



Neutral Citation Number: [2020] EWHC 950 (Admin)

Case No: CO/1363/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2020

Before :

MR JUSTICE CHAMBERLAIN

Between :

The Queen
on the application of
Samson Bello

Claimant

- and -

The Secretary of State for the Home Department

Defendant

Tim Buley QC (instructed by Bindmans Solicitors) for the Claimant
Andrew Byass (instructed by Government Legal Department) for the Defendant

Hearing dates: 17 April 2020

Approved Judgment

Mr Justice Chamberlain:

Introduction

- 1 The Claimant, Samson Bello, is a national of Nigeria. He was born on 21 January 1986 and came to the UK on 10 February 2000. He spent the rest of his childhood in the UK. Mr Bello developed serious mental health problems and now has a diagnosis of schizophrenia. On 12 June 2009, following a conviction for attempted rape and kidnap, he was made subject to a hospital order with restrictions under ss. 37 and 41 of the Mental Health Act 1983 (“MHA”). The sentencing judge said that, if a disposal under the MHA had not been appropriate, the offences would have justified a life sentence.
- 2 In 2015, the Secretary of State gave notice of intention to deport Mr Bello. His appeals against that notice were dismissed by the First-tier and Upper Tribunals in 2016. Challenges by way of judicial review were dismissed in 2017 and 2018. Mr Bello remained in hospital pursuant to the hospital order until June 2018. He was then conditionally discharged to a hostel in the community, with support provided by a charity called Forward Support. According to Forward Support, the support included a range of risk minimising interventions, including a safe group-living therapeutic environment, supervision, an agreed curfew, staff to ensure that he received his antipsychotic medication and a person-centred support plan with a view to maintaining the stability of his mental health. Mr Bello started a voluntary job at Dalston Market, visited his mother daily to help her with chores and attended church and the local migrant centre. Given his index offence, he received visits from Hackney Police, but they did not report any concerns.
- 3 On 13 December 2019, Mr Bello was detained pending removal at Brook House Immigration Removal Centre, Gatwick. Removal directions were set, first for 17 December 2019 and then for 23 December 2019. Both of these were cancelled, the first because of lack of resources, the second because the required notice had not been given. Further removal directions were set for 1 February 2020, but these were cancelled, again because the required notice had not been given. Removal directions were then set for 14 March 2020, but these were cancelled, again because of lack of resources. Finally, removal directions were set for 5 April. These too were cancelled, this time because air travel to Nigeria had by now been suspended due to the COVID-19 emergency. Applications for bail were refused on 3 and 13 January and again on 16 March 2020.
- 4 In addition to his mental health difficulties, Mr Bello suffers from a number of physical health conditions, including type-1 diabetes, asthma and sleep apnoea. On 27 March 2020, Mr Bello received a “shielding letter” from G4S, the company that runs Brook House. This indicated that the healthcare team had identified him as someone at high risk of severe illness if he were to catch COVID-19. The letter gave the following advice:
 - “1. You are strongly advised to stay within your cell and avoid any face-to-face contact for a period of at least 12 weeks from the day you receive this letter.
 2. Strictly avoid contact with someone who is displaying symptoms of coronavirus. These symptoms include high temperature, and/or a new continuous cough.
 3. Do not attend any gatherings.

4. Do not attend work, activities or the gym.
5. Fresh air/exercise will be arranged by the officers as the regime allows.”

- 5 On 31 March 2020, Mr Bello’s solicitors, Bindmans, sent a pre-action letter. They pointed out that Mr Bello was not being appropriately shielded. A number of other detainees regularly stood outside his room smoking. He was required to use shared bathroom facilities in common with 45 other detainees. He was required to collect meals from communal areas. Mr Bello’s solicitors sought his release from detention on the basis, *inter alia*, that he posed a level 3 risk in terms of the Secretary of State’s Adults At Risk in Immigration Detention (“AAR”) Policy, given his mental and physical health conditions.
- 6 On 3 April 2020, the Secretary of State reviewed Mr Bello’s detention. The reviewing officer said this:

“Mr Bello, who has mental health issues, has now been detained for 4 months which is much longer than envisaged due to the cancellations of RD’s on several occasions.”

The authorising officer said this:

“I have reviewed the recommendation that detention is maintained in this case and based on the current information, I agree that this remains justified and appropriate. Mr Bello committed serious sex offences and the JSR outlines that there were 3 victims. He has been under a hospital order as he has mental health condition. He is assessed by his RO to present a low risk of harm and re-offending, he presents a high risk of absconding.

