CO/5083/2008

Neutral Citation Number: [2010] EWHC 636 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 22 February 2010

B e f o r e:

MRS JUSTICE NICOLA DAVIES

- - - - - - - - - - - -

Between:
THE QUEEN ON THE APPLICATION OF MEHARI

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- - - - - - - - - - - -

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

- - - - - - - - - - - -

The Claimant and the Defendant were unrepresented at the reading of this judgment

- - - - - - - - - - - -

J U D G M E N T

1. **MRS JUSTICE NICOLA DAVIES:** The claimant's original application for judicial review was lodged on 29 May 2008. The application sought to quash the removal directions of the defendant, dated 22 May 2008, to remove the claimant to Eritrea. At the time the application was made, the claimant had been detained by the defendant. Her detention commenced on 22 May 2008, she was released from detention on AIT bail on 31 July 2008.

2. The matter now comes before this court in an amended form and relates to two specific issues:

i) How long was the claimant unlawfully detained by the defendant;
ii) What is the measure of damages to be awarded to the claimant for a period of unlawful detention.

Background

3. The claimant holds both Ethiopian and Eritrean passports. On 22 September 2004, the claimant entered the UK using her Ethiopian passport. She had a student visa which was granted by the British Embassy in Addis Ababa, Ethiopia, in February 2004. It was valid until 13 February 2005. The claimant was subsequently granted further leave to remain as a student from 13 February 2005 to 31 October 2007. On 15 October 2007, the claimant was issued with a Eritrean passport by the Eritrean Embassy in London. She subsequently renounced her Ethiopian citizenship. On 23 October 2007, the claimant applied for asylum in the UK. On 22 November 2007, the defendant served upon the claimant a notice of immigration decision refusing to vary her leave to remain in the UK, and gave notice of the defendant's intention to issue directions to remove her to Eritrea or Ethiopia.

Asylum and Immigration Tribunal Hearing

4. The claimant appealed against the defendant's decision, pursuant to Section 82 of the Nationality, Immigration and Asylum Act 2002 (The 2002 Act) on the following grounds:

i) That she was a refugee entitled to asylum and under paragraph 334 of the Immigration Rules her removal would breach the United Kingdom's obligations under the 1951 Geneva Convention relating to the status of refugees;

ii) In the alternative, that the defendant's decision was not in accordance with the Immigration Rules or the law, in that she was entitled to humanitarian protection under paragraph 339c of the Immigration Rules in so far as they apply, counsel directive 2004/83/ec;

iii) That her removal would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's rights under the European Convention of Human Rights.

5. A hearing was held on 28 January 2008 at the Asylum and Immigration Tribunal (AIT). As part of the appellant's case the following facts were put before the Tribunal. The appellant was born in Ethiopia on 4 July 1979. Her mother is Ethiopian and her father Eritrean. Until the age of 11 she lived with her mother and father in Assab (the court notes that Assab was at that time in Ethiopia, it is now part of Eritrea). When the appellant was 11 she moved with her mother to Ethiopia. She remained there until she came to the UK as a student in September 2004. The appellant is a practising Jehovah's Witness. The appellant is a well known figure in Ethiopia, she was Miss Ethiopia in 2003 and 2004. She has travelled extensively representing Ethiopia in beauty contests around the world. It was the case on behalf of the claimant that she could not be returned to Eritrea because, as a practising Jehovah's witness, she would be persecuted by reason of her religion. She also claimed that she could not be returned to Ethiopia because, as she had acquired Eritrean citizenship, she would be considered a traitor by the Ethiopian authorities. In addition, she said that upon her return to Ethiopia, she would be forced to live a lie in that she would be unable to continue to use her father's Eritrean name of Mehari, which she has now adopted. She claimed that the risk she faced upon her return to Ethiopia would be exacerbated because as a former Miss Ethiopia she is a well known figure there.

Ethiopia

6. It was the uncontroverted evidence before the AIT that at the date of the hearing the appellant possessed an Ethiopian passport which was valid until 30 March 2011. The Ethiopian passport held by the claimant at the date of the AIT hearing had been renewed on 30 March 2006. The passport is in the name of Jerusalem Ketema Geda, a name which the claimant confirmed was her mother's family name which she adopted in Ethiopia. It was recorded that the passport showed that the claimant had travelled extensively to Germany, Spain, Venezuela, the USA, South Africa, Libya, the UAE, Ghana and Nigeria, and also to the UK. It appears not to have been contested that the extensive travelling was done by the claimant in her capacity as Miss Ethiopia.

7. At the hearing the defendant conceded that if the claimant were found to be a Jehovah's Witness she could not be returned to Eritrea safely. Immigration Judge Leven found that the claimant was a Jehovah's Witness and so could not be returned to Eritrea.

