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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

[2021] EWHC 177 (Admin)



No. CO/4831/2020

Royal Courts of Justice

Friday, 22 January 2021

Before:

MR RICHARD CLAYTON QC

(Sitting as a Deputy Judge of the High Court)

BETWEEN:

THE QUEEN
ON THE APPLICATION OF
SAAD HABEB

Claimant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

MR R. HALIM (instructed by Duncan Lewis Solicitors) appeared on behalf of the Claimant.

MISS H. THORNLEY (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

(Transcript prepared from Microsoft TEAMS recording)

THE DEPUTY JUDGE:

On 20 January 2021, I heard extensive argument for half a day on the merits of this claim centring on whether the claimant should be released from custody.

Introduction

- The claimant is an Egyptian national, born on 25 January 1998. He arrived in the United Kingdom as a minor on 21 March 2013 and claimed asylum. On 24 December 2020, he issued these proceedings.
- 3 The claimant has been detained under immigration powers since 13 May 2013 for over 19 months to effect his deportation to Egypt. A deportation order was made on 26 June 2013. The claimant himself does not resist his deportation and the claimant's case is that the defendant's own officers have accepted in clear terms that there is no prospect of removal. The detention is alleged to be unlawful for three reasons. First, it is said that claimant's detention is unlawful as a breach of *Hardial Singh* Principles 2, 3 and 4, that is to say, first, that the claimant has been detained for a period that is not reasonable in all the circumstances; secondly, that before the expiry of the reasonable period it became apparent that the defendant would not be able to effect deportation within that reasonable period and should have released the claimant and, thirdly, the claimant had failed to act with reasonable diligence and expedition to effect the deportation. The second basis for the claimant's complaint of unlawful detention is that the defendant has failed to authorise the claimant's detention on a number of occasions in breach of the Supreme Court decision of Kambadzi v Secretary of State for the Home Department [2011] 1 WLR 1299. Third, it is said that the claimant's detention is unlawful as a breach of the defendant's published policy in relation to adults at risk.
- The defendant resists this application, arguing that liberty should be withheld on the basis that the claimant presents a risk of absconding and reoffending.
- On 29 December 2020, Lane J ordered that, no later than 4.00 p.m. on 12 January 2013, the defendant must file and serve any response to an application for interim relief and all detention reviews and GCCID notes on the claimant up to the date of filing and, secondly, the application for interim relief, if practicable, be listed for a remote hearing in the week beginning 18 January 2021 with a time estimate of three hours.

Application to vary the order of Lane J

- Due to an oversight by the defendant's instructing solicitor, the defendant's response to the claimant's interim relief application, detention reviews and GCCID evidence was not filed in time. On 12 January 2021, it was said that the defendant's solicitors began preparing his bundle and draft acknowledgement of service. Due to the volume of documents within the defendant's disclosure bundle, the claim's complexity and the need to obtain further instructions in respect of the detention reviews, GCCID evidence and the acknowledgement of service the defendant was not in a position to comply with the court's deadline.
- The defendant recognises that she may require relief from sanctions under CPR 3.9 for the failure to comply with a court order in the event the court is not persuaded that the direction should be varied. The three stage set out in relief from sanctions would then need to be applied, that is the approach taken in *Mitchell v Newsgroup Newspapers Limited* [2014] 1 WLR 795, and in *Denton v TH White Limited* [2014] I WLR 3926.

8 Mr Halim, on behalf of the claimant, took an entirely realistic approach to this issue and submitted that the fundamental sanction was in relation to costs. In those circumstances, I grant the variation and relief from sanctions.

The Interim Application for Release from Detention
The submissions of the parties

9 The most important issue in this case is the view expressed by the defendant herself. I refer to certain passages now at certain dates in the detention notes. On 8 November 2019, it was recorded that:

"After considering the evidence from all the information presented on the day, the panel considered there are factors which suggest that removal within a reasonable timeframe in the particular circumstances of this case may not be possible.

Reason for balance: The panel has recommended release in this case as there is no prospect of imminent removal. There are barriers in place which frustrate imminent removal. The barriers are obtaining a travel document. Due to the timescale of this, the panel have recommended release. The panel have noted the subs risk as being medium and to mitigate any risk upon release the panel have recommended appropriate measures be in place to restrict the risk factors, such as reporting curfews, approved accommodation or tagging. As at current, there is no prospect of removal. The panel have recommended release.

