

Charter flight deportations: the Wild West of immigration law

Maria Thomas discusses the recent charter flight deportations, calling for an end to this legally and morally dubious practice.

The recent charter flight to Jamaica received significant interest from the media and fuelled a polarised public debate. To those opposing the flight, it represented all that was wrong with a proudly hostile environment; embracing a 'deport first, ask questions later' policy. They argued it embodied a government already accused of being institutionally racist in the leaked *Windrush lessons learned review*. ¹ For those on the other side of the fence, it became the poster child for an untamed judiciary meddling in political decisions and failing to respect the best interests of the public. ²

There were a number of different legal challenges taking place on the day before the charter flight. One of these culminated in a Court of Appeal injunction on behalf of the NGO Detention Action to stop the Home Office deporting anyone detained at the Heathrow immigration detention centres. The basis of this challenge was the failure to provide working mobile phone SIM cards to detainees, which resulted in them being unable to access legal advice in the days leading up to the flight. Fifty people were scheduled to depart on the charter flight on 11 February and the injunction prevented the removal of approximately 25 people. ³ The significance of this court order is magnified by the individual cases also issued the day before the flight.

Emotions run high in deportation cases, for obvious reasons. It is a politically incendiary area of law, in which the ripple effects are profound. The Jamaican charter flight case was billed by the government as being a clear-cut case of dangerous men with no right of stay in the UK, who were being deported as a punishment for their heinous crimes. But the reality is less black and white. We



need to start by unpacking the idea that the 'Jamaica 50' – as they became collectively known – were all hardened, dangerous criminals whose cases had been fully adjudicated.

The Jamaican flight

First, it is important to understand that the statutory framework brought in with the UK Borders Act 2007 *requires* the secretary of state to make a deportation order against a foreign national who has received a prison sentence exceeding 12 months, unless certain exceptions apply (see s32(5)). There were a wide range of offences represented among those on the flight, with sentences ranging from just over 12 months to more than a decade. While some on board the flight had been convicted of serious offences such as rape and manslaughter, there were also individuals convicted of dangerous driving and other lesser offences. Several individuals had only committed a single offence and had successfully returned to their communities for months or years before being detained and served with removal directions a week before the flight. During this time, they had re-engaged with their friends and families, undertaken voluntary work and sought to improve their employability. In essence, many of those on the flight had left prison and adjusted their behaviour to that of *any* British national claiming successful rehabilitation.

The secretary of state's position remained that everyone aboard the Jamaica flight had had their case considered and adjudicated by an independent court or tribunal, and consequently that any last minute legal action was solely for the purpose of frustrating removal. While in some cases this was true, in plenty of cases it was not.

Duncan Lewis issued proceedings for 14 individuals on 10 February 2020, seeking, first, to prevent *anyone* from being forcibly removed to Jamaica pending the publication and implementation of the *Windrush lessons learned review*. Second, we argued that there was a heightened risk to anyone being removed by charter flight, as a result of the intense publicity and media scrutiny surrounding this type of deportation. The generic challenges failed, but seven of our 14 clients were taken off the flight on the basis of individual facts, either by court order or deferred by the secretary of state herself. The remaining seven benefited from the Court of Appeal order, and all 14 are now in the process of preparing their fresh claims.

Of this cohort, at least four individuals have been referred to the National Referral Mechanism (NRM) as potential victims of forced criminality. If accepted as victims of trafficking, they will have grounds for seeking to overturn their criminal convictions in an out-of-time appeal. Despite multiple indicators that these individuals were groomed by gangs as children and coerced into selling drugs in county lines networks, they have been repeatedly failed by a system ill-prepared and lacking in political will to view them as victims and treat them accordingly. There continues to be an alarming disconnect between the commitments that politicians claim to have made to all victims of trafficking and modern day slavery, and the reality felt by those without secure immigration status who find themselves in situations of forced criminality, battling the criminal justice system as well as the hostile environment.

Others scheduled to be on the flight remain fearful of criminal gangs; some have historical trafficking claims, others severe mental and physical health problems – all of which may never be properly evidenced or adjudicated. One client made five serious suicide attempts in as many days. Another was so unwell that he had to be taken to the detention centre in an ambulance. Additionally, we are now representing a number of individuals who instructed us after being deported on the charter flight, who appear to have experienced significant deficiencies in the way their cases have been argued previously and where important factors, including possible Windrush connections, have been overlooked by the secretary of state.

While none of our clients have yet had their cases substantively determined, it is clear that a large number of people scheduled to be removed on the Jamaican charter flight had unresolved, unconsidered circumstances that may ultimately result in a grant of leave to remain. Whether their removal was stayed by court order or deferred by the secretary of state herself, the number of people taken off the flight as a result of their individual circumstances serves as a timely reminder that the right to access legal advice must be protected as a fundamental right and a cornerstone of the British legal system.

