Case No: AC-2024-LON-001874

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

[2024] EWHC 1856 (Admin)

The Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 20 June 2024

BEFORE:

MR JUSTICE SHELDON

BETWEEN:

THE KING
on the application of NAKRASEVICIUS

Claimant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

MR A SCHYMYCK appeared on behalf of the Claimant.
MS A JONES (instructed by Government Legal Department) appeared on behalf of the Defendant.

Hearing: 18 June 2024

JUDGMENT

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(Official Shorthand Writers to the Court)

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1. MR JUSTICE SHELDON: The claimant, Mr Valdemaras Nakrasevicius, is a citizen of Lithuania. He is currently in immigration detention and has been since 11 December 2023, more than six months ago. He seeks interim relief from this court: namely, that he be released from immigration detention and be provided with Schedule 10 accommodation within seven days.

2. Judicial review proceedings against the ongoing detention were initiated on 3 June 2024. On the same date, the claimant made an application for urgent consideration, seeking a prompt interim relief hearing. That application came before me on 5 June 2024. I ordered the defendant, the Secretary of State for the Home Department, to respond to the application for interim relief with his position within seven days of the order. I also ordered a hearing of the application within 14 days.

3. At the hearing, the parties were ably represented by counsel, Mr Alex Schymyck, for the claimant, and Ms Amanda Jones for the defendant. At the end of the hearing, I notified the parties that I would order that the claimant be released from detention and that I would provide my reasons at a later date. These are my reasons.

Background

4. The claimant came to the United Kingdom in 2010, entering lawfully as a citizen of the European Union. On 15 February 2017, he was arrested for controlling prostitution for gain and was released on bail. On 10 February 2020, the claimant made an application to the EU Settlement Scheme ("the EUSS"). In August 2021, the claimant went to Spain. On his return to the United Kingdom on 9 March 2022, the claimant was arrested at Stansted Airport. On 7 April 2022, he was arraigned and pleaded not guilty. He was detained in custody, however. The custody time limits expired on 7 September 2022 and he was released on bail.

5. On 11 December 2023, the claimant pleaded guilty to facilitating the travel of another person with a view to exploitation and possessing criminal property. He was sentenced to ten months' imprisonment. Due to the time spent on remand, the claimant's custodial sentence came to an end on the same day as he was sentenced.

6. On 11 December 2023, the claimant was detained under immigration powers. On the following day, the defendant made a stage one deportation decision (that is a notice that the claimant was liable to deportation) because he deemed deportation to be conducive to the public good. On 18 December 2023, the defendant refused to grant the claimant immigration bail. On 27 December 2023, the claimant made an application to the defendant's Facilitated Return Scheme and indicated that he would be willing to return to Lithuania. He indicated that he wanted to go back to Lithuania "as soon as possible". The claimant repeated this request on several further occasions and, on 6 February 2024, the claimant signed a disclaimer confirming that he did not intend to challenge the deportation decision and wished to return to Lithuania.

7. On 4 March 2024, the defendant served the claimant with a monthly progress report stating that consideration of the EUSS application was a barrier to removal. The claimant subsequently withdrew his EUSS application on 15 March 2024.

8. Throughout this period, the various monthly progress reports had stated that the claimant was at Level 1 of the Adults at Risk Guidance due to his claiming to have stress and anxiety. There is, however, no medical or other evidence before the court to substantiate this claim. The claimant was also assessed as posing a medium risk of absconding and a high risk of harm, but a low risk of reoffending.

9. The monthly progress report dated 2 April 2024 stated that the current barrier to removal was "Confiscation Order Stage 2 and DO" (that is the making of a deportation order). The reference to the Confiscation Order was to proceedings that were afoot under the Proceeds of Crime Act 2002 ("POCA"). A timetable for these proceedings had been set down by the Crown Court. This included a mention or a directions hearing that was fixed for 9 August 2024.

