EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Osborne
Lord Clarke
Lady Dorrian

[2010] CSIH 10
P329/09

OPINION OF THE COURT

delivered by LORD OSBORNE

in the Reclaiming Motion

by

A.A.S

Petitioner and Reclaimer;

For Judicial Review of a decision of

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent;

_____

Act: Forrest; Drummond Miller LLP

Alt: Lindsay; Solicitor to the Advocate General for Scotland

12 February 2010

The background circumstances

[1] The reclaimer is a citizen of Zimbabwe, who was born on 9 February 1982. On 11 April 2001 he arrived in the United Kingdom using his own Zimbabwean passport, when he was granted leave to enter as a visitor for a period of 6 months. On 16 August 2001 a stamp was endorsed on the reclaimer's passport purporting to show an extension of leave to remain in the United Kingdom granted until 30 September

2003, which has been proved to be counterfeit. On 2 April 2004 the reclaimer appeared at Luton and South Bedfordshire Magistrates Court for possession of a Class B controlled drug, namely cannabis, and for failing to surrender to custody. He was given a conditional discharge of 6 months. On 10 November 2004 a stamp was endorsed on the reclaimer's passport purporting to show an extension of leave to remain granted until 12 December 2005, which has been proved to be counterfeit. On 24 December 2004 the reclaimer was convicted at Luton and South Bedfordshire Magistrates Court of driving a motor vehicle with excess alcohol, driving while disqualified, using a motor vehicle while uninsured, failing to surrender to custody at an appointed time and breaching his conditional discharge. On 1 February 2006 he was convicted of two counts of assaulting a police constable and possession of cannabis and was sentenced to a total of 6 months imprisonment. On 8 February 2006 he appeared at Luton and South Bedfordshire Magistrates Court in respect of counts of driving while disqualified and using a motor vehicle while uninsured. On 16 May 2006 a stamp was endorsed on the reclaimer's passport purporting to show a grant of leave to remain with no time limit, which has been proved to be counterfeit. On 13 May 2007 the reclaimer was arrested for driving dangerously and attempting to resist arrest. After his arrest he stated that he had arrived in the United Kingdom in May 2001 and had over-stayed. He was served with over-stayer papers, whereupon he claimed political asylum. On 23 July 2007 his claim for asylum was finally refused, against which no appeal has been lodged. On 2 November 2007 the reclaimer was convicted at Wolverhampton Magistrates Court of dangerous driving, driving with excess alcohol and three further counts of motoring offences, when he was sentenced to 9 months imprisonment.

[2] On 11 January 2008 a notice of liability to deportation was issued. On 10 April 2008 a decision to make a deportation order was made and on 14 April 2008 the reclaimer was in fact detained. On 18 April 2008 a notice of the decision to make a deportation order was served on the reclaimer. On 28 April 2008 the reclaimer lodged an appeal against the decision to make a deportation order against him, which was refused on 12 June 2008. On 20 June 2008 a reconsideration was sought against the decision to make a deportation order against the reclaimer, but on 4 July 2008 that application was dismissed. On 16 July 2008 all appeal rights against the decision to make a deportation order against him were exhausted. On 12 September 2008, in terms of section 5(1) of the Immigration Act 1971, a deportation order was made and served upon the reclaimer, who, of course, was then in detention. On 7 October 2008 the reclaimer submitted an application for bail, but on 10 October 2008, bail was refused. A further bail application was made on 20 November 2008, but refused on 21 November 2008. A further application for bail was made on 26 March 2009, but that was refused on 30 March 2009.

[3] The reclaimer made an application to be returned voluntarily to Zimbabwe on 19 November 2009, under the Facilitated Return Scheme. His application was accepted, following which arrangements were made for him to board a flight to Zimbabwe on 10 December 2009. However, unfortunately his passport had been misplaced in the offices of the respondent, with the result that he was unable to travel. Subsequently an application was made to the Zimbabwe High Commission Office for an emergency travel document, but hitherto such a document has not been made available. More recently the reclaimer has equivocated concerning voluntary return to Zimbabwe and we were informed that currently the reclaimer is unwilling to return voluntarily to that state.

[4] Against the foregoing background the reclaimer brought a petition for Judicial Review of the respondent's decision to detain him and to continue to detain him. He seeks declarator that that decision is unlawful and irrational and reduction of it, as well as certain other remedies. The petition came before the Lord Ordinary on 5 June 2009 when he sustained the second plea-in-law for the respondent and refused the petition. The second plea-in-law was to the effect that the decisions complained of were lawful and reasonable. The Note by the Lord Ordinary setting forth his reasons for that decision is available to us. The reclaimer has now reclaimed against the Lord Ordinary's interlocutor of 5 June 2009.

