Case No: CO/4995/2017

Neutral Citation Number: [2018] EWHC 650 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2018

Before :

ANNE WHYTE QC SITTING AS A DEPUTY HIGH COURT JUDGE

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Between :

THE QUEEN **(on the application of LWANDA MAZANA)**	**Claimant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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Miss Galina Ward (instructed by **Duncan Lewis**) for the **Claimant**
Mr Jack Holborn (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 21 March 2018

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Judgment

Anne Whyte Q.C.:

1. The claimant is a national of South Africa with a valid South African passport. He entered the UK, possibly, in 2005. He has been convicted of a number of crimes since 2009 including robbery, battery, public disorder offences and breaches of various court orders. On 23 October 2015 he was convicted at Bristol Crown Court of section 18 wounding with intent and was sentenced to 30 months imprisonment in a Young Offenders Institute. He was made the subject of a deportation order on 21 September 2016 as a result of that conviction and does not challenge that decision. He was detained by the defendant ("SSHD") from 21 January 2017 under her immigration powers of detention. This detention continued until 29 January 2018. The claimant issued an application for judicial review of his ongoing detention, seeking his release and damages on 30 October 2017. On 21 November 2017 permission was granted on the papers but interim relief refused. On 29 January the claimant was granted bail by the First Tier Tribunal ("FTT") and this is therefore now a claim for damages for unlawful detention. My task is to decide whether any part of the claimant's detention was unlawful after mid July 2017, the claimant accepting that detention up to that point was lawful.

Background

2. The SSHD made an application dated 30 March 2017 to the South African High Commission for an emergency travel document ("ETD") in respect of the claimant. Previously the claimant had not co-operated with the ETD process, indeed he had frustrated it at times by refusing to sign documents or provide the SSHD with his passport. That changed, and a telephone interview took place between the claimant and the High Commission. The defendant's application was agreed on 4 May 2017.

3. Mid July 2017 is taken as a threshold date for unlawful detention because that is when, according to the claimant, the defendant cancelled removal directions which had been set. This was because the South African authorities had "paused" the process of agreeing and/or issuing ETDs. The claimant contends that, as a result, his removal could not have taken place within a reasonable period of time. On 23 June 2017 he had signed a disclaimer confirming his wish to return to South Africa as soon as possible. Removal had been set for 21 July 2017. The case record sheet for 7 July 2017 noted that ETDs were not being issued for foreign national offenders ("FNOs") and shortly afterwards the removal directions were cancelled. On 10 August the authorising officer recommended following up with the relevant department (Returns Logistics or RL) what progress had been made with "the South Africans". It was noted in the Case Progression Plan that RL was in the process of arranging a meeting to resolve the South African FNO issue.

4. A detention review dated 7 September noted that removal was not imminent "but is expected within 3 months". The Case Record Sheet for the next day noted that the data sharing agreement was with the Government Legal Department for sign off after which the Foreign Commonwealth Office would liaise with the relevant authorities in Pretoria. It recorded, in respect of the ongoing negotiations about the data sharing agreement:
"*We are hopeful that the process will resume shortly but at the moment I cannot give you a date.*"

5. On 27 September 2017 the FTT refused bail solely on the basis of a lack of Approved Premises ("AP") warning that the defendant needed to address the situation as a matter of urgency. The defendant had informed the FTT that it had no time estimate for resolution of the ETD impasse and the tribunal noted that the claimant was effectively in open-ended detention "*with no realistic prospect of imminent removal"*. The claimant could only be bailed to an AP as that was a condition of the licence governing his release from criminal justice detention.

6. In a pre-action protocol letter dated 4 October 2017, the claimant's solicitors asserted that there was currently no prospect of removal within the third *Hardial Singh* principle. They repeated this in a further pre-action protocol letter dated 13 October 2017 and asked the SSHD to fund the claimant's placement at an AP. Meanwhile on 5 October the authorising officer indicated that given the ETD situation a release referral should be considered and he authorised a further 28 days of detention to enable this to happen. On 23 October the defendant wrote to the claimant effectively suggesting that he or his friends/family fund his accommodation. In a follow-up letter the next day, the claimant's solicitors cited "The Guidance Section 4 Accommodation for Immigration Bail for NPS Supervising Officers". This guidance was drafted to assist offender managers within the NPS. At page 98 it says:

> "While offenders are in APs, the HOIE (Home Office Immigration Enforcement) has agreed to fund their maintenance charges where they are unable to fund themselves."

7. On 23 October the claimant indicated that his sister would cover his AP funding but the next day he confirmed in writing that he had no funds to cover the AP costs. Proceedings were issued on 30 October 2017.