Eritrean passport

8. The passport was issued to the claimant in the name of Jerusalem Teklehimanot Mehari, the latter being her father's Eritrean name. The passport was issued by the Eritrean Embassy on 15 October 2007. It was noted that this was the day prior to her asylum claim being lodged. It was the claimant's case that the only reason for obtaining her Eritrean passport was because she wished to visit her father in Eritrea. The case was rejected by Immigration Judge Leven at the AIT, who found that the claimant had applied for an Eritrean passport, not because she wanted to visit her father in Eritrea, but solely because of her asylum claim. He was satisfied that she was fully aware when

applying for a Eritrean passport that she would not be able to visit the country as a practising Jehovah's Witness.

Return to Ethiopia

9. Immigration Judge Leven considered the question of the appellant's return to Ethiopia. He found that she would not be at risk of return due to her being a Jehovah's Witness. He also found, in respect of the claimant's contention that she would be identified as Eritrean due to her adoption of her father's family name and by reason of her status as a former Miss Ethiopia, that there was no substance in either allegation.

Refugee status

10. The Immigration Judge found that the claimant's application did not engage the Refugee Convention. Specifically he stated:

> "The appellant is not out of Ethiopia because she fears of being persecuted there by reason of her religion, but rather because she voluntarily and deliberately acquired an Eritrean passport in an effort to establish her asylum claim in the UK. In such circumstances, I find that the appellant's claim does not engage the Refugee Convention, irrespective of her acquisition of Eritrean nationality and regardless of her being deemed to have renounced her Ethiopian nationality by reason thereof".

11. Immigration Judge Leven dismissed the claimant's appeal.

12. On 15 February 2008, the claimant applied for reconsideration of Immigration Judge Leven's determination. On 28 February 2008, Senior Immigration Judge Latter declined to make an order for reconsideration. On 7 March 2008, the claimant renewed her application for reconsideration to the High Court. On 16 April 2008, Dobbs J dismissed the claimant's application for reconsideration.

Judicial review

13. On 22 May 2008, the defendant decided to remove the claimant from the UK and detained her. Also on that date, the defendant set directions for the claimant's removal on 31 May 2008. These directions were set for removal to Eritrea.

14. On 29 May 2008, the claimant issued the present judicial review claim. She challenged the directions for her removal to Eritrea and the legality of her detention. On the same date, Saunders J ordered a stay on the claimant's removal to Eritrea. On that date, the defendant cancelled directions for the claimant's removal to Eritrea. On 4 June 2008, the claimant served additional grounds of challenge. On 24 June 2008, the defendant filed an acknowledgement of service and summary grounds of defence. In the summary grounds, the defendant acknowledged that the removal directions set for

Eritrea were erroneous, and noted that this had been conceded in a letter to the claimant's solicitors dated 6 June 2008. The defendant maintained that the claimant's detention was lawful.

15. On 30 July 2008, Walker J granted the claimant permission to apply for judicial review, and stayed the proceedings until further order. On 2 September 2008, the claimant served further amended grounds of challenge, specifically the claimant sought to reopen the issue of the legality of her return to Ethiopia. In written submissions served 21 April 2009, the defendant conceded that directions dated 22 May 2008 for the claimant's removal to Eritrea were unlawful. However, the defendant maintained that the claimant's detention between 29 May 2008 and 31 July 2008 were lawful.

16. On 16 June 2009, the matter came before Kenneth Parker QC, sitting as a Judge of the High Court. The parties agreed that the claim was to be stayed for a period of 2 months to enable an agreement to be reached on a figure of damages for the claimant's unlawful detention. By agreement, the claim was stayed for a further period. What was clearly contemplated, both by the court and the defendant, was that the claimant would amend her claim to deal specifically with the issue of the length of the period of unlawful detention. No amendment was made, however, there is no dispute that the matter now comes before the court on the two issues raised in paragraph 1 above.

Claimant's case

i) The removal directions are unlawful because the claimant is a refugee. It is the claimant's case that:

> "To succeed as a refugee, the claimant has to show a well founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion is a pre-requisite for refugee status. The second requirement is that the person is either unable, or owing to such fear is unwilling, to avail himself or the protection of his nationality or former habitual residence".

ii) Even if the claimant is liable to removal, the power of the Secretary of State to detain was not exercised reasonably.

17. At the date of the detention to detain, removal could not be effected within a reasonable time frame. The claimant relied upon the fact that even at the date of this hearing, no effort had been made to effect the removal of the claimant to Ethiopia. The point was made that the Home Office has, at all material times, been in possession of the claimant's Ethiopian passport. Further, it was contended that return to Ethiopia was not possible. The suggestion appeared to be that the difficulty related to the fact that the claimant had dual nationality.