10. From the statement filed by the police and the Proceeds of Crime Unit of the Crown Prosecution Service ("the CPS") in accordance with POCA in May 2024, I note that cash in the sum of £9,137.85 was seized from the claimant's home and was held by Dorset police. The statement also referred to a series of transfers of money in excess of £100,000 to various bank accounts held by the claimant which were assumed to have come from the claimant's criminal conduct.

11. The monthly progress report dated 25 April 2024 contained comments from the authorising officer. This stated that:

> "The barriers to removal remain an outstanding Confiscation Order (CO), consideration of the Stage 2 decision and obtaining a DO. Further information will need to be obtained regarding the CO from the courts. This will need to be paid or he could incur a further custodial sentence. The Stage 2 decision will need to be put on hold pending the outcome of the CO … The presumption of liberty is acknowledged. However, currently due to the barriers to removal, release is considered appropriate. In the meantime, please establish with the courts where we are in relation to the CO. Until this is resolved, deportation action is paused."

The actions agreed for the next review period included:

> "Contact Mr Nakrasevicius to explain what is happening; i.e. that he cannot be returned home until the CO proceedings are concluded … Draft release referral."

12. On 31 May 2024, the detention review contained comments from the reviewing officer. This stated that a release referral had been submitted and their recommendation was that the claimant should be detained for a period of time whilst they continued to process his release referral. The authorising officer (an assistant director) commented as follows:

> "The key barrier to removal are the impending prosecutions and, whilst we have several court dates, there is no confirmed timescale for these proceedings to be concluded. An SCW (senior caseworker) advice is that we cannot serve the Stage 2 DO or remove until then. Mr Nakrasevicius has been convicted of offences akin to trafficking exploitation, but this is his only offence and there is no indication that he is a violent offender or that he poses a significant risk to the public. Given the barriers, I am minded to refer to the SD for SOS bail and so a short period of further detention will be required whilst this is completed."

13. I was told that a decision to release from detention needed to be made by a civil servant at strategic director level. Although it appears that the recommendation has been made by two authorising officers for the claimant to be released from detention, this does not appear to have been actioned. There is no evidence before the court as to why that was.

14. On 4 June 2024, the defendant made a deportation order and authorised the claimant to be detained until he was removed from the United Kingdom.

The Submissions

15. The claim concerns the application of the principles set out in the well-known case of *Re Hardial Singh* [1984] 1 WLR 704. Mr Schymyck contends on behalf of the claimant that interim relief should be granted on the modified *American Cyanamid* test in that (1) there is a serious question to be tried that the ongoing detention is in breach of *Hardial Singh No.1* (that the detention power is being used for an improper purpose); (2) there is a serious question to be tried that the detention is in breach of *Hardial Singh Nos.2 and 3* (that detention has been unreasonably long and will be unreasonably long going forward); and (3) the balance of convenience favours the claimant's release.

16. With respect to (1), Mr Schymyck contends that the power to detain the claimant has been used for an improper purpose; namely, to enable the confiscation proceedings to go ahead. Those proceedings have acted as an improper barrier to the claimant's removal. This is inappropriate as the Crown Court has its own powers to ensure that its proceedings can be effective and the defendant should have left matters to the Crown Court. Mr Schymyck relies in this regard on the case of *AXD v Home Office* [2016] EWHC 113 (Admin) in which the court held that the immigration detention powers could not be used to provide indirect support to criminal law or to effect removal to detention in another country.

17. With respect to (2), Mr Schymyck points out that the claimant has already been detained for more than six months and there is no indication as to when removal will take place. The period of detention is unreasonable, given that (a) the claimant wants to leave the United Kingdom; (b) he poses a low risk of reoffending; (c) he broadly complied with bail conditions imposed by the police and the Crown Court and, given that the claimant clearly wants to leave the United Kingdom, there is no real risk of him absconding; and (d) the detention is having a negative effect on the claimant's wellbeing. The unreasonableness of his detention is further evidenced by the fact that two authorising officers have recommended that the claimant be released.

