CO/9079/2009
CO/12676/2009

Neutral Citation Number: [2010] EWHC 3079 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 4 November 2010

B e f o r e:

MR C M G OCKELTON
(Sitting as a Deputy High court Judge)
Between:
THE QUEEN ON THE APPLICATION OF MONDAY
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Mr Christopher Buttler (instructed by T V Edwards) appeared on behalf of the Claimant
Mr Jeremy Johnson (instructed by Treasury Solicitor) appeared on behalf of the Defendant

J U D G M E N T
(As Approved)

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1. DEPUTY JUDGE: There are two separate proceedings for judicial review with numbers CO/9079/2009 and CO/12676/2009. They were consolidated by order of the court in October 2009. I have before me an application for judicial review, with permission granted by His Honour Judge Sycamore on 26 October at an oral hearing.

2. By consent of the parties, the matters raised by the two separate proceedings are to be divided, but not in accordance wuith the original separate proceedings; that is to say, today the court is concerned with matters as they are today and subsequently the court will be concerned with matters as they have been.

3. How does that come about? The proceedings are a challenge to the defendant's detention of the claimant under powers in the Immigration Act 1971. Today the claimant seeks release from detention on the grounds that today his detention is illegal. He also seeks a declaration in due course that his detention for some or all of the previous period has been unlawful and if he obtains that declaration he will be seeking damages for unlawful detention.

4. The claimant is a national of Nigeria. He came to the United Kingdom unlawfully. He has, so far as I am aware, never had any leave to be here. He made a claim for asylum which was rejected. He was sentenced in 2006 to a period of eight months' imprisonment for attempting to open a bank account using a false passport. There was a recommendation for his deportation. In April 2007 he was sentenced to 15 months' imprisonment for a further offence connected with the misuse of passports and he was again recommended for deportation. He was then detained under the powers in paragraph 2 of Schedule 3 to the Immigration Act. A deportation order was made against him on 17 September 2008. He has been detained ever since, for the most part in the immigration estate although for a period of some weeks during the course of the summer of 2010 in hospital. The total period of his detention is now over 35 months.

5. Mr Buttler who represents him has asked me to say that the period of detention that the claimant has undergone is such as to be unreasonably long; that is to say, he submits that it breaches the second principle in R v Governor of Durham Prison ex p Hardial Singh [1984] 1 WLR 704. In that case, as is well known, Woolf J (as he then was) said (at page 706):

> "Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if an individual is being detained, in one case pending the making of a deportation order and in the other pending his removal. It cannot be used for any other purpose.
>
> Secondly as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case. What is more, if there is a situation

> where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing person who are intended to be deported within a reasonable period, it seems to me it would be wrong for the Secretary of State to seek to exercise his power of detention.
>
> In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

6. The principles there set out have been examined by the Court of Appeal on a number of occasions. The classic statement on them is that of Dyson LJ (as he then was) in R (I) v Secretary of State [2002] EWCA Civ 888 at paragraphs 46 and 47.

7. The facts in the present case are - as they are in all cases of this sort - of great importance. The difficulty in the present case is that the relevant facts are relatively difficult to ascertain. The claimant exercised rights of appeal against the decision to make a deportation order against him. He ceased to pursue those rights and claims in August 2008. Because he was at that stage - and I am told is still - claiming to be a national of Sierra Leone, the Secretary of State attempted to make arrangements for his removal there. Those arrangements were unsuccessful. Subsequently Nigeria has - as I am told - accepted him and it is for that reason that I described him a moment ago as a national of Nigeria.

8. The present proceedings were begun by an urgent application for a stay on the claimant's removal from the United Kingdom on 30 October 2009. That application was granted. There has therefore been an injunction against the claimant's removal since that date. Those facts may be regarded as beyond dispute.

9. The facts which are more difficult to ascertain are those which relate to the claimant's mental state. I should say before embarking on examination of those that it it is also not in dispute that the claimant has a physical illness, but I think it is fair to say that Mr Buttler has not pressed any aspect of his case that relies on that illness. Instead Mr Buttler points to the evidence of the claimant's mental illness.

10. The most recent full statement of that is a medical report produced this summer towards the end of the claimant's time in hospital. Mr Johnson points to it as compelling evidence of the position as it is today. That position, according to that report, is that the claimant exaggerates his own mental disorder, that he is apparently not seriously mentally ill and that he is clearly fit to fly. But although that report is itself clear on the position in the mind of its author at the time it was written, it is somewhat different from many of the other reports from various sources at various times during the claimant's detention.