Submissions for the reclaimer

[5] Counsel for the reclaimer moved us to sustain pleas-in-law 3 and 4 in the petition and to allow the appeal. If that were done, the result would be a reduction of the respondent's decision to detain and continue to detain the reclaimer; and his release from detention. Counsel said that the issue raised in the reclaiming motion was whether the Lord Ordinary had erred in holding that the reclaimer's refusal to return Zimbabwe voluntarily was a relevant or a key factor, having regard to the circumstances. It was submitted that he had erred in that respect. Counsel relied on *Regina* v *Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 W.L.R. 704, particularly the observations of Woolf J., as he then was, at page 706. The respondent's power to detain was derived from section 5 of and Schedule 3 to the Immigration Act 1971. Paragraph 2(3) of the Schedule authorised detention pending the removal of the subject of a deportation order from the United Kingdom. However that power was circumscribed, as explained by Woolf J.

[6] Counsel also relied on *R (I)* v *Secretary of State for the Home Department* [2003] I.N.L.R 196, a decision of the Court of Appeal. The relevance of voluntary return, or,

more particularly, a refusal to accept voluntary return, had been considered in that case. Reference was made to the observations of Simon Brown L.J., as he then was, in paragraphs 30-32, 36, 37 and 41, those of Mummery L.J. at paragraph 41, and those of Dyson L.J. in paragraphs 46-56. Counsel submitted that the offer of voluntary repatriation was not in itself a relevant factor, but refusal to accept voluntary return might be considered along with other circumstances. The Lord Ordinary had attributed too great importance to that matter in paragraph 6 of his Note. It was recognised that other factors which he had taken into account were the risk of the reclaimer absconding, were he to be at liberty, and the risk of his re-offending in that situation. Counsel accepted that there was available extensive evidence of law-breaking by the reclaimer when he was at liberty. What had come about in the present case was that an impasse had developed to which there was no apparent end, since it was understood that the respondent currently operated a policy of not deporting persons to Zimbabwe for political reasons.

Submissions for the respondent

[7] Counsel for the respondent moved the court to refuse the reclaiming motion because the Lord Ordinary's decision disclosed no error of law. If the court were minded to grant the reclaiming motion, it would be appropriate for a further hearing to be held relating to the conditions on which the reclaimer should be released.

[8] Counsel drew our attention to the Lord Ordinary's observations in paragraph 6 of his Note. It was clear that he had accepted that there was a risk of the reclaimer absconding, were he to be at liberty, and also a risk of further offending behaviour in that situation. These were relevant considerations. In *Regina* v *Governor of Durham Prison, ex parte Hardial Singh*, at page 706, Woolf J. had considered the nature of the power of detention available under paragraph 2(3) of Schedule 3 to the 1971 Act.

Although he recognised that that power was not subject to any express limitation, he expressed satisfaction that it was in fact subject to limitations. First, detention was authorised only pending the making of a deportation order or pending removal. Secondly, the power of detention was given in order to enable the machinery of deportation to be carried out; it was impliedly limited to a period which was reasonably necessary for that purpose. That period would depend upon the circumstances of a particular case. The power would cease to be available if the respondent would not be able to operate the machinery within a reasonable period of time.

[9] Counsel went on to draw to our attention four other decisions. The first of these was *KM* v *Secretary of State for the Home Department* [2010] CSOH 8, a decision of Temporary Judge Reid. The circumstances included the fact that the Iranian authorities were not prepared to accept a deportee, who was a failed asylum-seeker. It was evident from paragraph [11] of the decision that the petitioner had been detained following the completion of a prison sentence, after which he had spent more than 3 years in detention. In paragraph [68], the temporary judge concluded that what he referred to as self-induced detention was a weighty consideration in the case before him. Reference was made to paragraph [69] in that connection. Reference was also made to paragraphs [72] and [78]. The temporary judge concluded in paragraph [79] that the *Hardial Singh* principles had not been infringed and that the period of detention, though lengthy, continued to be reasonable in the circumstances. Counsel acknowledged that the present case was unlike the case of *KM* v *Secretary of State for the Home Department*, in respect that it could not be said here that, if the reclaimer were forcibly deported, he would not be accepted by the authorities in Zimbabwe.