18. Mr Schymyck contends that the balance of convenience plainly favours the claimant's release. The claim for unlawful detention is a strong one. There is ongoing prejudice to the claimant as a result of the detention and no prejudice to the defendant's duty to maintain immigration control or to the POCA proceedings, as the Crown Court has sufficient powers to ensure that the claimant remains within the jurisdiction if it considers that this is necessary.

19. Mr Schymyck contests the defendant's contention that judicial review is not appropriate and that the claimant should have pursued the alternative remedy of applying for bail from the First-tier Tribunal. Mr Schymyck argues that the lawfulness of the detention cannot be challenged at the First-tier Tribunal and, in any event, the High Court (but not the First-tier Tribunal) has the power to require the defendant to grant Schedule 10 accommodation to the claimant (paragraph 9 of Schedule 10 to the Immigration Act 2016 confers powers on the Secretary of State to enable persons to meet bail conditions. This includes the provision of accommodation to the bailed person. This power applies only to the extent that the Secretary of State thinks that there are exceptional circumstances justifying the exercise of the power).

20. Further, Mr Schymyck contends that it would be unfair to the defendant if the matter was considered in the First-tier Tribunal, as bail applications before the tribunal do not generally involve complex legal submissions and usually last for 45 minutes only.

21. Mr Schymyck also contends that, if the court orders the claimant's release, then this should be to Schedule 10 accommodation. The defendant has indicated, through Ms Jones, that an application by the claimant for Schedule 10 accommodation will be refused by the defendant on the basis that the claimant has access to money if he applies to the Crown Court in the POCA proceedings. Mr Schymyck argues that it is unfair for the claimant to have to deal with this matter at the hearing before me as the reasons given by the defendant for why a Schedule 10 application would be refused have only just been brought to his attention. In any event, Mr Schymyck contends that Schedule 10 accommodation should be made available to the claimant pending any consideration by the Crown Court as to whether he can access any of the frozen funds.

22. For the defendant, Ms Jones submits that, with respect to point (2), that is *Hardial Singh Nos. 2 and 3*, an application for bail is an alternative remedy. The First-tier Tribunal has extensive experience of dealing with these matters and can take into account the reasonableness of the period of time spent in detention and the future prospect of removal. Ms Jones accepts that point (1) - proper purpose - cannot be dealt with by the First-tier Tribunal as it involves a question of whether the defendant has lawfully exercised his powers in the present case.

23. On the substance, Ms Jones submits that no arguable case or serious issue to be tried has been made out. The purpose of the detention is to effect the claimant's deportation. The defendant is not detaining the claimant to effect or to assist the POCA proceedings, rather the defendant does not wish to frustrate those proceedings. The period of detention has not been unreasonably long and it would not be unreasonable to detain the claimant for a longer period pending the completion of the POCA proceedings.

24. With respect to Schedule 10 accommodation, Ms Jones contends that the conditions for granting that accommodation are not met, whether one looks merely at the statutory wording or at the slightly broader wording contained in the guidance that the defendant has promulgated: the Immigration Bail Interim Accommodation Guidance. Essentially, Ms Jones argues that there were no exceptional circumstances here and, in any event, the claimant could reside in a foreign country, Lithuania.

Discussion

25. In considering this application for interim relief, I apply the modified test in *American Cyanamid v Ethicon Limited* [1975] AC 396. I need to consider whether there is a serious issue to be tried and, if so, where does the balance of convenience lie. Whether damages are an adequate remedy is not an essential feature of this test in the public law context. Where, as here, the application seeks mandatory relief, that is the release of and the provision of accommodation to the claimant, the claimant is required to establish a strong *prima facie* case (see the recent discussion of the appropriate test for mandatory relief by the Court of Appeal in the case of *RRR Manufacturing Pty Limited v British Standards Institution* [2024] EWCA (Civ) 530. That case was not concerned

with the liberty of the subject, but I see no reason in principle why the same approach to mandatory relief should not apply). It is clear to me, however, that the claimant has established a strong *prima facie* case that the defendant has been acting unlawfully in detaining him since he withdrew his EUSS application. Up until that point, the EUSS application served as a barrier to his removal. From that point onwards, however, the evidence suggests that the only barrier to the claimant's removal was the POCA proceedings. It is strongly arguable, however, that those proceedings should not have constituted a barrier to the claimant's removal and the defendant has used the detention power for an improper purpose. The detention power has not been exercised for, or at least solely for, the purpose of effecting the claimant's deportation, rather the power has been used, at least in part, for the purpose of allowing the POCA proceedings to take their course.