Defendant's case

18. The defendant's case was that from 29 May 2008, it was open to the defendant to consider whether to set directions for the claimant's removal to Ethiopia. Ethiopia was both a country of which the claimant was a national, and a country to which there was reason to believe she would be admitted. The claimant was born in Ethiopia, she had lived there all her life prior to entering the UK. She was Miss Ethiopia in 2003 and 2004. She travelled extensively around the world representing Ethiopia in her capacity as Miss Ethiopia. She entered the UK on 27 September 2004 using an Ethiopian passport. Her Ethiopian passport was issued on 10 November 2002. On 30 March 2006, the claimant renewed her Ethiopian passport at the Ethiopian Embassy in London. Her Ethiopian passport was therefore valid until 30 March 2011. Despite the best efforts of the claimant's solicitors, the Ethiopian authorities have never confirmed that the claimant is no longer considered to be an Ethiopian national.

19. Between 29 May 2008 and 31 July 2008, the defendant had every reason to believe that Ethiopia was a country of which the claimant was a national, or a country to which she would be admitted. Accordingly, the defendant was entitled to detain the claimant between 29 May 2008 and 31 July 2008 pending a decision on whether to direct her removal to Ethiopia. Further, the claimant's detention was compliant with the Hardial Singh principles. In R v Governor of Durham Prison, ex parte Hardial Singh [1984] 1 WLR 704, Woolfe J indicated that the defendant's power of detention was subject to the following limitations:

i) The power could only authorise detention if the individual was being detained pending his removal;

ii) The power of detention was limited to a period which was reasonably necessary to enable deportation to be effected,

a) "Reasonable" period depending on the circumstances of each case.

iii) The defendant should not exercise the power of detention if it was apparent that deportation could not be effected within a reasonable period;

iv) The defendant should act with all reasonable expedition to effect removal within a reasonable time.

20. The claimant was detained pending her removal. She was expressly detained, under paragraph 16(2)(a) of Schedule 2 of the Immigration Act 1971, from 29 May 2008 pending a decision whether or not to issue removal directions. The claimant was released on bail a day after the permission to apply for judicial review was granted. It was not apparent between 29 May 2008 and 31 July 2008 that the claimant's removal could not be effected within a reasonable period. The only barrier to her removal during that time was her judicial review application, and she was not granted permission to proceed with this application until 30 July 2008.

Findings

i) The claimant is a refugee.

21. There is no merit in this submission. This matter was fully considered by Immigration Judge Leven who concluded that the claimant was not a refugee. The view of the Immigration Judge was subsequently endorsed by the Senior Immigration Judge and Dobbs J, it was a finding upon which the Secretary of State was entitled to rely.

ii) The power of the Secretary of State to detain was not exercised reasonably.

22. The basis for the claimant's detention was set out in notice IS151A in "Notice to a person liable to removal", dated 22 May 2008, and in notice IS91R "Reasons for detention and bail rights", dated 22 May 2008. In the first notice the defendant indicated that he was satisfied that the claimant was a person in respect of whom removal directions may be given in accordance with section 10 of the Immigration and Asylum Act 1999 (The 1999 Act). The relevant provisions of section 10 of the 1999 Act provide as follows:

> "10) Removal of certain persons unlawfully in the United Kingdom.
>
> (1) A person who is not a British citizen may be removed from the United Kingdom in accordance with directions given by an Immigration Officer if (a) having only a limited leave to enter or remain, he does not observe the condition attached to the leave or remains beyond the time limit by the leave..."

23. The claimant was a person who had remained in the UK beyond the time limited by her leave and so was liable to removal under section 10(1)(a) of the 1999 Act. The claimant's leave as a student expired on 31 October 2007 and her appeal rights were exhausted on 28 April 2008.

24. Further, the defendant sets out, in notice IS151A, the claimant's liability to detention. It states:

> "You are therefore a person who is liable to be detained under paragraph 16(2) of schedule 2 to the Immigration Act 1971 pending a decision whether or not to give removal directions".

25. At the end of notice IS91R, under the heading "Detention powers", the following is noted:

> "...(2) for an illegal entrant or a person to whom section 10 of the Immigration and Asylum Act applies - paragraph 16 of schedule 2 to the 1971 Act, or section 62 of the 2002 Act (that is the National Immigration and Asylum Act 2002)".

26. Paragraph 16(2) of schedule 2 to the Immigration Act 1971 (The 1971 Act) provides that:

> "If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10(a) or 12 to 14, that person may be detained under the authority of an Immigration Officer pending (a) a decision whether or not to give directions; (b) his removal in pursuance of such directions".

27. In respect of directions given under section 10(1)(a) of the 1999 Act, section 10(7) of the 1999 Act provides that:

> "In relation to any such directions, paragraphs 10, 11, 16 to 18, 21, 22 to 24 of schedule 2 to the 1971 Act...apply as they apply in relation to directions given under paragraph 8 of that schedule".

