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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2020] EWHC 2118 (Admin)



No. CO/2263/2020

Royal Courts of Justice

Wednesday, 15 July 2020

Before:

MR JUSTICE HOLMAN

B E T W E E N :

THE QUEEN ON THE APPLICATION OF
SW

Claimant

- and -

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Defendant

MISS A. PATYNA (instructed by Duncan Lewis Solicitors) appeared on behalf of the claimant.

MR S. MURRAY (instructed by the Government Legal Department) appeared on behalf of the defendant.

J U D G M E N T
(As approved by the judge)

MR JUSTICE HOLMAN:

- 1 The underlying proceedings are currently a claim for judicial review, which is at its very early stages and permission to apply has not yet been considered. The application before me today is an interim application for orders to the effect that the Secretary of State releases the claimant from immigration detention and provides accommodation for him pursuant to paragraph 9 of Schedule 10 to the Immigration Act 2016.
- 2 By an order made on consideration of the papers on 2 July 2020, Henshaw J directed that that application be listed for an urgent oral hearing. I mention that the hearing today has been a fully public hearing in open court here at the Royal Courts of Justice, with counsel for both parties and also the solicitor for the claimant attending. In other words, it has been a fully normal, attended in-court hearing with no “remote” element.
- 3 The essential factual background is that the claimant is now aged thirty-six. He entered the United Kingdom on 2008, claiming to be a refugee from Eritrea. He was later granted refugee status by the Secretary of State for the Home Department. Between 2011 and 2019, he committed not less than eighty-eight offences in respect of which he has fifty-seven convictions. The offences include damage to property, theft, assault, and the possession of illegal drugs.
- 4 On 28 November 2019 he was further convicted of a sexual assault. No one present in the courtroom today is clear as to the facts and circumstances of that assault. He was, however, sentenced to five months and five days of imprisonment. The effect of that was that he was released on licence from the actual custodial term of his sentence on 19 January 2020, which is now almost exactly six months ago.

- 5 The Secretary of State has notified the claimant that he is liable to deportation as a result of that offending, although no decision actually to deport him has yet been taken.
- 6 Immediately upon the claimant's release from the custodial term of his sentence, the Secretary of State detained him in the exercise of immigration powers. For a relatively short period, he continued to be detained at HMP Wandsworth but, for many months now, he has been detained, first at Holmbrook IRC and then at Harmondsworth IRC.
- 7 It cannot realistically be maintained by the Secretary of State that she can continue lawfully to detain this claimant. Realistically, there is no prospect in the near or foreseeable future of his removal, for at least one or both of the following reasons. First, before she can remove the claimant the Secretary of State would have to revoke his refugee status. There is evidence to the effect that the process of deciding whether or not to do that takes an appreciable period of time, which may even be measured in years and certainly not in weeks. Second, there is evidence that the number of removals to Eritrea, from which the claimant came, are vanishingly small. It is said that only about three people have been removed to Eritrea in the last ten years or so. Further, there is evidence that currently there are simply no flights between this country and Eritrea.
- 8 So, on application of the principles in *Hardial Singh*, the Secretary of State cannot continue lawfully to detain this claimant. Indeed, it is clear that that was recognised by officials on her behalf as long ago as January, and there may be a lively debate when these proceedings are transferred to the county court as to the date when unlawful detention began.
- 9 It is also accepted by the Secretary of State that she has both the power, and a consequent duty, under paragraph 9 of Schedule 10 to the Immigration Act 2016, to provide appropriate

accommodation for this claimant. Here there are two areas of practical difficulty which may, indeed, pull in opposite directions. There is evidence, and it is accepted by the Secretary of State, that this claimant suffers from certain respiratory conditions, which it is not necessary further to elaborate in a public judgment, which have the effect that he is at considerably enhanced or elevated risk if he were to contract the still prevalent Covid-19 virus. This makes the need for his release from the IRC especially pressing, but it may also impose some practical restrictions or limitations on where he may now be accommodated. Any accommodation must pay due regard to his respiratory condition and must protect him, so far as is possible and practicable, from the risk of exposure to Covid-19.