11. In particular Mr Buttler has pointed to a substantial period lasting from at least September 2008 until the most recent report in August 2010 where the claimant was assessed by a number of medical practitioners of various qualifications and instructed

by both sides. The assessment was that the claimant was not what is called ‘fit to fly’. Exactly what that phrase means is, I have to say, rather unclear to me: Mr Johnson indicated that the Secretary of State's position was that a person who is not ‘fit to fly’ might nevertheless be put on a plane and removed to the country that the Secretary of State thought he ought to be in. But for the purposes of this judgment I assume that in the claimant's case being unfit to fly means having a mental disorder which renders it in practice impossible for the Secretary of State lawfully to remove him. I appreciate that is not what Mr Johnson wants it to mean, but it seems to me that if a person is unfit to fly there would need to be some very good reason for forcing him to fly.

12. That means, as it seems to me, that during the period from September 2008 until October 2010 there has been a practical inhibition from removing the claimant which derives from his mental condition.

13. It is accepted that time does not run for Hardial Singh purposes when the reason why the Secretary of State cannot remove the claimant is the appeals provisions of the Immigration Acts which prohibit removal while an appeal is pending. Mr Johnson points to the injunction sought by the claimant and obtained at the beginning of these proceedings as another reason why the clock should not be regarded as running. It would be pointless, he says, for the Secretary of State to attempt to remove the claimant. He is prohibited from doing so. Mr Buttler has attempted to show by the use of phrases such as "the operative cause" what it would be that a court ought to take into account in seeing whether removal was possible.

14. It seems to me that - without wanting to formulate a test for use in future cases - apart from the statutory prohibition during an appeal, one question which it might be interesting to ask in cases of this sort is, apart from the prohibition during statutory appeals, to which I have already referred, would removal be possible but for matters that are the claimant's own choice? If removal is prevented by the claimant's non-co-operation, or resistance to removal, or because the claimant pursues a judicial review claim, or because the claimant obtains an injunction, those might be regarded as matters of his own choice which do not allow him to say that the subsequent delay is one which makes his detention unreasonable. But where there are factors which are not of his choice which prevent removal it appears to me that the clock must be regarded as running.

15. Even if the claimant had not sought an injunction in the present case, the medical evidence would presumably have been the same. The injunction therefore adds little to the prospect or lack of prospect of his removal at any particular time. It therefore seems to me that it is right to say that the period to take into account for Hardial Singh purposes is from July 2008 when his appeal process finished until the present time. That is a period of over two years.

16. It is clear from the authorities that detention of a person with a view to his deportation or other removal is lawful for the period during which proper efforts are being made to secure that removal, provided that there is not some other reason why removal is impractical or impractical within any reasonable period. It is also clear that detention is

more likely to be lawful if there are good reasons for keeping the claimant in detention rather than releasing him.

17. In the present case there are a number of factors counting against the claimant's release. The most important is that he has previously breached immigration bail. He absconded from reporting requirements very soon after they were imposed and he went on to commit the second of the offences to which I have referred, while on immigration bail. There are other factors to be taken into account, of which perhaps the most important is that he has committed offences which show a willingness to contrive identities and to disregard those parts of the law of this country which require identity to be protected and to be used only properly.

18. It is fair to say that Mr Johnson made it quite clear that, from the Secretary of State's point of view, the reason why detention ought to be maintained, albeit now for a considerable period of time, is the likelihood of absconding, particularly because as time goes on the Secretary of State says it becomes more likely that removal will take place within a reasonable time. Indeed Mr Johnson's position is that there is no hindrance to removal now. The medical evidence favours it, says Mr Johnson. The injunction is the only reason why the Secretary of State should not proceed directly, to renew the emergency travel document which has been obtained from the Nigerian Government, and remove the claimant within a very short period of time.

19. My review of the medical evidence suggests to me that that is over-optimistic. The most recent report which favours the Secretary of State's view of the claimant's position so strongly is, in my judgment, a mere snapshot, and must be seen in the context of the other reports in this case. I do not say that it is wrong. I simply say that I do not think it would be right to rely on it as showing a settled position in terms of the claimant's mental state. I agree with Mr Buttler that there is a substantial body of opinion from different sources pointing in the other direction. It may be that all that opinion is, as Mr Johnson suggested in his skeleton argument, simply wrong: that is to say that other professionals were misled into providing reports of the sort they have. It may be that the claimant - whether as a result of his time in hospital or not - is now in a much improved mental state. But it may be simply that the present report is one of a number of factors which will in due course have be taken into account in assessing in a balanced way what the claimant's mental state is.