He is an AAR at level 2. There have been 3 attempts for RDs to be set the most recent had to be cancelled in light of flight disruption due to COVID 19. RDs to be arranged as soon as we are able to do so however the CO should continue to monitor his health in detention and availability of flight.”

- 7 On 7 April 2020, all detainees at Brook House received a letter from Mr Phil Wragg, Director of the Gatwick Immigration Removal Centres. The letter informed them that a detainee had tested positive for COVID-19. The detainee had been on a different wing from Mr Bello.

The claim

8 This claim was issued on 9 April 2020, challenging Mr Bello’s past and continuing detention. There were three grounds.

9 First, detention was said to be in breach of the second and third *Hardial Singh* principles (*R v Governor of Durham Prison ex p. Hardial Singh* [1984] 1 WLR 704). These have been restated as requiring that: (ii) the deportee may only be detained for a period that is reasonable in the circumstances; and (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention”: see *R (I) v SSHD* [2003] INLR 196 (Dyson LJ), approved in *R (Lumba) v SSHD* [2012] AC 245, [22] (Lord Dyson). Reliance was placed on Chapter 55 of the Secretary of State’s Enforcement Instructions and Guidance (“EIG”). This provides at §55.3.2.4 as follows, in relation to criminal casework cases:

“In all cases, caseworkers should consider on an individual basis whether removal is imminent. If removal is imminent, then detention or continued detention will usually be appropriate. As a guide, and for these purposes only, removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks.

Cases where removal is not imminent due to delays in the travel documentation process in the country concerned may also be considered for immigration bail. However, where the FNO is frustrating removal by not co-operating with the documentation process, and where that is a significant barrier to removal, these are factors weighing strongly against release.”

Under § 55.3.2.11, those assessed as low or medium risk should generally be considered for rigorous contact management, rather than detention. It is said on Mr Bello’s behalf that, given the restrictions on travel to Nigeria imposed in response to the COVID-19 pandemic, removal was not “imminent” within the meaning of Chapter 55 of the EIG. That being so, it would take very compelling factors to justify detention for any length of time. Although Mr Bello’s index offence was serious, there is no evidence that he now poses an elevated risk of reoffending. In any event, in considering the reasonableness of his continued detention, it was critical to bear in mind the significant risk to his physical health by reason of increased risk of exposure to COVID-19 and the risk of deterioration of his mental health if detention is maintained.

10 The second ground of challenge is that Mr Bello’s detention contravenes the Secretary of State’s AAR policy and AAR Casework Guidance. It is said that, given his extensive mental health problems, Mr Bello plainly presents a level 3 risk. In any event, whether the risk is properly assessed as level 2 or level 3, the AAR policy creates a strong

presumption of release. That presumption could only be overridden by powerful immigration factors; but there are no such factors.

- 11 The third ground of challenge alleges breach by the Secretary of State of her positive obligations under Articles 2 and 3 ECHR to protect persons detained by the state, including in immigration detention centres, from death or suffering which rises to the level of inhuman or degrading treatment. It is said that this positive duty arises whenever the Secretary of State knows, or ought to know, that there is a “real and immediate risk” of detainees suffering serious harm or dying; and the duty has been and is being breached in this case, given that the shielding letter acknowledges Mr Bello’s particular vulnerability to COVID-19.
- 12 The claim was accompanied by an application for urgent consideration seeking interim relief or, in the alternative, directions for an urgent rolled-up hearing. I made an order on the day the claim was issued, giving the Secretary of State until yesterday to respond to the application for interim relief and directing an oral hearing today.

The Secretary of State’s response

- 13 For the Secretary of State, Mr Andrew Byass produced a concise but clear written response to the application for interim relief or directions. Certain relevant documents, including the detention reviews in respect of Mr Bello, were disclosed.
- 14 First, Mr Byass indicated, on instructions, that the Secretary of State proposes to remove Mr Bello to Nigeria and has set removal directions for 25 May 2020 on a flight from Heathrow, via Paris, to Lagos. In those circumstances, the Secretary of State does not accept that removal is impossible. The restrictions that currently prevent travel to Nigeria expire on 23 April 2020. Should the Nigerian authorities extend the period of these restrictions, the Secretary of State will review the continued appropriateness of Mr Bello’s detention. Even if Mr Bello fell to be categorised as presenting a level 3 risk, the AAR policy provides that detention is appropriate where removal has been set for a date in the immediate future or the offender has received a custodial sentence of four years or more. In this case, both criteria are in substance met: removal on 25 May 2020 is removal in the immediate future; and the MHA disposal in Mr Bello’s case was imposed in lieu of a likely life sentence.
- 15 Second, Mr Byass noted that Mr Bello’s mental illness was fully considered in his last detention review (on 3 April 2020), in which it was noted that his mental health was stable and that no concerns had been raised by detention staff. It was also noted that his responsible clinician had stated that he could be detained, though “not for a lengthy period”.
- 16 Third, Mr Byass indicated – again, on instructions – that on 27 March 2020 Mr Bello, in common with other vulnerable detainees, was offered the opportunity to move to B Wing in conditions in which there would be (i) no contact with the general population in the rest of the detention centre; (ii) separation from other detainees and the wearing of a face mask while not in the detainee’s own room would be encouraged; and (iii) access to showers, fresh air and wing-based activities and officers would take daily shop orders. It was explained to Mr Bello that it would be in his best interests to relocate to B Wing, but

