lacks a measure of specificity and any concrete exemplar to illustrate the alleged harm. It seems to me that there is force in the assessment of Lang J that the claim amounts to a generalised challenge to the defendant’s operational and managerial judgement. Further, the core difficulty with the claimant’s approach is that this situation is complex and evolving. The filed evidence from the defendant is that a new scheme is in development and under active and ongoing consideration. There is an element of

prematurity about the claim in light of the developments that Lang J recognised the defendant is “in the course of designing”. While there is an understandable concern expressed by the claimant that this process is protracted and has not progressed with the hoped-for expedition, in sensitive and multifaceted institutional arrangements such as immigration detention, these are highly complex matters not reducible to simple expedient.

7. I judge that this iterative administrative and structural evolution presents a number of connected difficulties for the claim’s arguability. The paradoxically at once concrete but fluidly evolving situation does not clearly fall within any of the categories in *R(A) v SSHD* [2012] UKSC 37. There is to be a further review in July 2025. The statement of Ms Hardy on behalf of the defendant (deputy director of detention services) and the witness statement of Peter Ledwitch-Madsen (“PL-M”) dated 8 April 2025 (and thus subsequent to the oral hearing, but filed with permission) paint a picture of a fluid situation. The “Instruction Document” can fairly be understood as interim operational guidance (PL-M, para 8), as the defendant submits. It was circulated to case workers on 2 December 2024. I take the claimant’s point that since it states that it was “most recently updated” on that date, there may well be earlier versions that have not been placed before the court. While the claimant raises a series of criticisms of the document, it seems that there are “interim measures” as the defendant puts it, in place before the July 2025 review. This is the granular and intricate context in which to assess the application for permission.
8. I have carefully reviewed the Court of Appeal’s decision in *VC*. It is true that in *VC* the Court of Appeal found that (1) there is a power available to the Secretary of State to implement an independent advocate system by finding that section 153 of the Immigration and Asylum Act 1999 “is sufficiently wide to give the Secretary of State power to set up a system to provide mentally ill detainees with assistance in making representations”; (2) the independent advocate approach was the “obvious” adjustment or solution. However, I do not read the Court of Appeal in *VC* as either mandating the independent advocate solution or identifying it as the only solution. Indeed, the Court expressly recognised that other solutions may exist. One must be careful not to conflate the absence of a desirable or ideal policy with the existence of unlawful conditions in which that policy might be enacted or be implemented to remedy. Examined in the abstract, these are matters engaging judgment involving a series of complex policy questions it is undoubtedly the province of the Secretary of State and those duly nominated by the defendant to assess and decide: resource, system design, operational function, day-to-day (and medium- and longer-term) management, effective implementation, supervision and monitoring and – vitally, it seems to me - funding.
9. The evidence filed in the application demonstrates that the defendant is actively engaged in considering the viability of a system of independent advocacy or equivalent arrangements (pausing to note once more that the claimant seeks either). I therefore agree with Lang J that a generalised challenge to the defendant’s operational and managerial judgment is not suitable for determination in a claim for judicial review. Such matters lie classically and comfortably within the broad range of discretion of the Secretary of State, as is clear under the recognised constitutional settlement. It is difficult to discern how this application fits within *Gillick* principle that the practice or policy is not “capable of being operated” lawfully across the range of cases in a material and identifiable number of cases. The systemic review sought does not arguably fall within the necessary identified categories in *R(A)*.

10. The Detention Services Order (“DSO”) was implemented in July 2020, reissued in July 2023 and, as noted, is due for review in July 2025. Its stated purpose is

“to provide non-clinical staff in immigration removal centres (IRCs), pre-departure accommodation (PDA) and residential short-term holding facilities (RSTHFs) with instructions on how to identify individuals who may:

- lack capacity (see paragraph 14 below);
- have a disability arising from mental impairment;
- have a mental health condition.”

11. It outlines “the process to follow” where an individual may lack capacity or have a mental health condition or disability arising from mental impairment. At para 22 it states:

“22. In cases in which the individual may lack capacity in respect of a particular decision, the member of staff who has identified the possible lack of capacity should take any necessary steps to ensure that the individual has access to legal representation and that any necessary reasonable adjustments are made to accommodate this or to facilitate any daily living issues experienced by the individuals. Where appropriate, this consideration should be carried out with the support of healthcare and other members of staff.”

12. The issued interim guidance builds on this. The claimant’s criticism of the Instruction Document is that it “appears only to be directed at ‘case workers’”. However, in addition to published guidance, Ms Hardy points out at para 35 of her statement that:

“staff at all centres are also given training and support to proactively identify and act upon indicators of vulnerability at the earliest opportunity. As set out in the summary of the review into DSO 04/2020, Mental Vulnerability and Immigration Detention on 31 May 2024, the Home Office will build upon the existing training, which is provided to non-clinical members of staff, supplemented by more focus on identifying those who may lack mental capacity. The Home Office is currently researching options to recruit ‘mental capacity officers’ from the current body of operational staff, who will receive specialised training, have oversight of cases of concern and the responsibility to liaise with the healthcare provider, making a referral for independent mental capacity advocates (IMCA) support where appropriate. This is the current intention of the Home Office, subject to the outcome of further policy development work in the coming months.”

13. During the course of the oral hearing it was confirmed by the defendant that the current plan is for mental capacity officers to be trained. The lawfulness of the treatment of any individual person, or the lawfulness of the decision-making about them, is highly context- and fact-specific. I acknowledge that it is incumbent on the defendant to be proactive in its PSED duties and be “anticipatory”, as per the Statutory Code of Practice (confirmed in *VC*

at para 159). However, the conceptual problems argued for by the claimant presently lack clear and concrete focus. It may be that a relevant case would bring into vivid relief the concerns raised by the claimant about unlawfulness, but no such case is before the court.