20. The period of detention that has already taken place has been long. It is twenty-eight months since appeal rights were exhausted. That would be a long period of time by any standards. It has been, in my judgment, largely or wholly a period during which it is difficult to see that the Secretary of State could have had any proper view that removal would take place soon because of the claimant's mental condition as assessed from time to time. At the present time, although Mr Johnson suggests that removal is now possible within a reasonable time, I disagree. It may be or may not be, but, looking at the material for myself, I am not satisfied that that is a reasonable prospect.

21. For those reasons I have come to the conclusion that the detention of the claimant for a period beyond next Thursday will breach the second principle in Hardial Singh. I should emphasise that in reaching that view I have not reached a view on a number of

other matters. I have not found it necessary to reach any conclusion at all about whether the claimant's detention has been unlawful at any time in the past. I have not reached a view on the claimant's mental state, but only on the state of the evidence relating to the claimant's mental state. I have not reached a view on whether the injunction should be lifted. Those, it seems to me, are all matters which are properly considered in the second part of these proceedings.

22. I have identified the date of one week from today in order to enable proper arrangements to be made for the claimant's release. I emphasise that I would expect there to be strict conditions designed to secure, as far as possible, the unlikeliness of his absconding. It seems to me that a curfew will be appropriate. The claimant has offered electronic tagging. Although Mr Johnson suggests that in the case of a person suffering from mental illness electronic tagging is sometimes found to be inappropriate, no doubt the claimant's preparedness to undertake it will be of some relevance. It will be necessary to secure a place where the claimant can live at, and living and sleeping every night at that address will be a condition of his release. There should be a reporting condition, I would assume daily reporting. There is to be a Section 117 assessment. There will be a need to ensure that any conditions made by order as a result of this judgment do not conflict with the programme set up in order to meet those requirements.

23. The parties should be prepared to agree the terms of release. If necessary the court is at hand to make an order. I would hope that the matter can now be dealt with by agreement.

24. MR BUTTLER: I am grateful. Noting what your Lordship said about the Section 117 assessment, could I ask that the interested parties - the London Borough of Hillingdon and Hillingdon Primary Care Trust - be directed to complete their Section 117 assessment and care plan in advance of next Thursday.

25. DEPUTY JUDGE: Yes. That would be appropriate. They have indicated that they are ready to do it. I have no idea what timescale is needed.

26. MR BUTTLER: The PCT has said it would do it within the timeframe requested by the court. What I would suggest, and I suggested in the pleadings, was three days.

27. DEPUTY JUDGE: Do you say that your client cannot be released until it is completed?

28. MR BUTTLER: If I am being consistent with the pleadings, and consistent with the case that the claimant does have a mental illness, enduring mental illness, I ought to say that certainly the care plans arrangements ought to be in place before he is released. There ought to be no difficulty with that because the Section 117 duty is an absolute duty and a duty that bites on release from hospital.

29. DEPUTY JUDGE: I will order that that plan be completed by Tuesday at 5 pm. That is an order against Hillingdon Primary Care Trust and the London Borough of Hillingdon.

30. MR BUTTLER: I ask for the claimant's costs.

31. DEPUTY JUDGE: Had not costs better be reserved?

32. MR BUTTLER: The way my friend put it and what I accept is that this claim has been split in two in relation to - - - - -

33. DEPUTY JUDGE: I appreciate that but the problem is the preparation and much of the work has really been for a whole proceedings, has it not? To divide it up for the purposes of today would be totally artificial.

34. MR BUTTLER: I do not accept that. I do not accept that the work has been anywhere near split in that way, at least since the application, certainly since my involvement. I was instructed shortly before the application for consideration was drafted in June 2010. The purpose of that application was to secure release. Since then we had hearings in August, October and today, each of which has been directed at securing release. All of the claimant's efforts, all of the written and oral arguments, have been directed to that one issue. I accept that prior to June 2010, in terms of drafting the claim forms, that is directed as much at the lawfulness of past detention as at current detention. At the very least I would ask for an order that the claimant has his costs in relation to this issue. If the costs cannot be agreed it can go off to assessment.

35. MR JOHNSON: In my submission, the appropriate course is to reserve costs. First, because it is artificial and potentially problematic to make an order now for one set of costs now and there will be a second set at the end of proceedings and to disentangle it. In my submission it will be for the judge hearing the substantive claim at the conclusion of litigation who can take an overall view, an overview of the case.

36. In addition, I accept that substantially my friend has succeeded today. The consequence of your order is that the Secretary of State has not at the moment acted unlawfully but that she would do so if she continued to detain beyond next Thursday. That is another reason why the appropriate course is to assess costs in the round.