he declined the offer and signed a disclaimer to confirm his decision. It followed that, to the extent that detention exacerbated his risk of contracting COVID-19, this was as a result of his own actions.

- 17 Fourth, Mr Byass submitted that Mr Bello posed a high risk of absconding. This could be demonstrated by what had happened in April 2019, when his family physically prevented escorts from taking him from a hostel in order to give effect to removal directions, and by his multiple failed attempts to prevent removal by making repeated further submissions and repeated claims for judicial review of the Secretary of State's decisions to refuse to accept those submissions. The last but one of these claims was refused permission on 31 December 2019 and marked as being totally without merit. A further claim for judicial review, filed on 6 April 2020, is currently pending before the Upper Tribunal, but because it was filed within six months of his last unsuccessful claim and raises the same or similar issues, it does not give rise to any barrier to removal.
- 18 Shortly before the hearing, the Secretary of State filed a witness statement from Alan Gibson, Head of Operations, Detention and Escorting, at the Home Office. Its purpose was to give an overview and explanation of the arrangements in place at Brook House for the protection of detainees identified as vulnerable to COVID-19. In the statement, Mr Gibson confirms the conditions which it was proposed would be provided to Mr Bello if he had agreed to transfer to B Wing. They are as follows:
- (1) Social distancing from the main population through separation in a small unit;
 - (2) Meals to be taken in room;
 - (3) Social distancing for the occupants of the unit encouraged by staff.
 - (4) Vulnerable detainees encouraged to wear facemasks when leaving their rooms on the unit.
 - (5) Vulnerable detainees encouraged to remain in their room.
- 19 Mr Gibson said that, as none of the detainees who were invited to move to B Wing agreed to do so, the wing was identified for use as an area to house newly arrived detainees. The purpose of this was to reduce the risk of an inward transmission of COVID-19 to the centre through new arrivals. On 7 April, a detainee located on the wing (who had been brought to the centre on 2 April) tested positive for COVID-19. That detainee had been transferred into isolation on 5 April when it was realised that he was unwell. There have been no other reported cases of COVID-19 on the wing since 5 April.

Submissions for Mr Bello at the hearing

- 20 For Mr Bello, Mr Tim Buley QC, sensibly focused on his grounds 1 and 2, though he made clear that he was not abandoning ground 3. The first question was whether there was a serious issue to be tried on grounds 1 and/or 2. As to that, Mr Buley submitted as follows. First, the detention reviews disclosed by the Secretary of State show that Mr Bello poses a low risk of serious harm to the public by reason of reoffending and a low risk of reoffending. It follows that there is no overriding public protection concern in favour of his detention. Second, taking the Secretary of State's case at its highest, Mr Bello's removal is not "imminent" in the sense described in the EIG, because removal is not "likely to take place in the next four weeks". Moreover, removal is unlikely to be effected even by the date currently set (25 May 2020), given the spread of the COVID-

19 pandemic in Nigeria and the increasingly severe measures implemented at national and state level to combat it. Accordingly, even taking the Secretary of State's factual case at its highest and ignoring the risks to Mr Bello's mental and physical health, this is a case for release, applying the Secretary of State's own policy.