14. To conclude on Ground 1: I concur with Lang J about two matters. First, the question is not about sufficient connection or standing, but the proper scope of public law intervention by the court by way of judicial review. Second, and overall, I also conclude that Ground 1 is not suitable for determination in a claim for judicial review and is not arguable.

### **Ground 2: irrationality**

15. The submission is that it is irrational for the defendant not to exercise her powers to make arrangements to ensure that detained people whose mental illness or disability make it difficult for them to represent their own interests without independent advocacy or assistance. Further, the claimant relies on *R (Johnson) v Secretary of State for Work and Pensions* [2020] PTSR 1872 (“*Johnson*”). There the Court of Appeal found it irrational for the SSWP not to enact a solution to remedy a particular aspect of a payment mechanism for universal credit. The claimant combines this with the decision of the Court of Appeal in *VC* where a system of independent advocacy was the obvious adjustment necessary to correct the discrimination and procedural unfairness.
16. For the purposes of this application at this stage, the court does not need to resolve whether the four factors identified by Rose LJ (as she then was) in *Johnson* at paras 93-106 are applicable only to refusal cases rather than failures to act. The claimant submits that “this is an omission case”, and that may be correct. Further, I recognise that as Rose LJ said at para 107, “the threshold for establishing irrationality is very high, but it is not insuperable”. I judge that is not arguable that there is irrationality here and the claim is better understood as a severe criticism of maladministration not illegality in a public law sense, and certainly not to the demanding irrationality threshold.

17. Ground 2 is not arguable.

### **Ground 3: section 149, Equality Act 2010 (Public Sector Equality Duty (“PSED”))**

18. The submission is that the defendant has failed to provide any evidence of due regard to the equality impact of not making any arrangements for the provision for independent advocacy to detained persons whose mental illness or disability affects their ability to participate in or challenge, decisions relevant to their detention. The claimant points to the fact that the defendant “has already been found to be in breach of the PSED in *ASK / MDA*” and that the Brook House Inquiry “spotlighted” the harmful impact of a failure to make independent advocacy available to this class of detained people.
19. It is submitted that “What little change which has been brought in – e.g. by way of introducing DSO 04/2020 – does not address the issue identified, i.e. the need for independent advocacy to remedy the discrimination and procedural unfairness suffered by mentally ill and disabled people who require assistance to participate effectively in decision-making affecting their liberty, the use of punitive measures against them in detention and their immigration entitlements.” This submission is an example of why the defendant characterises the claimant’s position as an exclusive focus on independent advocacy. As explained previously, I judge that this and other such submissions while expressly mentioning only independent advocacy do in fact include equivalent

arrangements. Nevertheless, the defendant has filed evidence a very detailed statement from Ms Hardy in her capacity as deputy director, extending to 328 pages, including attachments. She describes that

“some of the matters being pursued as part of the ongoing development programme include the arrangements for initial mental health screening; provision for those identified as vulnerable; assessments of mental capacity; and safeguarding mechanisms. Further, as set out in the defendant’s skeleton argument, the new system being developed involves “relevant individuals are identified and connected with suitably qualified and experienced solicitors and counsel who can act for those who lack mental capacity under the existing representation system in the UK.”

20. The defendant submits that the development of this new system “was and is informed directly by the judgments of the Court on the old system, including *VC*, and through the recommendations made in the Scott report and additional more recent concerns raised by those engaged in the sector.” The defendant points to practical difficulties such as the fact that an IMCA cannot be compelled to work in the IRC environment. This has relevance to the granting of a mandatory order against the SSHD to insist on such a requirement.
21. A clear difficulty for the claimant is that questions of capacity are highly issue-based (see the Mental Capacity Act 2005, for example) and vulnerability is similarly individual-based. Once more, the absence of a specific case to illustrate the alleged breach of PSED presents significant difficulty. As Lang J ruled, the claimant has failed to identify the function or decision at which the allegation is directed and not identified any individual case to highlight the impact of the concern.
22. Ground 3 is not arguable.

#### **Ground 4: *Tameside* duty**

23. The *Tameside* claim (*Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 (“*Tameside*”)) rests on whether the defendant has made sufficient enquiry necessary for an informed, public law-reasonable and rational decision. The claimant submits that the defendant failed to take reasonable steps to enquire about the needs of the cohort in question. Thus, the defendant cannot reliably or confidently speak to the size of the affected cohort, the scale or continuing impact of the discrimination and procedural unfairness caused to disabled detained people who lack the capacity to make representations or effective ones.
24. Here again there is the lack of a decision to properly attach the submission to. The existence of an identified decision under challenge is an important consideration, as made clear in *R (Plantagenet Alliance Limited) v. Secretary of State for Justice* [2014] EWHC 1662 (Admin) at paras 99-100. Indeed, in the developing situation, the defendant has not ruled out the IMCA-type system and the feasibility of different institutional arrangements is being actively evaluated.
25. Once more, I agree with Lang J. The *Tameside* argument has no real prospect of success. Ground 4 is not arguable.

**Disposal**

26. None of the grounds has a real prospect of success. Therefore, none is arguable. Therefore, permission to proceed must be refused on all four grounds.
  
27. While the court has received some submissions on costs, the parties are granted an opportunity to file short and focused (if necessary consolidating) submissions on costs in light of this decision on permission. The defendant to file any application for costs within 7 days of the date of this judgment. The claimant to respond 7 days thereafter. The defendant with liberty to reply 3 days after that.