28. The effect of the above is that if directions for removal can be given under section 10(1)(a) of the 1999 Act, paragraph 16 of schedule 1 to the 1971 Act applies. In the claimant's case, directions for removal could be given under section 10(1)(a) of the 1999 Act as the claimant had overstayed her leave, and so paragraph 16 of schedule 2 to the 1971 Act, which makes a person liable to detention, applied. The claimant was accordingly liable to detention.

29. Paragraph 16(2) of schedule 2 to the 1971 Act only authorises detention pending:

i) A decision whether or not to give removal directions; or
ii) Removal in pursuance of such a direction.

30. The claimant's case is that her detention remained unlawful after the removal directions were cancelled on 29 May, because there was no prospect of the defendant being able to issue directions for the claimant's removal to Ethiopia. The court does not accept this submission. By reason of the matters set out in paragraphs 20 above, the court accepts that the Secretary of State had good reason to believe either that the claimant was a national of Ethiopia or had reason to believe that she would be admitted to Ethiopia. It is significant that on five occasions, namely 17 December 2007, 21 February 2008, 29 February 2008, 5 March 2008 and 7 March 2008, solicitors acting on behalf of the claimant sought, from the Ethiopian Embassy, confirmation that the claimant was not an Ethiopian national. No response was ever received.

31. At the hearing, counsel for the claimant placed considerable reliance upon the fact that no efforts had been made by the Secretary of State to effect the removal of the claimant to Ethiopia. In response, counsel for the defendant stated that, following the conclusion of these proceedings, removal would be effected. The point was made that no steps thus far had been taken, solely by reason of the on-going judicial review proceedings. Further additional travel documentation was unnecessary, because the claimant possesses a valid Ethiopian passport.

32. As to the difficulties which it is alleged the claimant would encounter upon her attempt to return to Ethiopia, these were fully and comprehensively considered by the Immigration Judge. He found there was no substance in them. Nothing which was

placed before this court suggests that the finding of the Immigration Judge in this matter was in anyway unreasonable, still less flawed.

Conclusion

33. The court is satisfied that during the period of the claimant's detention, 29 May 2008 to 31 July 2008, the Secretary of State acted reasonably in regarding the claimant as a person who could be removed to Ethiopia either as a national of Ethiopia or had reason to believe that the claimant would be admitted to Ethiopia. Accordingly, the claim for unlawful detention in respect of this period fails.

Quantum

34. There now falls to be assessed, damages for the period of detention between 22 May 2008 and 29 May 2008. As between the claimant and the defendant there is no issue as to law or the principles governing the assessment of quantum.

35. In Thompson v Hsu and Commissioner of police of the Metropolis [1998] QB 498, the Court of Appeal indicated that in a straightforward case of wrongful arrest and imprisonment, the starting point for damages was likely to be about £500 for the first hour of detention, with an additional sum to be awarded after the first hour on a reducing scale, so as to keep the damages proportionate with those payable in personal injury cases and to recognise that a higher rate of compensation should be payable for the initial shock of being arrested. As a guideline, the Court of Appeal indicated that an award of £3,000 should be made for 24 hours of unlawful detention, with a daily rate to be on a progressively reducing scale for subsequent days of detention (page 515, letters D to E). However, it is clear that the Court of Appeal was not endorsing a mechanistic approach. Page 516, letter A states:

> "The figures which we have identified so far are provided to assist the judge in determining the bracket within which the jury should be invited to place their award. We appreciate, however, that circumstances can vary dramatically from case to case, and that these and the subsequent figures which we provide are not intended to be applied in a mechanistic manner".

36. The facts of Thompson v Hsu are very different from the present case. They involve gross misconduct by the police.

37. In R v Governor of Brockhill Prisoner, ex parte Evans (2) [1999] 1QB 1043, Lord Woolfe MR, who gave the judgment of the Court of Appeal in Thompson v Hsu stated that an award should not be made on the basis of each day of unlawful detention, but a global approach should be taken (1060F-G). The shorter the period of unlawful detention, the larger the pro rata rate, and the longer the period of unlawful detention, the lower the pro rata rate.

38. In R (Beecroft) v Secretary of State for the Home Department [2008] EWHC 3189 Admin, £32,000 was awarded in basic damages for a period of detention where the first one or two days were lawful and the subsequent 6 months were unlawful. The court in Beecroft followed the Court of Appeal's guidance in Thompson v Hsu and Evans and adopted a global approach to assessment.

39. The claimant contended that for this period of detention, the appropriate figure was £5,000. The defendant assessed the figure at £3,000. The award I have arrived at is a global figure and takes account of the fact that this was a period of detention for a woman of good character, which must have caused her distress. The award of damages is £4,000.

40. No parties are present in court for the reading out of this judgment, and therefore, as to the matter of costs, the defendant would be entitled to his costs but the sum, for the moment, remains unknown.