37. There is one other matter I wish to raise. Would you like to deal with costs first?

38. DEPUTY JUDGE: Yes. I will deal with costs first, subject to this. I am going to order that costs be reserved. I can make an exception for fees in relation to today's hearing if that would be helpful.

39. MR JOHNSON: I would not dissuade you.

40. MR BUTTLER: Can I try to persuade you to make a slightly different order? I accept the point that matters would become a little confused if there was a costs order up to now or part costs up to now and then everything having to be reconciled at proceedings. I say the claimant has been successful in relation to this part of the claim and that there needs to be an order that he have his costs for his part of the claim but not be assessed until the proceedings and then, let us suppose the claimant loses, the rest of the claim or two sets can be offset or changed to no order as to costs.

41. Your Lordship has heard the argument. You are in a better position to adjudicate on whether the claimant ought to have his costs on his part of the claim than will be the trial judge at the end of the next proceedings.

42. DEPUTY JUDGE: I will order the defendant to pay the claimant's costs properly attributable to today's hearing. The remainder of the costs are reserved.

43. MR BUTTLER: As to costs attributable to today's hearing, that includes a skeleton argument.

44. DEPUTY JUDGE: A skeleton argument properly attributable to today's hearing is a cost properly attributable to today's hearing.

45. MR BUTTLER: Yes.

46. DEPUTY JUDGE: I am not going to go through all the documents to work our which ones I did not need for today. I suspect that many of the documents are primarily attributable to the main argument you make in the rest of the proceedings.

47. MR BUTTLER: Thank you.

48. DEPUTY JUDGE: Mr Johnson, your other point?

49. MR JOHNSON: The other matter is this. There is no urgency for the substantive claim in relation to detention because that is only a damages claim. But there is some urgency in relation to the removal point. I am not asking for you to deal with it today plainly. I do invite you to give directions for the determination of that. The judge said some months ago - I forget in which order it was - that this needed to be dealt with expeditiously. Nothing has been done by the claimant.

50. Apart from the injunction, the Secretary of State is entitled to remove. If the claimant wants to challenge removal he needs to get on and do that. As matters stand, the Secretary of State is entitled to have the injunction set aside. Therefore I would invite the court to set directions for a hearing of the Secretary of State's application to set aside the injunction, requiring both parties - particularly the claimant as the claimant is going to have to make the running on this at the moment because there is no ground to challenge - requiring in early course skeleton arguments and that might then just crystallise the issue. It may be then that a hearing is not necessary or it may turn into a different type of hearing, permission to make judicial review of the challenged to being removed.

51. DEPUTY JUDGE: In view of what I have said you will appreciate that, on the material I have seen, I consider that a proper, preferably agreed, report on the claimant's condition is going to be the document which will most persuade the court as to whether removal is appropriate. That, I appreciate, you say you already have. The claimant says your report is not accurate. The court is unlikely to be able to reach an assessment while there is still the level of doubt. The appropriate direction must therefore be one for the claimant to put his case against removal in full by some date - probably about

three weeks from now I would have thought, including whatever medical evidence and other material on which he relies.

52. MR JOHNSON: The question of permission could be dealt with on paper, for example, or at the hearing.

53. DEPUTY JUDGE: That would simply be in conjunction with an application to remove the injunction. If you undertake to make that application formally I can give the appropriate directions, I suppose.

54. MR JOHNSON: It has already been made formally. It was adjourned by Mr Justice Nicol. We have made the application. It stands adjourned. We have permission to restore it.

55. DEPUTY JUDGE: You seek to restore it. Mr Buttler is very anxious not to have to deal with today. He will clearly have notice of it now. There can be a hearing if necessary, but the application is restored, and I will then direct - - Mr Buttler, I have indicated roughly three weeks. Have you any observations to make?

56. MR BUTTLER: You indicated that the claimant might have an opportunity to file medical evidence in response to the Secretary of State's position. If the claimant is given a proper opportunity to do that, in my submission, it would require more than three weeks in so far that psychiatrists usually require considerably more lead time. Under those circumstances I ask for six weeks.

57. DEPUTY JUDGE: What is six weeks today?

58. ASSOCIATE OF COURT: 16 December.

59. DEPUTY JUDGE: I am minded to direct that on the defendant's application to discharge the injunction against removal, the claimant be directed to file and serve any arguments against removal and supporting documents by 16 December and that the matter be listed for hearing on the 20. Does that seem sensible?

60. MR BUTTLER: Yes.

61. MR JOHNSON: That is listed for hearing of the defendant's application to discharge the injunction.

62. DEPUTY JUDGE: Yes.

63. MR JOHNSON: Might it also be sensible to list for hearing the claimant's application for permission to claim judicial review of the decision to remove the claimant, if indeed that challenge is maintained because it has become academic?

