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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

**[2019] EWHC 1725 (Admin)**



No. CO/5051/2018

Royal Courts of Justice

Wednesday, 29 May 2019

Before:

SIR DUNCAN OUSELEY  
(sitting as a Judge of the High Court)

B E T W E E N :

THE QUEEN  
ON THE APPLICATION OF  
AKBAR

Applicant

- and -

SECRETARY OF STATE FOR JUSTICE

Respondent

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MR D. SQUIRES QC AND MS A. DAVIES (instructed by Daniel Guedalla Solicitors) appeared on behalf of the Applicant.

MR A. DEAKIN (instructed by Government Legal Department) appeared on behalf of the Respondent.

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**J U D G M E N T**

SIR DUNCAN OUSELEY:

- 1 Notwithstanding the excellence of Mr Deakin's submissions, I have concluded that this case is arguable. How it will fare on full argument is a very different matter, but I am satisfied that the threshold is passed.
- 2 Very briefly, the claimant is a convicted terrorist whose life imprisonment sentence carried a tariff of seventeen and a half years, which expires on 29 September 2021. He would, if an ordinary life prisoner, be considered for transfer from Category C, where he is, to Category D in September 2018. But, by virtue of Prison Rule 7(1A), the claimant cannot be referred to the Parole Board for assessment for suitability for Category D open conditions.
- 3 This was a rule introduced in 2014 and it applies to him because he is an Italian National, so he is a foreign national prisoner. He does not contest his liability to be deported and his appeal rights, which he never exercised, are exhausted. Accordingly, Rule 7(1A) unquestionably applies to him. He contends that this discriminates against him contrary to Art.14 of the European Convention on Human Rights read with Art(s).5 and 8. He also contends that it is an irrational rule.
- 4 The first issue is as to the application of Art.14 with Art.5. It is not contested but that his position comes within the ambit of Art.8. It is not necessary to go into all the developing jurisprudence of Art.14 and "other status", which is what the claimant relies on. I am satisfied that it is arguable that liability to deportation is a status, and liability to deportation and being appeal rights exhausted is an arguable other status as well. It may turn out not to be. It is not an innate characteristic but does not have to be. It is arguably a personal characteristic and, although its legal significance might, but not necessarily, derive from this rule, the characteristics themselves do not derive from the rule; they derive externally to the rule and affect his legal position regardless of the rule. He is to be deported when he becomes available for deportation. Accordingly, I do not accept Mr Deakin's submission that this claimant does not have another status.
- 5 It is not contended that the process whereby he is excluded from the Parole Board process involves a substantive breach of Art.5 itself. Mr Squires, for the claimant, contends however, that it comes within the ambit of Art.5 which is all that is necessary for the purposes of establishing the potential for a link to Art.14. The question is whether the situation is sufficiently related to an infringement of the core values protected by a substantive right.
- 6 Mr Deakin referred me to *Queen on the application of Ryder v The Lord Chancellor* [2015] EWHC 1857 (Admin) in which Davies LJ, dealing with the lack of legal aid for the purposes of representation for a parole board hearing, commented in terms which are undoubtedly supportive of Mr Deakin's submission about the ambit of Art.5. However, I am not persuaded that the force of what Davies LJ said, in the context he was dealing with, resolves beyond sensible argument, the Art.5 issue in relation to this case, with the effect which that has on the progression to open conditions and the way in which the risk assessment, or the absence of risk assessment, may affect post-tariff expiry release.
- 7 Accordingly, I have come to the view that it is arguable that the claimant is possessed of another status, as an appeal rights exhausted foreign national prisoner with a life sentence, and that is linked adequately to Arts.5 and 8.
- 8 The position of a foreign national prisoner, under the regime where there is no referral to the Parole Board for the consideration of transfer to Category D open conditions, appears to be this: at tariff expiry, the Secretary of State, through the public protection casework section, considers whether the risk is such that the individual can be removed from the UK without more ado. In the event that the casework section has to consider that - and he is not excluded

by the provisions of the fourth bullet point of para.2.3 - he would be released without having passed through open conditions. This is not something which is unheard of, as *Ryder* makes clear, and indeed there are provisions for certain categories of prisoner to be released having gone through the different progression regime.