- 21 Mr Buley submitted that the case is stronger still because Mr Bello is at increased risk of exposure to COVID-19. Mr Bello's refusal of the offer of a move to B Wing was motivated by rumours of an infected person on the wing and, in the light of the Secretary of State's new evidence, was "prescient". So, the only measure taken by the Secretary of State to protect Mr Bello would, if accepted, have exposed him to greater risk. Since 6 April, no other measures have been made available and Mr Bello continues to use the communal washing and eating facilities on D Wing.
- 22 Furthermore, Mr Buley submits, the Secretary of State's own internal policy is that those at high risk from COVID-19, and certainly those in the shielding group, should not be detained unless they are "high risk FNOs". Mr Bello is not a high risk FNO, even on the Secretary of State's own case. In any event, he is at least a level 2 under the AAR policy and has been detained for 4 months. As to the risk of absconding, Mr Buley submits that the Secretary of State's reasons for concluding that Mr Bello presents a high risk do not withstand scrutiny. He lived in the community for over a year with help from Forward Support. If he were released now it would be to supported accommodation funded pursuant to s. 117 MHA. He was fully compliant with the terms of his support in the community. He is, in any event, a conditionally discharged patient, subject to clinical and social supervision, who can be recalled to hospital if his mental health deteriorates. He is reliant on the support given to him professionally and by his family, so has every incentive to remain in contact. The suggestion that his family might "hide" him is speculative.

Submissions for the Secretary of State at the hearing

- 23 My Byass submitted that the setting of removal directions is not a mere administrative step. It involves securing (i.e. booking) flights. It was perfectly proper to rely on the indication given by the Nigerian authorities that flights would be suspended until 23 April 2020. There was nothing to indicate that they would still be suspended on 25 May 2020, but if and when that situation changed, Mr Bello's detention would be reviewed in the light of the new information.
- 24 Mr Byass confirmed my understanding from the detention reviews that, given the assessment of the risks of harm to the public and reoffending as low, the case for detaining Mr Bello was based squarely on the risk of his absconding. What had happened in April 2019, and the subsequent repeated abusive claims for judicial review, showed that there was a high risk of absconding. The Secretary of State was entitled to conclude, taking into account all the evidence (including the evidence as to the stability of Mr Bello's mental health condition), that continued detention was appropriate for the time being.

Discussion

- 25 There is an obvious overlap between the two stages of analysis that I must undertake on this application for interim relief. The first is to examine the strength of the claim, not only to decide whether there is a serious issue to be tried, but also with a view to forming an assessment of how strong the claim is. The second stage is to consider the balance of convenience. That will inevitably draw on my assessment of the strength of the case, among other factors.
- 26 The starting point is that Mr Bello was convicted of very serious offences. There were three victims. The sentencing judge indicated that, had an MHA disposal not been appropriate, a life sentence would have been likely. In the light of those offences, the Secretary of State has determined that deportation is appropriate and Mr Bello's appeals and subsequent challenges have, to date, been unsuccessful. The Secretary of State accordingly has a proper interest in securing deportation of Mr Bello as a foreign national offender. The present challenge is not to the decision to deport Mr Bello, but the decision to detain him pending deportation. The EIG makes clear that the first question to consider in criminal casework cases is whether removal can be said to be "imminent".
- 27 In this regard, I accept Mr Byass's submission that Mr Buley can draw little from the fact that the date set for removal is five rather than four weeks from now. As the EIG is at pains to make clear, the four-week period is suggested as a guide and no more. It is possible that Nigeria will choose to extend the travel restrictions beyond their current expiry date of 23 April. The Secretary of State does not claim to have any better knowledge than anyone else as to whether this will or will not happen. But I do not accept Mr Buley's submission that it is obvious that removal on that date will be impossible. What can be said is that there is considerable uncertainty as to the likelihood of removal taking place – and that must be factored into the overall decision on the reasonableness of Mr Bello's continued detention: see *R (MH) v Secretary of state for the Home Department* [2010] EWCA Civ 1112, [66] (Richards LJ).
- 28 Mr Byass properly accepted that the Secretary of State did not seek to justify detention on the basis of the risk of harm to the public if Mr Bello were to reoffend, nor on the basis of the risk of reoffending *simpliciter*. In both cases, the risk has been assessed by the Secretary of State as "low". The Secretary of State's case for maintaining detention is based squarely on the risk, which she has assessed to be "high", of Mr Bello absconding. I am not persuaded by the Secretary of State's case that repeated unsuccessful legal challenges (one of which was considered to be totally without merit) support the conclusion that there is a risk that he will abscond: the fact that an individual uses lawful routes to challenge his deportation (even if he does so repeatedly and unsuccessfully) does not, on its own, suggest that he will seek to use unlawful ones. The fact, however, that his family sought to obstruct his deportation by preventing the escorts from removing him in April 2019 does, however, provide some support for the view that they may seek to use unlawful means to avoid his deportation again.
- 29 The length of Mr Bello's detention to date – some four months – is considerable. That is relevant to the question whether the Secretary of State can show that continued detention is reasonable in accordance with the second and third *Hardial Singh* principles. So is the fact that previous attempts to remove him failed due to failures on the part of the Secretary of State or her officials. But, in the context of this application for interim

relief, the length of Mr Bello's detention to date must be considered in the light of the fact that there is, on current information, at least some prospect of removal on 25 May 2020. If that changes, there is no reason to doubt that the Secretary of State will do what she has undertaken to do, namely review the continued appropriateness of Mr Bello's detention, and no *a priori* reason to doubt that that review will be lawfully conducted.