Charter flights and access to justice

The secretary of state must give five working days' notice to anyone being removed on a charter flight (*Judicial reviews and injunctions*, v20.0, Home Office, 10 October 2019, page 22). This is slightly longer than the usual 72 hours required for detained persons being removed on a commercial flight. In theory, the extended notice period allows the person due to be deported an

opportunity to seek legal advice and, where applicable, challenge the removal. In a procedural sense, what separates charter flight deportations from removals on a commercial flight is that issuing a judicial review in the former is not in and of itself a guarantee that the removal will be cancelled; usually it will be necessary to obtain an injunction. Frivolous and unmeritorious last-minute applications will rarely achieve the desired outcome.

Anyone dealing with complex immigration cases will know that even five days is woefully inadequate if the firm is newly instructed. Very rarely will a client turn up with all the relevant documentation needed to effectively prepare a human rights and revocation application. The threshold to succeed in deportation cases is exceedingly high. To properly develop and argue these types of cases, one usually requires months of preparation to obtain disclosure of Home Office papers and CPS files, secure expert evidence and, not least, ensure that Legal Aid Agency funding is in place. Since the introduction of LASPO, ⁴ immigration matters – including deportation – are no longer in scope and exceptional case funding is therefore necessary. At Duncan Lewis, we routinely encounter clients who have been turned away at legal aid surgeries and find themselves unrepresented or represented by privately paid solicitors, incurring fees that they cannot afford or being represented by firms without the requisite experience of running complex deportation cases.

Charter flight deportations are not rare. The week after the Jamaican charter flight, another flight was scheduled for Switzerland. We know of at least 16 people who had their removal deferred on the basis of last-minute representations and referrals being made to the NRM as potential victims of trafficking. ⁵ One week later, another charter flight departed for Pakistan. It transpired that one of the deportees had in fact secured an order from the court preventing his removal but he nevertheless found himself en route to Pakistan. The secretary of state returned him on a flight within a few hours. ⁶ One can only imagine how absent the rule of law must have appeared to this man as he was bundled onto the plane.

Charter flights: a breach of international law?

Returning to the Jamaican charter, we had reports during the night and in the following days of clients in the Heathrow detention centres being handcuffed and bundled into prison vans, despite the Court of Appeal order preventing their removal. They had their

phones taken off them and were unable to contact their families or lawyers. They were driven through the night to an airfield near Doncaster, only to be returned to various detention centres the following day. Throughout the night and the following morning we received calls from terrified family members who were unable to contact their loved ones. This scenario – which one could compare to cattle being taken to the abattoir – illustrates the humiliation, terror and brutality involved in charter flight deportations. Add to this human suffering the burden on the British taxpayers: in the last quarter of 2019 alone, the Home Office reportedly spent £443,000 on removing 37 individuals by charter flight. ⁷ This amounts to a staggering £12,000 per person.

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The power to deport is a core legal weapon in a sovereign state’s toolbox, and no amount of campaigning or legal action will achieve an outright end to any government’s right to deport foreign national offenders, nor should this be the goal. However, what must be guaranteed is that an individual facing deportation has access to adequate legal advice; that their case is fully considered; and that if, ultimately, they *are* deported, this happens in a safe, humane and dignified way that does not create additional risks on arrival. None of these criteria apply to charter flight deportations, as illustrated by the Jamaican example above. On the contrary, deportation by charter flight is unnecessary and unjustifiable, and amounts to mass expulsion, which – for good reason – is unlawful under international law.

While we may be some way off the courts accepting the idea that charter flights breach international law, it is evident that the nature of mass deportations leads to mistakes being made: administratively, procedurally and substantively. In a time with frequent legal aid cuts, limited resources and an increasingly hostile environment, these mistakes have devastating effects on those being deported: on the individuals themselves, their families and their wider communities. We should not accept a method of deportation that reduces individuals to collateral damage in the government’s pursuit of immigration control, and must continue to work to bring an end to this cruel and dangerous practice, the effects of which are complex and long-lasting.

- 1 Steven Swinford and Oliver Wright, 'Home Office is "institutionally racist", said report into Windrush scandal', *Times*, 21 February 2020. »
- 2 Richard Ford et al, 'No 10 to examine "farce" of judicial reviews after Jamaican criminals saved from deportation', *Times*, 11 February 2020. »
- 3 We do not know how many of those 25 also had their removal stayed on the basis of their individual cases. »
- 4 Legal Aid, Sentencing and Punishment of Offenders Act 2012. »
- 5 May Bulman, 'Torture victims who endured slavery escape deportation by matter of hours after lawyers intervene', *Independent*, 20 February 2020. »
- 6 May Bulman, 'Home Office deports man despite court order ruling it illegal before flying him back to UK hours later', *Independent*, 3 March 2020. »
- 7 Diane Taylor, 'Deportation flights for 37 people cost Home Office £443,000', *Guardian*, 12 February 2020. »

About the author(s)



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