Panel decision - recommend release."

On 9 October 2020, the detention notes record this:

"Factors in favour of release: Mr Habeb is an AaR level 2 due to mental health concerns for which he is prescribed medication. He was previous sectioned under the Mental Health Act in 2016. He also has tendencies to self-harm, but no new concerns raised, last reviewed on 17 September 2020. The EDT barrier. A video call interview was completed on 20 August 2020 and Mr H has been advised to contact the embassy personally as per the CID notes of 17 September 2020. FRS has provisionally agreed. Reason for balance. The CPP Panel agreed to the take case forward to unit(?) due to no DR uploaded since 13 July 2020 and the CPP lit ops expert raised great concerns as to the lawfulness of Mr H's current detention if he submits any litigation, as no current DRs are uploaded to the CID/Atlas. The CPP have recommended a release in this case as there is no prospect of imminent removal. The EDT barrier in place frustrates imminent removal due to the timescales of this. The CPP have recommended the release. The CPP have noted Mr H's harm risk, agreed elements of public protection and to mitigate any risk upon release the panel have recommended appropriate measures to be in place to restrict the risk factors, such as reporting, curfews and approved accommodation or tagging. At present, there is no prospect of removal. The CPP has recommended a release."

Then on 23 October 2020, as a result of further disclosure made in these proceedings, the defendant's CPP, led by an assistant director, who is the second most senior position in the detention review hierarchy, again recommended the claimant be released.

"Factors in favour of release: Mr Habeb is an AaR Level 2 due to a mental health concern for which he is prescribed medication. He was previously sectioned under the Mental Health Act in 2016. He has tendences to selfharm, with no concerns raised, last reviewed 17 September 2020. O/S EDT is the barrier. A video call interview was completed on 20 August 2020 and Mr H has been advised to contact the embassy personally per CID notes 17 September 2020. FRS has provisionally agreed. Reason for balance. The CPP agreed to take case forward to unit. Due to no DR uploaded since 13 July 2020 and the CPP lit ops expert raised great concern as to the lawfulness of Mr H's current detention if Mr H submits any litigation as to no current DRs are uploaded to the CID/Atlas. The CPP have recommended a release in this case as there is no imminent prospect of removal. The EDT barrier in place frustrates imminent removal. Due to the timescales of this, the CPP have recommended a release. The CPP have noted Mr MR's harm risk, agree elements of public protection and to mitigate any risk upon the release. The Panel has recommended appropriate measures be in place to restrict the risk message, such as reporting, curfews and tagging."

The defendant's acknowledgement of service records dated 30 October 2020 at para.16 states:

"In the CID entry on 30 October it is noted that the barrier EDT video interview conducted with the Egyptian Consulate on 20 August 2020 the EDT approximate timeframe is up to one year. There are travel delays due to coronavirus. Flights are available once a travel document is issued. Egypt is subject to entry restrictions. Action mandated by director and agreed by AD. Submit release referral ASAP."

- Mr Halim vigorously submits that this is an unusual detention case because he relies on the defendant's own evidence rather than the evidence of the claimant him or herself adduces. As he rightly submits, the defendant's evidence is to be accorded very considerable weight and deference by the court on the question of detention.
- Miss Thornley, on behalf of the Secretary of State, submits that all forms of discretionary relief are granted only where necessary and no alternative remedy is available. Since the claimant could apply to the First-tier Tribunal (Immigration and Asylum Chamber) for the grant of immigration bail pursuant to s.1(3) of Schedule 10 to the Immigration Act 2016, this form of interim relief should be refused on this basis. She also contends that the First-tier Immigration Tribunal is a more proportionate remedy since it allows for the risk of absconding to be assessed in an orderly manner and bail accommodation to be tied into the process under the normal system.
- Mr Halim responds by contending that interim applications for release from detention are frequently entertained in judicial proceedings and draws attention to that fact Lane J, as the President of the Immigration and Asylum Chamber, did not express any concerns in relation to the claimant's interim application. Mr Halim also relies in *R* (*Konan*) *v* Secretary of State for the Home Department [2004] EWHC 22 (Admin), where Andrew Collins J said at para.30:

"[Counsel] submitted that judicial review was inappropriate since bail was an alternative remedy and in any event it was a collateral challenge to the refusals of bail. Both his points are thoroughly bad. An adjudicator in considering a bail application is not determining (indeed, he has no power to determine) the lawfulness of the detention. The grant of bail presupposes the power to detain since a breach of a bail condition can lead to reintroduction of the detention."