However, the respondent had a policy which involved that, in current circumstances, a person would not be forcibly deported to that country from the United Kingdom.

[10] Counsel went on to draw our attention to *TP* v *Secretary of State for the Home Department* [2009] CSOH 121, a decision in respect of which there was a reclaiming motion. The case showed that the *Hardial Singh* principles had to be respected. The risk of absconding and the risk of re-offending were relevant considerations to be taken into account in connection with detention. In that case the petitioner had been detained for nearly 2 years and 3 months, but it was held that there was no automatic cut-off point after which continued detention became unlawful. Reference was made to paragraphs 21, 25, 26, 31 and 32.

[11] Counsel next relied upon *A* v *Secretary of State for the Home Department* [2007] EWCA Civ 804. Reference was made to paragraphs 46, 47 and 50 to 55 in the judgment of Toulson L.J. The significance of a risk of absconding and of re-offending was uncontroversial. Refusal to accept voluntary repatriation was also an important factor and might often be decisive. Reference was also made to the observations of Keene L.J. at paragraphs 78 and 79. The refusal by a detainee to accept voluntary return could not be seen as a trump card.

[12] Finally counsel drew our attention to a decision on an application for leave to appeal by Sedley L.J., *Tawonezwi* v *Secretary of State for the Home Department* [2008] EWCA Civ 924, particularly paragraphs 8 to 12. It was there recognised that the risk of absconding was an important factor, however, the power to detain could not be seen as of indefinite duration.

[13] Finally counsel emphasised the importance of the Lord Ordinary's unchallenged finding of risks of absconding and re-offending in the present case. Those were

important considerations, in association with a refusal to accept voluntary return. In the whole circumstances the reclaiming motion should be refused.

The decision

[14] At the outset, it is appropriate to recognise the statutory provisions under which the reclaimer has been detained. Section 5 of the 1971 Act provides that the provisions of Schedule 3 to that Act are to have effect with respect to the removal from the United Kingdom of persons against whom deportation orders are in force and with respect to the detention or control of persons in connection with deportation. In Schedule 3 paragraph 2(3) it is provided:

> "Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless [he is released on bail or] the Secretary of Stare directs otherwise."

The nature of that power was considered in *Regina* v *Durham Prison Governor ex parte Hardial Singh* by Woolf J. at page 706, where he said:

> "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 the individual is being detained in one case pending the making of a deportation order and, in the other case, 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 upon 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 persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention."

Nothing said to us in the course of the reclaiming motion suggests that that interpretation of the statutory provisions is other than authoritative. In particular, nothing said in *R* v *Secretary of State for the Home Department* is inconsistent with Woolf L.J.'s approach. While the circumstances of *R* v *Secretary of State for the Home Department* are materially different from those in the present case, it appears to us that certain observations of Dyson L.J., which are of a general nature, must also be borne in mind. In paragraph [46] of his judgment he set out principles which he considered applicable to a case where the lawfulness of detention was in issue, saying:

> "In my judgment, [counsel] correctly submitted that the following four principles emerge:
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> > (i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose.
> >
> > (ii) The deportee may only be detained for a period that is reasonable in all the circumstances.
> >
> > (iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention.
> >
> > (iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal."

Elaborating his third principle, he went on to say in paragraph [47]:

> "Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired."

Dyson L.J. in paragraph [50] agreed with the other judges in the case that an appellant's refusal of voluntary repatriation was a relevant circumstance in considering the lawfulness of detention, although the weight to be given to that factor was not the subject of agreement. In paragraph [51] in relation to that factor he said:

> "But in my judgment, the mere fact (without more) that a detained person refuses the offer of voluntary repatriation cannot make reasonable a period of detention which would otherwise be unreasonable."

[15] While in *R* v *Secretary of State for the Home Department* there was no agreement as to the weight to be given to a refusal to accept voluntary repatriation, that was not the position in *A* v *Secretary of State for the Home Department*. In paragraphs 54 and 55,, Toulson L.J., delivering the judgment of the court, said:

> "I accept the submission on behalf of the Home Secretary that where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, and likely often to be decisive factors, in determining the reasonableness of a person's detention, provided that deportation is the genuine purpose of the detention. The risk of absconding is important because it threatens to defeat the purpose for which the deportation order was made. The refusal of voluntary repatriation is important not only as evidence of the risk of absconding, but also because there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the

> latter case the loss of liberty involved in the individual's continued detention is a product of his own making.
>
> 55 A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring and the potential gravity of the consequences.....The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom and whose continued presence would not be conducive to the public good. If the reason why his presence would not be conducive to the public good is because of a propensity to commit serious offences, protection of the public from that risk is the purpose of the deportation order and must be a relevant consideration when determining the reasonableness of detaining him pending his removal or departure."