10 The other area of complication is that, although the licence period under the claimant's sentence of imprisonment has now expired, he remains subject to supervision by his Probation Offender Manager until January 2021. One consequence or condition of that supervision is that the claimant must live at an address and in premises that are approved by his Offender Manager. So, as well as a general quest for accommodation for the claimant, the defendant will have to obtain accommodation which is capable of being approved by, and is in fact approved by, the claimant's Offender Manager.

11 All these facts and circumstances have been known to the Secretary of State for several months now. Further, as long ago as 22 May 2020, now nearly eight weeks ago, a judge of the First Tier Tribunal made an order for bail "in principle", subject to the accommodation sourced by the Secretary of State being approved by the Probation Service. It is accepted on behalf of the claimant that, in view of his offending history, he could not be accommodated in hotel or bed and breakfast accommodation with others; and accepted, on behalf of the Secretary of State, that realistically he requires to be accommodated in sole occupancy accommodation, such as a self-contained bedsit with its own kitchen and bathroom and washing facilities.

12 There is material within the documents as to the extent to which the Secretary of State has so far tried to find such accommodation for the claimant. It is true that a few weeks ago she referred his case, along with a long list of others, to Serco, as providers of accommodation under paragraph 9 of Schedule 10. For some reason which is obscure, her suggestion at that time was that it should be accommodation “in the north-west”. In fact, the previous connections of this claimant are in South London, and it appears to be common ground between both counsel today that he may be accommodated anywhere throughout England and Wales, and there is no requirement for accommodation in any particular area.

13 It does seem to me, with respect to the Secretary of State, that she and her officials have not so far put any real case-specific urgency into finding accommodation for this claimant.

14 Today, Mr Simon Murray has argued a case on behalf of the Secretary of State with both cogency and valour. His fundamental point is that at this interim stage the court should not be making any order at all for the release of the claimant from detention, or for the provision of accommodation for him. Mr Murray submits that that would be tantamount to granting, at this very early interim hearing, before the Secretary of State has even filed her acknowledgement of service and summary grounds of defence, the substantive relief sought in this judicial review.

15 I do not accept that argument. Part of the substantive claim, and no doubt the most urgent part, is release from detention. However, the balance of the claim is also significant, namely the claim for damages for unlawful detention, as to which I say nothing substantively at all today. Mr Murray suggests that it is only very rarely that this court does make interim orders for release from detention. I can only say that that is not my personal experience. In my experience, it frequently happens that, either on paper or after a hearing such as this, an

order is made for the release from detention and/or for the provision of accommodation, notwithstanding that those remedies are key remedies amongst those sought in the underlying proceedings. So, with respect to Mr Murray, I am not in the least deterred from making an order for release today, if that is otherwise justified and required on the basis of the balance of convenience.

16 It seems to me that this claimant has now been detained for far too long since the point at which it was crystal clear that he could not be removed. Further, it is particularly pressing in his case that he now be released from detention in view of the heightened risk to him of exposure to Covid-19. It may be that the Secretary of State must now look beyond Serco to other providers, or even, on a case-specific basis, simply go out into the community, anywhere in England and Wales, and rent some appropriate accommodation in which this claimant can now live. Mr Murray suggested that looking beyond Serco, or any other approved providers, might raise all kinds of so-called “public procurement” issues. I am afraid that does not weigh with me. If the fact of the matter is that this claimant has now been detained far longer than he should be, and in circumstances of personal risk to him due to his heightened risk from Covid-19, and if, as she accepts, the Secretary of State is under a power and duty to accommodate him under paragraph 9 of Schedule 10 to the 2016 Act, then considerations of “public procurement” cannot stand in the way of discharge of those duties.

17 I do nevertheless accept that there are the particular features that I have already mentioned, which will require to be considered before specific accommodation is finally identified and decided upon, and, in particular, that there will have to be liaison with the claimant’s Offender Manager so as to identify accommodation that that Offender Manager will approve pursuant to the supervision requirements.

18 For those reasons, I intend to recite in the order, which I will make, that it is noted that “one of the circumstances of this case is that pursuant to his post-licence supervision the claimant is required to live at accommodation approved by his Offender Manager.” Having noted that that is one of the circumstances of this case, I propose, for the reasons I have given, to order that the defendant must release the claimant from immigration detention to self-contained accommodation, appropriate to the circumstances of this claimant and this case, to be provided pursuant to the defendant’s powers and duties under paragraph 9 of Schedule 10 to the 2016 Act.