8. On 11 November 2017 in a further detention review, the authorising officer noted that a release referral was with the relevant officer and that the position over funding of an AP was outstanding with discussions on 14 November being likely to resolve that. The outstanding barrier to deportation of the ETD was given an estimated timescale of 6 months although it is not known how this estimate was arrived at. In those circumstances a detention of 7 days only was authorised. On 20 November 2017 detention was authorised for a further 7 days on very similar grounds to those set out in the previous review.

9. Beverley Jones is employed by the defendant as an Assistant Country Manager in a team whose purpose is to facilitate travel documentation through diplomatic engagement. In a statement produced for these proceedings and dated 23 November 2017 she states that the defendant was informed by the South African authorities on 4 July 2017 that South Africa was not currently agreeing applications for ETDs or issuing ETDS for foreign national offenders, of which the claimant is one. This decision was taken by the South African authorities because the SSHD felt unable to provide them with requested information about FNOs and their criminality before arrival in South Africa, due to the provisions of the Data Protection Act 1998. No data sharing agreement was in place at the time. Ms Jones was unable to provide any timescales for resolution of this impasse and confirmed that the lack of a data sharing agreement meant that the SSHD was currently unable to deport the claimant to South Africa. She explained that there was to be a meeting in Pretoria in late November to

try and finalise the process, agreement having been reached about relevant Standard Operating Procedures.

10. A review on 28 November noted that any AP address would take eight weeks to source from the point of release being agreed and that the release referral had been sent for approval on 6 November 2017. The authorising officer noted:

> "*I note the position of this case. Returns Logistics are pushing on the position of ETDs for South Africa. A timeframe is predicted at around 4 weeks. Agreement has been received from the G6 to pay for any approved premises should this become protracted and discussions will need to take place with the offender manager. A discussion was held with the substantive AD and detention is to be maintained whilst we moniter progress from Returns Logistics*."

11. Detention was authorised for a further 14 days on the basis that progress about the data sharing agreement would be monitered. The detailed grounds of defence filed on 29 November 2017 contained an agreement to fund the claimant's AP i.e. just over a month after the claimant had indicated that he did not have funds.

12. The substantive hearing listed for 19 December 2017 was adjourned following confirmation that AP for the claimant could not be made available until January 2018. The Detention Panel on the same day noted:

> "Need a timescale from RL regarding the movement of obtaining the ETD from RL. If in January there is still no movement in obtaining the ETD, then a release needs to be looked into"

13. In a second statement dated 13 December 2017, Ms Jones confirmed that an important meeting had taken place on 12 December and that the Department for Home Affairs was happy with the draft agreement which needed legal sign off. The Department undertook to update Ms Jones by 22 January 2018. The release referral was officially put on hold on 8 January 2018 because of the impending resolution of the data sharing issues. In the meantime, the claimant applied for bail and was released on bail on 29 January 2018 despite the bail judge being aware of the current progress with the data sharing agreement.

14. In a further statement dated 13 March 2017, Ms Jones confirmed that following a meeting in late January 2018 between Home Office officials and the South African authorities a data sharing agreement had been agreed which came into force on 12 February 2018 and which facilitated the process of documenting FNOs ready for return to South Africa.

15. The claimant submits that he is now resident in an AP with the service charge being funded by the defendant. He says that the defendant cannot stand back, retrospectively and claim that removal was always possible within a reasonable time because the short-term time frames referenced in various detention reviews were speculative and in reality were on a "wait and see" basis. Even now, he says, removal is not said by

the defendant to be a given. Once the removal directions were cancelled, it was apparent, he says, that he could not have been removed within a reasonable period.

16. Alternatively, the claimant submits that detention is unlawful from 27 September because, placing heavy reliance on the decision of the bail judge, the only reason for detaining him by then, given the uncertainties over the ETD issue, was the unlawful failure to follow the guidance cited at paragraph 4 above and to fund his placement at an AP.

Legal Principles

17. It is for the SSHD to justify the need for and duration of detention. The four propositions governing the legality of Immigration Act detention, as originating in *R v Governor of Durham Prison ex parte Hardial Singh* [1984] WLR 704 and thereafter clarified, are well known. In this case the claimant contends that the defendant has breached the third principle:

> "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."

18. I am not required to conduct a *Wednesbury* review. The court assumes the role of primary decision maker. In making an assessment, this court must consider what was known to the defendant's officers at the time, not with the benefit of hindsight. In *AXD v The Home Office* [2016] EWHC 1133 (QB) Jay J. said in this respect:

> "The court can take into account any facts that were known to the defendant at the time even if they did not feature in the reasons for detention that were furnished…Hindsight is no part of the exercise…..The weight to be given to the defendant's view is a matter for the court, although certain issues are more within the expertise of the executive than the judiciary, for example the progress of diplomatic relations and the attitude of other countries to accepting returnees."