64. DEPUTY JUDGE: Yes. That is the issue to be decided on that day, is it not?

65. MR JOHNSON: Yes.

66. DEPUTY JUDGE: Whether the claimant can be removed?

67. MR JOHNSON: Yes. Discharge of injunction and permission if appropriate.

68. DEPUTY JUDGE: The claimant has or does not have permission on that?

69. MR JOHNSON: That is why I was standing up earlier. He was granted permission. We can check, but I think he was only granted permission to claim judicial review of his current detention.

70. MR BUTTLER: Yes.

71. MR JOHNSON: He does not have permission to claim judicial review of this decision to remove him.

72. DEPUTY JUDGE: Yes. The consolidated actions are falling apart again.

73. MR JOHNSON: Yes.

74. MR BUTTLER: I foresee a difficulty if we are going to try to list permission at the same time in that the claimant ought to be given an opportunity to regularise the pleadings. That ought really to follow the opportunity of putting in further documents, including medical evidence.

75. DEPUTY JUDGE: I am not prepared to give an indefinite amount of time for things to roll on when the history is that the challenge to removal has not really been supported at all. It seemed to me initially that three weeks was appropriate. You asked for six weeks: you have it. It seems to me that six weeks is plenty of time to get all that sorted out. There can be a rolled-up hearing on 20 December. The matter can proceed to the substantive trial of the judicial review on removal.

76. MR BUTTLER: Very well.

77. DEPUTY JUDGE: It will take a day?

78. MR JOHNSON: Yes. Unless I am told otherwise, we are attracted by it being a rolled-up hearing and removal.

79. DEPUTY JUDGE: Yes. It needs to be, to make any sense of the lifting of the injunction.

80. MR JOHNSON: My friend is asking about time for summary grounds. We will do summary grounds quickly but we need to see grounds before we can respond.

81. MR BUTTLER: I raise the point. If the claimant is to put in documents by 16 December and a hearing by 20 - - - - -

82. DEPUTY JUDGE: You can put them in before 16 December.

83. MR BUTTLER: I agree. I will take what I have been offered. The claimant has been hampered in this part of the claim by the absence of any pleadings on the part of the defendant.

84. DEPUTY JUDGE: I am told that 20 December is available. I must say that I am rather inclined to release the Secretary of State from obligation to provide summary grounds. It is, broadly speaking, obvious what they are. The Secretary of State's position is that the claimant is a person who is ripe for removal. There may be some dispute about the facts shown by the medical evidence. But it is difficult to imagine there is anything that would take you by surprise.

85. MR BUTTLER: Certainly.

86. MR JOHNSON: I am not going to disagree with that. We can put in summary grounds if we think there is something.

87. DEPUTY JUDGE: It does not seem to me that one or two weeks after that - - - - -

88. MR JOHNSON: We are not going to try and ambush my friend. We unilaterally exchanged our skeleton argument early yesterday. We are not in the business of ambushing anyone.

89. DEPUTY JUDGE: The position is this. The defendant's application to discharge the injunction and the claimant's application for permission to apply for judicial review of the decision to remove will be listed together on 20 December with the substantive hearing of the judicial review to follow if permission is granted with a time estimate of one day. The claimant is directed to file and serve any submissions against removal with all supporting documents by close of play on 16 December. The defendant is released from any obligation to provide an acknowledgement of service but is at liberty to put in submissions or documents in response to any served by the claimant. The matter is not reserved to me.

90. There is one other factor which I wondered about which is whether I should direct the claimant to attend in person on 20 December.

91. MR BUTTLER: For what specific purpose?

92. DEPUTY JUDGE: It would be an indication of his good faith. It could be made one of the conditions of his release.

93. MR BUTTLER: It is very difficult for me to deal with that without instructions and without considering the potential impact on the claimant's mental health and a number of other factors.

94. DEPUTY JUDGE: All right, I will not.

95. MR JOHNSON: I am not asking you to do that. But you have indicated that you would have in mind the Secretary of State can set stringent conditions on release. The

Secretary of State can set a condition as to reporting. The Secretary of State might wish to set, for the Secretary of State only, a condition that he attend that hearing.

96. DEPUTY JUDGE: May I leave it to the Secretary of State to decide whether to propose that condition? Then, on instruction, if appropriate, Mr Buttler can oppose it. If necessary, the matter may have to come back to court on Thursday or Friday of next week for final order. For the avoidance of doubt I shall have to say also that that would have to be before another judge because I am not around next week. Is there anything else?

97. The associate will be sorting out the order. You will need her e.mail address so wait until she gives it to you.