19 The next question is the cut-off date by which the defendant must do that. My attention has been drawn to several recent decided authorities of this court, in which, in similar but not identical circumstances, judges have made similar orders at this interim stage of proceedings for judicial review. Those authorities include the decision of Fordham J on 8 June 2020 in the case of *R (Merca) v Secretary of State for the Home Department* [2020] EWHC 1479 (Admin). There are points of similarity, and also points of difference, between that case and the present case. Fordham J required the Secretary of State to provide accommodation within seven days. That was also the outcome in certain other authorities which have been drawn to my attention. So, on behalf of this claimant, Miss Agata Patyna understandably urges me also to fix a time limit of seven days from today.

20 It may be that I am simply a softer touch as a judge. It may be that I am personally always particularly sensitive to the real practical difficulties that the Secretary of State, or other public bodies, do face in cases concerning the provision of scarce accommodation. But in any event, any case such as this has to be decided ultimately on its own facts and particular circumstances. In view of the need in this case for approval by the Offender Manager, I propose to allow to the Secretary of State an absolute outer limit of fourteen days in which to release the claimant and provide the accommodation, namely by 29 July 2020.

21 Consistent with the other authorities that have been drawn to my attention, I will add in this order, which is made on an interim basis, a liberty to the Secretary of State to apply to vary or discharge it. However, I wish to stress very strongly and very clearly indeed, that it is only in the most extreme of circumstances that I personally can envisage any such application now being successful. Frankly, this claimant has now been detained for far too long. The search for accommodation has been insufficiently urgent. I am now giving to the Secretary of State double the period that most judges appear to have given in situations of this kind. In my view, it would require the Secretary of State effectively to demonstrate the impossibility of finding any accommodation at all before she could succeed under the liberty to apply.

22 So, for those reasons, that is the substantive relief which I grant on the present application.

23 In advance of the hearing, Miss Patyna indicated that she would seek permission to amend her grounds for applying for judicial review. That of itself is not opposed on behalf of the Secretary of State, and I am happy to grant it. But in my view, now that there is an order for the release of the claimant from detention and the provision of accommodation pursuant to paragraph 9 of Schedule 10, which I confidently expect the Secretary of State to obey, this case should now be transferred from the Administrative Court to the county court. Miss Patyna suggested that it still contains within it factors of a public law character. That may be so, but that is no reason why it cannot be fairly and fully resolved in the county court. Once he has been released, the only remaining claim of the claimant can be a claim for damages, and it is in the county court that that claim should now be resolved if it cannot be settled by agreement, as claims of this kind usually are.

24 So, despite the resistance of Miss Patyna, I propose to order, as part of my order today, that pursuant to CPR 54.20 this claim is now transferred to the county court, where it should now proceed as a civil claim for damages for unlawful detention; and permission to apply for judicial review, as such, is refused. However, the order will make clear that that is all subject to the proviso that the claimant is indeed released from detention, pursuant to my order today, and the refusal of permission and the transfer to the county court will only take effect forthwith upon that release.

25 There has been a lively debate today as to the extent, if any, to which the Secretary of State should be required at this juncture in these proceedings to provide further documents. I do not intend further to give reasons in this judgment as to that, since my reasons are apparent, if ever it were necessary to refer to it, from the argument this morning. So, to the extent now provided for in paragraph 3, the Secretary of State must, by 26 August 2020, provide or disclose to the claimant the matters there set out.

26 With the agreement of the Secretary of State, I give permission to the claimant to amend his claim form and statement of facts, which will now stand as his particulars of claim in the county court. The amended pleadings must be served by 23 September 2020 to enable the claimant's legal team to consider and take account of the further material to be supplied by the Secretary of State. The time for the defendant to file an acknowledgement of service and a defence in the county court will run, according to the rules, from the date of service of the claimant's amended pleadings.

27 Mr Murray, with characteristic realism, has not felt able to resist an order that the Secretary of State pay the claimant's costs of and occasioned by the application for interim relief and of the claim for judicial review up to and including today. Obviously the costs hereafter will fall for consideration within the county court proceedings.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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