As I understand it, Andrew Collins J seeks to differentiate the role of judicial review to examine the lawfulness of detention, which is an issue which is distinct from a bail application.

Miss Thornley sought to distinguish *Konan* on the ground that the Secretary of State was not seeking to impugn the judicial review proceedings themselves, but merely an interim application for detention. However, I pressed her on the question of whether the principle which underlay the approach of Andrew Collin's J applied equally to an interim application for release. In the course of oral submissions, she developed her submission and argued that the governing principle was whether, in the circumstances, it was just for the court to consider the interim application rather than to require the claimant to make a bail application.

Discussion

- In the light of these submissions, I hold there is no principled objection to consideration an application for interim relief rather than requiring the claimant to make a bail application.
- Miss Thornley next contends that even if the court takes the view that a *prima facie* case has been made out, the balance of convenience falls against release, given the high risk of absconding, which may mean the claim cannot even be tried.
- I shall turn to the threshold test the claimant must satisfy to seek an interim order in a moment, but I should first address the defendant's case concerning the high risk that the claimant will abscond.
- Mr Halim disputes the defendant's contention itself, but he also strongly contends that the defendant herself, at a very senior level, recognise that the claimant should be released. Miss Thornley relies on the views expressed in the detention records and, in particular, the final view expressed in January 2021, which concluded there was a high risk that the claimant would abscond.
- In my judgment, the difficulty the Secretary of State has is that there is no evidence before me than the Panel's recommendations were considered and rejected, as any recommendation can be. In the absence of any witness statement from the Secretary of State to the contrary, I find the Panel's views must be accorded considerable weight and that on the evidence is appropriate for me to grant immediate release.

The Grace Period
The submissions of the parties

If the court takes the view that the claimant should be released, the defendant says they require a grace period to make the necessary arrangements for his safe release by identifying suitable accommodation. They contend that, on the present facts and having regard to the COVID-19 crisis, a reasonable grace period would be three weeks. The defendant, they say,

is entitled to a reasonable time either for the claimant to provide her with details of a release address or to identify suitable accommodation for the claimant where the asylum support is.

23 On the other hand, the claimant submits that, even on the defendant's case, the grace period or any other reasonable grace period expired a long time ago. They draw attention to the following factors. First, the recommendation for release has been made by the Panel since 8 November 2019. Nothing has materially changed since then, other than to make the prospect of release even more remoted, as admitted by the defendant's case workers inter alia in the light of the coronavirus aggravating already lengthy delays on the part of the Egyptian Consulate to approve emergency travel documents. Secondly, the defendant's published policy is clear that she should have prepared a release plan long ago, before the 8 November 2019. Thirdly, the claimant's application for accommodation pursuant to s.4 of the Immigration and Asylum Act 1999 has been outstanding before the defendant for consideration since 11 December 2020. Fourthly, the defendant could and should have acted upon the recommendation of the Panel on 23 October 2020, which urged her to consider Mr Habeb's case as exceptional and to authorise accommodation under her own motion pursuant to Schedule 10 of the Immigration Act 2016 which provides powers to the defendant to provide or arrange for the provision of accommodation to detainees seeking release. Fifthly, and finally, the claimant's counsel contends that the claimant himself completed his term of imprisonment so there is no requirement on him to satisfy licensing conditions.

Discussion

It is important to appreciate that the Secretary of State has been unable to identify any particular facts and circumstances peculiar to the claimant to justify a grace period longer than 48 hours. She, instead, relies upon generic factors. In those circumstances, I find that the appropriate grace period is 48 hours.