26. Ms Jones described this as the defendant not wishing to frustrate the POCA proceedings. I appreciate that the defendant takes this view because it is not part of the defendant's powers to prosecute the POCA process. That is properly a matter for the CPS. However, even this way of characterising what the defendant is seeking to do is highly likely to be an improper purpose for the exercise of the detention power. The detention power can only be used for the purpose of effecting and/or ensuring deportation. It cannot be used for an auxiliary purpose, even where the long-term intention of the Secretary of State is to deport the claimant.

27. I am supported in this view by the decision of Cheema-Grubb J in the case of *R (Ibori) v Secretary of State for the Home Department* [2017] EWHC 1207 (Admin). At a substantive hearing of the claimant's judicial review application, the court held that the Secretary of State had acted unlawfully in detaining the claimant under immigration powers following his release from prison on the basis that, "We cannot deport Mr Ibori until the confiscation matter has been resolved". At paragraph 31, Cheema-Grubb J stated that:

> "I have no doubt that the SSHD intended to deport Mr Ibori. I am also sure that he wanted to go back to Nigeria immediately on conditional release from his term of imprisonment and certainly before any confiscation order was made against him. But I am driven to the conclusion that the SSHD failed to have regard to the limits on her power to detain. The principle of public law that statutory powers

> must be used for the purpose for which they were conferred and not for some other purpose has been breached: [Lumba v Secretary of State for the Home Department [2011] UKSC 12 at [22] and [30], Lord Dyson, and at [199], Baroness Hale]. Mr Ibori was detained under the deportation order for a purpose not permitted by the Act and therefore unlawfully."

This case is a close analogue to the one that I am hearing.

28. A further authority which supports the claimant's contention, is that of *HXA,* relied upon by Mr Schymyck. That was a case which raised the legality of the claimant's immigration detention by the Secretary of State between 26 January 2005 and 23 November 2005, in which the Secretary of State, purportedly, exercised his immigration powers under Schedule 3 to the Immigration Act 1971. In that case, the claimant had been served with a notice of intention to deport him. The reason for this was that it had been assessed that he had been actively involved in the provision of material support to the insurgency in Iraq. It was proposed that he would be removed to Iraq. The evidence before the Court was that the Secretary of State was concerned that, if the claimant was returned to Iraq, he may become involved again in the insurgency against British forces in that country. The Secretary of State wanted to make arrangements for the claimant to be detained on arrival in Iraq so that he could not join the insurgency. At paragraph 173, King J found that:

> "I am satisfied that from the beginning of June - (the letter of the 2nd of June) when the Defendant expressly turned his mind to what would and should happen to the Claimant upon his return to Iraq, the Claimant was not being detained for the sole and limited purpose of effecting his removal from the United Kingdom but for the additional purpose of investigating whether acceptable arrangements could be made to return the Claimant into detention in the destination country, be it that of the Iraqis, or the forces of the United States or those of the United Kingdom."

At paragraph 174, King J held that the detention for this purpose was unlawful being not for the statutory purpose of being "pending deportation".

29. That case is somewhat analogous to the present one. The purpose of detention is for an auxiliary purpose; namely, to ensure that the claimant remains in this country so as not

to frustrate the POCA proceedings. Indeed, that is the Secretary of State's own case as presented to me.

30. I do not express any view as to whether the POCA proceedings would be a lawful barrier to removal if the Crown Court made the decision that the claimant was required to remain within the jurisdiction until the completion of the POCA proceedings. The Crown Court has power to make restraint orders under section 41 of the 2002 Act. At section 41(7) there is power to make such order as the Crown Court believes is appropriate for the purpose of ensuring that the restraint order is effective. At section 41(7) it is stated that:

> "In considering whether to make an order under subsection (7), the court must, in particular, consider whether any restriction or prohibition on the defendant's travel outside the United Kingdom ought to be imposed for the purpose mentioned in that subsection."