[16] In *KM* v *Secretary of State for the Home Department*, in paragraph [69], the Temporary Judge drew attention to the observations of Sedley L.J. in *Tawonezwi* v *Secretary of State for the Home Department*. In that latter case Sedley L.J., in paragraph 9 recognised, as, in our opinion, must be the case, that ultimately a point might be reached where the duration of the detention might become such that it was disproportionate to the reasons for it. He put the matter in these words:

> "What ultimately I think is capable of bearing on it is the possibility that the sheer length of detention may at some stage become such that it outweighs in proportionality the reasons for it".

Of that passage, the temporary judge in *KM* V *Secretary of State for the Home Department*, in the passage mentioned, said

> "While that may, in theory, be true, as a legal principle it offers no guidance whatsoever as to how one determines when that *stage* arrives. It is particularly difficult to apply in a self induced detention case in the light of the court's observations in paragraph 11 referred to above."

With the Temporary Judge's view, we have considerable sympathy. However, it seems to us that the determination of when detention might become disproportionate to the reasons for it must simply be the subject of judgment and decision by the court in the light of all of the relevant factors placed before it in the particular case.

[17] Turning to the relevant circumstances of the present case, in our view, a number of factors require to be considered. First is the risk of absconding by the reclaimer, were he to be liberated. In our view, as regards that, a consideration of considerable importance is that fact that on no less than three occasions in the past, the reclaimer's passport has been tampered with dishonestly with the object of falsely certifying his entitlement to residence in the United Kingdom at different periods of time. In our opinion, the reclaimer must be seen as having been responsible for that state of affairs. His preparedness to resort to dishonest methods in order to try to perpetuate his residence in this country suggests to us that, were he to be liberated, he would take any steps that appeared to him appropriate, legal or not, to avoid removal from the country, including absconding. In a situation where the respondent has concluded that deportation of the reclaimer is appropriate and in the public interest, plainly his absconsion would not be conducive to the public good and would undermine the respondent's decision.

[18] A further consideration which we consider material is the fact that, during his residence in the United Kingdom, the reclaimer has offended against the criminal law on a number of occasions. While it must be recognised that his offences have not been

of most grave character, nevertheless, in certain instances, they were sufficiently serious to justify the imposition of not insignificant sentences of imprisonment. Were he to be at liberty, it is not unreasonable to suppose that he would be likely to resort once again to such behaviour, which would not be conducive to the public good.

[19] A third factor of some significance is the attitude which the reclaimer has displayed to the prospect of voluntary repatriation to Zimbabwe. The history of the case suggests that his posture in that regard has vacillated from acceptance of that option in December 2009, in consequence of which arrangements were actually made for his travel to that country, to his present unpreparedness to follow that course.

[20] Taking all of these circumstances into account we can discern no error in the decision of the Lord Ordinary; we have come to the conclusion that, at the present time, while the reclaimer's detention has been lengthy, it has not yet reached a stage at which, to use the words of Sedley L.J., "It outweighs in proportionality the reasons for it." Furthermore, we do not consider that a situation has yet come into being where it is apparent "that [the respondent] is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period...", to quote the words of Woolf J. at page 706 of his judgment in *Regina* v *Governor of Durham Prison ex parte Hardial* Singh, although that may yet happen. For those reasons, we shall refuse this reclaiming motion.

[21] Before parting with the case, we should say that we have some level of concern about the approach of the respondent, as manifested in the policy which is currently being followed by him to the effect that, for political reasons, enforced deportation of individuals to Zimbabwe is not to be undertaken. It is public knowledge that the political situation in that country is to some degree unattractive, unpredictable and dependent on the continued involvement in government there of those currently

holding power. It cannot be foreseen, even broadly, how long that situation is likely to endure. It might be for a relatively short period of time; on the other hand, those circumstances might continue in being for a period of years. In that situation, in our opinion, if there is no significant change of circumstances in that respect and if, as a consequence, the respondent's policy in relation to compulsory deportation to Zimbabwe does not change, there will undoubtedly come a point when the length of the reclaimer's detention will become disproportionate to the justification for it, although it is currently impossible to say exactly when that stage will be reached.