19. There is no such thing as a definitive reasonable period and each case must be considered according to its own facts and dynamics. A relevant circumstance to one case, may be irrelevant to another. Further guidance was given in *Lumba v SSHD* [2012] I AC 245. The question of what a reasonable length of time is, will depend upon the length of detention, the nature of the obstacles to removal, the diligence and expedition displayed by the SSHD to circumvent such obstacles, the conditions of detention and effect of on the individual. The risk of absconding and public harm issues resulting from absconding are very important. The lengthier the detention, the more certain should be the proximity of removal. Whether a prospect of removal is sufficient, at any given time, will depend upon the weight of other factors. There can be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur (per Richards LJ in *R v M(H) v SSHD* [2010] EWCA Civ 1112).

20. It is for the court to decide what is the scope of the power of detention and whether it was lawfully exercised (per Toulson LJ (as he then was) at paragraph 62 of *R (on the application of A) v The Home Office* [2007] EWCA Civ 804). The fact that steps may have taken longer than originally assumed, does not, of itself, render the resulting additional period unlawful.

21. The defendant is obliged to deport foreign criminals within the meaning of section 32 of the UK Borders Act 2007. Section 36 of the 2007 Act mandates detention prior to deportation unless the SSHD believes detention to be inappropriate. The SSHD accepts that this detention is subject to the *Hardial Singh* principles.

Ground 1

22. Miss Ward, on behalf of the claimant, submitted that the third *Hardial Singh* principle was engaged by mid-July. After that date, she submits, there was no certainty or even realistic estimate of when the ETD issues with the South African authorities would be resolved. She refers to the varying and allegedly unsubstantiated timescales identified in the miscellaneous detention documents and relies on these to submit that there was plainly no understanding or clarity amongst staff as to when or in what sort of timescale the claimant could realistically be removed. She tethers this to a suggestion that even within the defendant's own pleadings, there was no established timescale consistently provided and to an observation that Ms Jones could not say in late November at the time of her first statement, what the timescale for resolving the data sharing agreement might be. Accordingly, it was or should have been apparent to the defendant that removal could not take place within a reasonable amount of time.

23. Mr Holborn, on behalf of the defendant, points out that at no stage was there any suggestion that the South African authorities were being obstructive or unreasonable or wished to frustrate the deportation process. It was a matter of drafting and finalising a data sharing agreement. The situation was always likely to be resolved within a reasonable period of time, it was just a question of when. He submits that the appreciation of when the ETD issue might be resolved fluctuated, but was closely monitored. For example, by August enquiries were to be made about progress, by September it was reckoned that the situation would be resolved within 3 months. By then, the defendant's officers knew that the data sharing agreement was with GLD for sign-off after which it would go to Pretoria. By early October it was noted that RL was in the process of arranging a meeting to resolve documentation for FNOs and that removal could not be re-booked without the South African High Commission issuing a travel document. This caused sufficient concern, by that date, to merit consideration of a release referral. But, he contends, within a short time, progress had been made. By November a new agreement had been sent to Pretoria for approval. By 23 November, the Standard Operating Procedures involved in this process had been agreed and a meeting had been scheduled for the end of the month to finalise the process. Reviews in November and December recommended monitoring the situation and the officers were careful to authorise shorter periods of detention to ensure careful scrutiny of the situation. Consideration of release does not mean that the continuing detention was unlawful.

24. I am satisfied that at each stage, the defendant's officers applied the correct test and considered whether there was a realistic prospect of deporting the claimant within a period that was reasonable in all the circumstances.

25. I do not accept the submission that detention became unlawful as soon as the removal directions were cancelled. It was apparent that the situation with the South African authorities was progressing at a relatively steady pace with the draft agreement ready for sign off at the UK end of business in September and lodged with the South Africans in November. That progress was closely followed by the defendant. The decision to consider a release referral did not make the ongoing detention unlawful. That decision quickly coincided in time with obvious developments with the ETD negotiations. It is unfortunate that this process was not, in fact, complete until a few days after the Claimant's further bail application in January 2018 but this does not determine the lawfulness question.

26. Furthermore, I do not accept that the inability to pin point a specific date or precise timescale for final "sign off" of the draft data sharing agreement rendered the detention unlawful at any stage. What mattered in this case, as in any other, was whether the prospect of removal was sufficient at any given time to justify the detention, bearing in mind all of the factors that needed to be weighed up. In this case, by the time the ETD became a real issue, the Claimant had been in detention for over six months. The longer the uncertainty went on, the more proximate the removal needed to be.