- 9 I do note however that, as the justification for preventing those in the claimant's position progressing to open conditions includes the fact that they would not resettle in the United Kingdom, because they would resettle abroad, the Secretary of State is required to consider the risk that such prisoners might present both in the UK and abroad. Clearly this recognises there is a degree of risk if someone convicted of serious offences is released directly.
- 10 It follows that there are some foreign national prisoners being deported immediately - and this will be particularly so with international terrorism - where testing and preparing for resettlement somewhere in open conditions is a factor that it might be thought necessary to consider. Indeed the Secretary of State will himself be doing that. If he decides that the individual is not safe for release abroad, the individual will then go through a Parole Board process to decide when it is safe for him to be released.
- 11 Again, it is odd that the Parole Board is invoked where the individual is not thought safe for release by the Secretary of State under the current regime, yet it is thought wrong for the Board to be involved in the earlier stage of deciding whether somebody should progress to open conditions.
- 12 I turn to the next question, which is whether there is discrimination. Mr Deakin submits that there is a difference, which is that those who are appeal right exhausted will be removed and those who are not appeal right exhausted might not be. But that, to my mind, becomes very close to an issue of justification. Essentially, Mr Deakin relies upon the terms of the policy that, because an individual is not to be resettled within the UK, there is no need to run the greater risk of their absconding from open conditions, because the purpose of their being transferred to open conditions cannot be fulfilled.
- 13 That is arguably a rather narrow view to take of the function of the transfer to open conditions, one of which is to test risk reduction, which would otherwise never be tested at all, the other is the question of the offering of experience outside an institutionalised environment to a prisoner, which may be of value in assessing their risk as well as controlling it. For certain categories of offenders, of which this claimant might be one, experience of open conditions and risk testing is something about which the foreign territory to which he is to be deported might express some relief. Accordingly, I think there is an argument that the policy itself does not grapple with the issues arising with transfer to open conditions.
- 14 The second aspect concerns alternative means of release. Mr Deakin points to the removal directly from closed conditions for foreigners under the TERS scheme to which I have already adverted. That has the problems, as I have indicated, that the Secretary of State looks in the operation of that policy to risk abroad and, if he is not satisfied about the risk, there will be a Parole Board hearing, seemingly without there being any transfer to open conditions.
- 15 He also referred to the progression regimes. He says they are, in principle, available although this category of person does not seem to be very high up on the list of those to whom those regimes are directed, receiving, as they do, not a single mention. But it may be that the progression regimes are in fact available to them in this case if the claimant moves prison.
- 16 But it remains the case that the normal routine available to foreign national prisoners who are not appeal rights exhausted is not available to those in the position of this claimant.

Fundamentally however, and in relation to rationality, there is an argument which also goes to the proportionality of justification, about whether a blanket regime of the sort here is necessary or justified, and whether a regime, reflecting differences between those who are to be resettled abroad and those who are to remain in the UK, requires there to be an absolute refusal to permit them to pass through the Parole Board with the prospect of open conditions at the end of it.

- 17 I am satisfied for those reasons that there is an arguable case, I emphasise that, and Mr Deakin's arguments may prevail. But the case merits fuller argument.
- 18 In those circumstances, the costs issue falls away, but I wish to say something about it. Without being unduly rigid and being, generally, a supporter of the observance of procedural rules and requirements for orderly litigation, I accept there is no rule that requires costs to be sought: there is guidance. The Court of Appeal decision in *Ewing* is guidance; the content of the Administrative Court Guide is guidance. It is sound guidance. Failure to comply with the guidance does not preclude an application for costs being made, but a court may well decide that the guidance requires observance at least in substance.
- 19 Here, I would not regard the fact that the summary grounds of defence contain the application for costs, as opposed to the acknowledgement of service, itself as being a reason for refusing costs. It seems to me that that would be a triumph of form over substance. But I do think that there is importance in not just claiming a bland sum. The sum claimed was not dreamt up by those instructing Mr Deakin. There was, at a simple level, a basis for it: Solicitor X at Y pounds an hour for ten hours or whatever it may be. It is not difficult to put that in and it does at least mean that the court can see at a very simple level whether there is an over claim for costs. It also gives the claimant an opportunity to know whether it is worth invoking the costs issue procedure, even if there is no renewal.
- 20 I spent a good deal of time when I was lead judge trying to simplify and reduce the amount of time wasted by judges dealing with costs applications. It is not a difficult thing to do, to put in the hours, the rate, the level of the person claimed for. Whether I would have made an order, I shall leave unsaid.
- 21 I wonder whether I could ask the GLD just to take note. Although the claim for costs is better made in the acknowledgement of service, if it is in an accompanying contemporaneous document, that does not matter greatly; I do not think the Court of Appeal really was fussed about exactly where it was. However, I do think some short explanation of the amount claimed is necessary. Thank you very much.
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**CERTIFICATE**

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This transcript has been approved by the Judge.