- 30 Mr Byass properly concedes that Mr Bello's mental health condition makes him a level 2 risk in term of the AAR Policy. But the evidence does not suggest that his condition is worsening because of his continued detention: on the contrary, the latest medical evidence suggests that his condition is stable. As to his vulnerability to COVID-19, there is a real question of interpretation as to whether every person identified as vulnerable by reason of comorbidities *ipso facto* falls to be categorised as a level 3 risk. That turns on whether it can be said of such a person that continued detention would be "likely to cause harm". I see some force in Mr Buley's suggestion that the answer to that question is yes, but I do not think the answer is obvious. The word "likely" can mean different things in different contexts. Consideration will also need to be given to whether the Secretary of State's case in this respect is consistent with what was said to the Divisional Court in proceedings recently brought by Detention Action (CO/1101/2020). It would be wrong to seek to resolve this important issue at this stage, without fuller details of the submissions made and an approved transcript of the Divisional Court's judgment.
- 31 Overall, I approach this application on the basis that there is plainly a serious issue to be tried. The claim has a real prospect of success. It is not, however, so firmly based that it can be regarded as overwhelmingly likely to succeed.
- 32 In approaching the balance of convenience, it is important to start by identifying the date when the claim will be determined substantively. It is agreed between the parties that a timetable leading to a rolled-up hearing in the week commencing 27 April 2020 could be managed, many – though not all – of the relevant documents having already been disclosed. A hearing in that week can also be accommodated by the Administrative Court. It follows that the question for me concerns the balance of risks in the period between now and then (a period of no more than two weeks).
- 33 It appears clear that the Secretary of State accepted in the *Detention Action* litigation that being detained in an immigration detention centre increases to some degree the risk that a detainee will contract COVID-19. If this risk eventuates it is more likely to have a serious effect in Mr Bello's case (given his comorbidities). It is, however, important not to go beyond what is established by the evidence or to overstate the extent of the risk. Some at least of the expert evidence before the Divisional Court in the *Detention Action* claim was before me. It may be noted that that evidence did not cause that court to grant interim relief in relation to detainees with comorbidities in general. The evidence filed by the Secretary of State in this case indicates that measures were put in place to enable those thought to be vulnerable to be housed in an environment that makes social distancing easier. The Secretary of State can hardly be held responsible for the fact that no-one (including Mr Bello) accepted the offer of a move to that environment. The fact that one individual housed in a different wing tested positive for COVID-19 is not in itself surprising. The fact that that individual was isolated on 5 April, as soon as he became symptomatic, and that there have been no other known cases since, provides some basis for believing that the risk is currently controlled. Things could, of course,

change quickly – but if they did, there is no reason to doubt that the Secretary of State would react appropriately by implementing further containment measures or by reviewing the need for continued detention on a cohort or individual basis.

- 34 As to the risks arising from Mr Bello’s mental health, the evidence suggests that his condition is currently well managed by medication and stable. That evidence does not provide a basis for believing that detention for a further period of up to two weeks will affect Mr Bello’s condition significantly or at all.
- 35 On the other side of the balance, there is the risk that release will afford Mr Bello the opportunity to evade deportation by absconding. As I have said, the fact that his family obstructed a previous attempt at removal provides some basis for fearing that that may occur. That episode provides evidence of a willingness on the part of Mr Bello’s family to resort to unlawful means to obstruct his deportation. If he were released now, less than two weeks before the rolled-up hearing, when the Secretary of State has made clear her determination to remove him and when removal directions have been set for 25 May 2020, there would be a powerful incentive to take steps to evade or obstruct removal. If those steps were successful and the claim were dismissed at the rolled-up hearing, the Crown’s interest in deporting a person convicted of serious offences would have been defeated because of the grant of interim relief. That interest must be accorded considerable weight, particularly in a case such as the present, where appeals against the notice of intention to deport have been dismissed, appeal rights have been exhausted and numerous subsequent challenges have been unsuccessful.

Conclusion

- 36 Overall, the strength of the claim is not such as to justify the grant of interim relief in these circumstances. The balance of convenience favours instead an urgent rolled-up hearing. After discussion with counsel, it has been possible to agree the directions necessary to enable such a hearing to take place.