27. I must however guard against hindsight. I am not bound by the views expressed by the bail judge in late September although I have borne them in mind. The relevant factors in this case included the status of the Claimant. He had been convicted of several offences but most recently of a very serious offence. He had been assessed as posing a high risk of harm and high risk of absconding and had a history of breaching court orders. His approach to removal had varied. There was nothing to suggest that detention (but for any argument about its length) was inappropriate. There were no health or fitness issues. I take the view that anxious care was taken in the very regular reviews conducted. In fact, the longer his detention went on, the closer the Defendant got to resolving the situation with the South Africans. There was never any suggestion that the situation would not be resolved. The impression given is one not of obstruction or major difficulty, merely the usual momentum of diplomatic issues.

Ground 2

28. The challenge on Ground 1 having failed, Ground 2 might seem academic. However, Miss Ward contended that it was a free standing challenge on the basis that absent any breach of the third *Hardial Singh* principle, it was a public law error not to follow the Guidance and that had the defendant offered funding sooner, the FTT would have granted bail.

29. On 8 September 2017 the defendant submitted a Bail Summary in response to the bail application lodged by the claimant with the FTT. The defendant opposed bail on the basis of the claimant's previous offending and conduct. She also asserted in paragraph 17 that until the claimant could provide funds for his AP and a suitable follow on address, no accommodation will be available. A probation officer had made contact with the manager of an AP in Bristol who would not accept a referral without funding being in place. In a letter dated 8 September 2017, the probation officer said that he did not know whether the claimant would be able to fund his approved premises placement and noted that the claimant would not be entitled to benefits. As set out above, bail was refused by the FTT on 27 September. The judge indicated that the

claimant could not bailed because of a lack of an AP and that there was no funding for the AP at Bridgestock Road, the address earlier identified as appropriate by the probation officer. Bail was only refused therefore because of the lack of the AP.

30. Miss Ward submits that the defendant ought to have known from 8 September 2017 that the claimant could not fund an AP and that therefore, under the guidance, the SSHD ought to have funded it. This is because as an FNO he would been unlikely to be able to pay, as intimated by the probation officer. Had the defendant offered to fund at this date, an address would have been available, and the claimant would have been released. Alternatively, she submits that by mid October and no later than 24 October, the defendant was well aware that the claimant could not pay and ought then to have applied her own policy. Had that been done, she contends that allowing reasonably for an 8-week period to find and organise AP, the claimant would have been released by Christmas. Even from 24 October, she says, it took 5 weeks and the filing of three pleadings for the defendant to concede that she would fund the AP. In responding to the suggestion from the defendant that even if that is right, by then it would have been apparent once more that the claimant could be removed within a reasonable amount of time, Miss Ward relies upon the fact that the FTT knew that the terms of the draft data sharing agreement had been agreed but still went on to grant bail on 29 January 2018.

31. Mr Holborn agrees that for a short period there might have been some confusion as to the operation of the Guidance. He contends that the claimant's inability to fund was not truly apparent until 24 October. If SSHD ought to have agreed funding by that date, he says that it would still have taken some time to identify and arrange AP and process the release. Within a short time of 24 October, the situation had changed in that it was clear that progress was being made with the ETD issue. There was nothing, he says, unlawful about the detention reviews in November and December. Therefore, even if there was, briefly, an unlawful to failure to apply the Guidance, it did not cause any unlawful prolonged period of detention because the claimant would still have been lawfully detained under the statutory immigration detention powers given the compulsion to remove him and the progress made with the South African authorities.

32. I find that there was confusion about the guidance. The defendant had agreed, on the face of it, to fund AP premises where the individual offender in question could not afford it. By 24 October rather than early September, I find that it was clear that the Claimant could not afford it. Within a short but reasonable time, the defendant ought to have conceded funding.

33. I am therefore concerned with the effect of that error. It occurred at a time when a release referral was under consideration but by no means complete. It is common ground that finding and arranging placement at an AP can take some time – sometimes as long as 8 weeks. During those weeks, as is clear from the chronology that I have summarised above, progress with the South African authorities was noted in the detention paperwork. By the time the defendant had conceded funding (in late November), the detention reviews were very clear that the timescale for resolving the ETD issue had swung back to an anticipated 4 weeks. It is evident, that by the third week of November removal was once more taking priority over release though the two options were being carefully reviewed. That was some two weeks after the

release referral was sent for approval and 3 to 4 weeks after the failure of the defendant to concede funding.

34. The review of 11 December noted with care that 4 weeks would be acceptable and reasonable on current information but that 2 or 3 months would not.

35. On that analysis of the chronology, Ground 2 fails because the outcome would have been no different. There was nothing unlawful about the reviews in November and December when analysed in the context of the defendant's decision-making. The Claimant would still have remained in detention, even had the defendant not delayed between 24 October and 28 November in agreeing to fund the AP. By the relevant time, the momentum had, reasonably, reverted towards a removal which was realistic prospect within a reasonable time.

36. The claim is therefore dismissed.

37. This draft judgment will be circulated to the parties in the anticipation that a draft consent order can be swiftly filed.