The Crown Court has not made such a decision and, as far as I am aware, has not even been asked to make that decision by the CPS.

31. With respect to this ground of challenge to the claimant-'s detention -- that is ground 1 -- the defendant, through Ms Jones, accepts that there is no alternative remedy available to the claimant and that it is appropriate for judicial review to be sought. The First-tier Tribunal cannot order bail on the basis that the defendant is using his powers unlawfully for an improper purpose.

32. I consider, therefore, that there is a strongly arguable case that the detention is unlawful and that it is appropriate for me to consider this application for interim relief.

33. As there is a strongly arguable case on point one, it is not strictly necessary for me to consider point two. I will do so, however, on the assumption that the defendant has power to detain for the purpose of not frustrating the POCA proceedings. In my judgment, I consider that there is a strongly arguable case that the principles of *Hardial Singh Nos.2* and *3* are made out, that is that a reasonable period of detention has already expired and/or there is no realistic prospect of the claimant's removal within a reasonable period.

34. Once the EUSS application had been withdrawn, the only barrier to removal was the POCA proceedings. However, on the timetable known, or that should have been known to the defendant, there was, and is, no clear end date to those proceedings. A directions or mention hearing has been set for 9 August 2024. There has been no indication to the defendant as to when a further or final hearing will take place. It is strongly arguable, therefore, that, once the EUSS application had been withdrawn or shortly thereafter, it was unreasonable to detain the claimant any longer.

35. This is reinforced by the recommendations made by the two authorising officers. They have looked at all of the material and reached a view that the claimant should be released. Why their views were not acceded to has not been explained. An inference that is reasonable for me to draw at this stage is that the defendant has no good reason to disagree with them.

36. I do not consider that the arguments on point two should have been pursued elsewhere and, therefore, shut out a claim for judicial review. Whilst I accept that, in the ordinary case seeking bail from the First-tier Tribunal might be a suitable alternative remedy, that would not always be the case, in particular here, where point two is allied to a ground of challenge (point one) that can only be heard by the High Court. It would make no sense for the different arguments to be presented in two different fora.

37. As for the balance of convenience, this plainly falls in favour of the claimant's release from detention. Liberty of the subject is a fundamental matter and, the ongoing prejudice to the claimant as a result of the loss of liberty, is severely prejudicial to him. On the other hand, there is minimal prejudice to the defendant. There is always a risk that the claimant will abscond, given that his repeated request to return to Lithuania was made during the period when he was in detention and not at liberty. However, that risk has been adjudged by the authorising officers as not justifying the claimant's further detention. Furthermore, there is a low risk of the claimant reoffending. These risks can, in any event, be mitigated to some extent by conditions.

Relief

38. As for the relief that I will order, this must include the claimant's release from detention. This should be effected within seven days of the date of the hearing. I consider that this period will give sufficient time for accommodation issues to be sorted out.

39. As for where the claimant should be released, it seems to me that it is certainly arguable, and may even be stronger than that, that there is power for the Secretary of State to provide accommodation to the claimant under Schedule 10 of the 2016 Act pending any decision by the Crown Court as to whether the claimant's funds, or some of those funds, can be released so that he can look after himself and provide himself with appropriate accommodation. At present, on the evidence available to me, the claimant has no available finance and there is no evidence that he has alternative accommodation available to him. Release without accommodation will, it seems likely, leave him street homeless and cashless. Although, as Ms Jones pointed out, he could go to Lithuania, at the same time it appears that the Secretary of State does not wish for the claimant to do that at present as this might frustrate the POCA process. In those circumstances, therefore, I am prepared to order that, pending consideration of the matter by the Crown Court as to whether the claimant can have his finances, or some of those, released to him, accommodation should be made available to the claimant under Schedule 10.

40. That is my judgment.

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