The threshold the claimant must satisfy to be granted an interim order

- It is common ground that it is necessary for the claimant to show a strong *prima facie* case. The three Hardial Singh breaches which are alleged are these; the claimant alleges that he has been detained for a period that is not reasonable in all the circumstances, that is *Hardial Singh 2*. *Hardial Singh 3* is the before the expiry of the reasonable period it became apparent that the defendant would not be able to effect deportation within that reasonable period and should have been released. *Hardial Singh 4* is that the defendant has failed to act with reasonable diligence and expedition to effect the deportation.
- In contending that he has a strong *prima facie* case, the claimant relies on the following factors. On 8 November 2019, the Panel recommend the claimant should be released. On 27 November 2018, the claimant again expressed to the Home Office case worker that he wished to return to Egypt. That day, when issuing the 7-month detention review, the defendant responded to the Panel release recommendation maintaining detention and noted,

"The only barrier to removal at present is the ETD and Mr H has expressed a wish to return to Egypt. I note the CPP recommendation, however, having liaised with RL on the progress of the EDT today. I have been advised that this will be following this case up and including it in a list of cases they will discussed with the Consulate in the second week of December. Whilst there are no current timescales, this is a positive move and could assist greatly in getting an agreement. Whilst removal may not be imminent, I am satisfied

that steps being taken to remove within a reasonable time remain a realistic prospect and authorise detention on this basis."

- On 13 February 2020, the claimant again made clear that he wished to return to Egypt, operating the facilitated return scheme. The defendant provisionally accepted this on 5 March 2020.
- On 10 March 2020, the defendant issued her 10-month review, but noted that the detention review has been authorised late, but this has made no material difference to the lawfulness of the continued detention.
- On 10 June 2020, when authorising a further period of detention for 28 days, the authorising officer noted concerns that the existing delays on the part of the Egyptian authorities processing EDTs were worsened by the COVID-19 pandemic and, as such, the defendant should consider the arrangements.

"We need to factor the event that the Egyptian authorities may remain closed and I would recommend that the investigations are made into possible addresses and a robust release plan is in breach in the event removal may be less reasonable as the Egyptian authorities remain closed. However, I am content that the detention remains proportionate. Detention is authorised for 28 days."

30 GCID entry dated 9 July 2020 records:

"Due to coronavirus, the Embassy and the Egyptian authorities are open, but operating a reduced EDT service. Process delays are unavoidable. This case was raised by the EMB Meeting on 16 December 2019, informing the officials that the subject wishes to return home. The EMB agreed to face to face interview with the required receipt of clearance from Cairo. A face to face interview is required at the Embassy, however, and this is not currently possible due to coronavirus safety concerns. RL are liaising with the Embassy to consider potential options in progressing EDT applications. The Egyptian authorities announced that from 1 July international flights will be permitted to and from Egyptian airports."

A GCID report record on 9 October 2020 confirms that further consideration was given to the EDT timescales. The defendant appeared to confirm that the EDT could normally take up to a year, but noted, as she did four months earlier on 10 June 2020, that this would likely be further delayed by the COVID-19 pandemic.

"If RL are liaising closely with the Consulate for the outcome of the interview though the EDT approximate timetable is up to one year, there are travel documents delay due to coronavirus."

The second basis for this claim is that the defendant's detention was not authorised, either in February 2020 or in August 2020, and the further disclosure since the proceedings takes place also indicate it was not authorised in November 2020 and December 2020. Miss Thornley contends that the failure to authorise made no difference. However, this submission is contrary to the Supreme Court decision in *Kambadzi*, where at para.49 Lord Hope reviewed various authority and, in particular, endorses the views expressed by Lord Hobhouse in *ex parte Evans No 2* at p.42, where Lord Hobhouse states:

"Imprisonment involves the infringement of a legally protected right and therefore must be justified. If it cannot be lawfully justified, it is no defence for the defendant to say he believed he could justify it."

Accordingly, I reject the submission made by Miss Thornley in relation to the failure to authorise, at least for these purposes today.

- Thirdly, the claimant complains that there is a breach of policy for continuing to detain an adult at risk. The Secretary of State sought to justify the detention on the basis that the claimant's health condition was stable and adequately managed. However, this is the language taken from Chapter 55, which was replaced by the Adult at Risk Policy four-and-a-half years ago and I accept the submission, for these purposes, that the defendant breached this policy.
- Accordingly, and only for these purposes, I emphasise, I am satisfied that there is a strong *prima facie* case that *Hardial Singh* Principles 2, 3 and 4 have been breached, that there has been an unlawful failure to authorise the claimant's detention and that there has been a failure to comply with policy.
- In those circumstances, I grant, subject to further discussion, the claimant's release, with a grace period of 48 hours, permission for the claim to proceed and I also order expedition.

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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This transcript has been approved by the Judge.