OUTER HOUSE, COURT OF SESSION

[2011] CSOH 31

P1370/10

OPINION OF LORD STEWART

in the Petition of

C L (AP)

Petitioner;

for

Judicial Review of decisions of the Secretary of State for the Home and Health Department to detain the Petitioner

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Petitioner: Caskie, advocate; Drummond Miller LLP
Respondent: Lindsay, advocate; Office of the Solicitor to the Advocate General

10 February 2011

[1] This Petition is for review of decisions to detain the petitioner pending deportation. The petition was lodged on 15 December 2010. A first hearing has been fixed for 9 March 2011. The petition called in Court on 19 January 2011 on the petitioner's motion to grant interim liberation from immigration detention. The motion was opposed by the Advocate General on behalf of the Secretary of State. No answers have yet been lodged. Having heard parties' submissions and made *avizandum* I have formed the opinion that the petitioner's motion should be refused.

[2] The motion for interim liberation in this case was heard at the same time as the motion for interim liberation in the case of *JMK Petitioner* with Court reference number P1369/10. I was asked by counsel to treat the submissions on the law as being applicable to both cases.

Background

[3] The petitioner is an illegal immigrant, said to be detained at Dungavel Immigration Removal Centre [Dungavel IRC] and awaiting deportation. (There may be question as to whether the petitioner remains within the jurisdiction - see below.) In the paragraphs that follow I set out a summary of the facts I have gathered from the petition, the productions for both parties and submissions by counsel.

[4] The petitioner claims to be a national of the Democratic Republic of Congo [DRC] with a date of birth of 29 April 1984. The petitioner entered the United Kingdom illegally, "using verbal deception" according to the Border Agency documentation produced. (Petitioner's counsel stated that he arrived on a false passport.) The petitioner claims to have arrived on 17 July 2006. He applied for asylum the next day. The claim for asylum was refused and the petitioner's appeal was dismissed on 27 September 2006. On 17 October 2006 the petitioner's application for review to the High Court, England & Wales, was refused. He was declared "rights of appeal exhausted" on 6 November 2006. The petitioner had been released on temporary admission on 18 July. Following the dismissal of his appeal, from 16 November 2006 onwards, he failed to comply with his reporting condition. The petitioner did not leave the United Kingdom and remained illegally.

[5] On 25 January 2007 and 7 December 2008 the petitioner was arrested in relation to charges of fraud and embezzlement. On 18 February 2009 at Manchester

Crown Court the petitioner was convicted of using a false instrument and fraud and in due course sentenced to 9 months imprisonment with a recommendation for deportation. On 2 April 2009 a notice of intention to deport was served on the petitioner. On 22 April 2009 at the end of his custodial sentence the petitioner was detained by the Border Agency under immigration powers pending the making of a deportation order.

[6] On 14 November 2008 subsequent to his first arrest but before his trial the petitioner submitted further representations for consideration as a "fresh claim" for asylum. The fresh claim application was refused on 11 February 2009.

[7] On 6 April 2009 just after the notice of intention to deport was served and while the petitioner was still in prison the petitioner submitted second further representations for consideration as a "fresh claim" for asylum. This fresh claim application was refused on 6 November 2009. Also on 6 November 2009 a deportation order was made and served on the petitioner. Since 6 November 2009 the petitioner has been detained under the Immigration Act 1991 Sched 3 pending removal or departure.

[8] On 13 November 2009 the petitioner appealed against the decision of 6 November. The appeal was listed for hearing on 12 January 2010. The appeal hearing listed for 12 January and subsequent hearings listed for 29 January and 19 February 2010 were all adjourned. The hearing took place on 5 March 2010. Judgement was reserved. On 18 March the appeal was dismissed. On 25 March 2010 the petitioner applied for leave to appeal. His application was refused on 21 May 2010. The petitioner was declared "rights of appeal exhausted" on 3 June 2010.

[9] On 8 January 2010, while his appeal was pending, the petitioner displayed threatening behaviour at Dungavel IRC and refused to accept his monthly progress

report. He apparently told officers that if he were called again to receive service of his report "there would be trouble".

[10] In the meantime the petitioner made a number of bail applications. The productions show that applications have been refused by Immigration Judges on the following dates, namely 15 June 2009, 18 June 2009, 13 July 2009, 28 August 2009, 7 September 2009, 30 October 2009, 1 December 2009, 9 June 2010 and 2 August 2010. It seems possible that there have been other applications, also refused or withdrawn. The recurring theme of the bail refusals is that the petitioner is at risk of absconding.

[11] The obstacle to deportation has been the unavailability of identity papers for the petitioner that would permit him to obtain an Emergency Travel Document [EDT] from the DRC authorities. According to counsel for the petitioner the DRC authorities will currently accept only four kinds of identification, namely (i) a previous passport, (ii) a birth certificate, (iii) a voter's registration/ identity card, (iv) a driving licence.

[12] I gather from counsel for the petitioner that a complicating factor has been the attitude of the DRC Embassy. It seems that in about March-April 2010 the DRC Embassy withdrew the service previously provided of interviewing candidates for re-admission to DRC who have no or poor supporting evidence of identity. The service was apparently intended to facilitate the granting of travel documents. As at the date of the last 28 day Detention Review, 23 December 2010, the DRC Embassy interview scheme had apparently still not been reinstated.

[13] According to the last 28 Day Detention Review [7/1 of Process at page 5 of 6] the Border Agency Criminal Casework Directorate [CCD] assessment is that the petitioner arrived in the United Kingdom at the age of 22 and "should therefore have sufficient documents in his own country to support an ETD application should he

choose to try and obtain this." This seems to be the basis on which the Border Agency has been proceeding since the DRC authorities ceased to facilitate poorly documented applications for ETDs.

[14] On the other hand a fax copy affidavit lodged in support of the petition and bearing to have been given by the petitioner's father on 12 November 2010 [6/4 of Process, see below] states:

> "C was born in Kinshasa. His birth was never registered, therefore does not have a birth certificate. Because of his age he would not have been able to get identification papers and I understand he came to the United Kingdom using a false passport therefore, does not have a valid Congolese passport."

The petitioner's own affidavit states that he has no family in DRC and that he cannot get any form of identification "from detention". He states that his birth was never registered and that he did not have an identification card because of his age.

[15] In 2009 the petitioner apparently offered some documentation to the Border Agency and his solicitors provided translations when requested to do so but the implication is that the documentation was not relevant for the purposes of establishing the petitioner's identity for the EDT process. It appears that the petitioner has been unwilling or unable to cooperate in the production of relevant documentation. The Border Agency view is apparently that he has been unwilling.

[16] Going back to the early part of the petitioner's Sched 3 detention, on 24 July 2009 an application was made on the petitioner's behalf, apparently to the Embassy of DRC, for an EDT to permit the petitioner's re-admission to DRC. On 11 September 2009 the Border Agency Return Group Documentation Unit [RGDU] contacted the DRC authorities for an update regarding the outstanding EDT application. On 28 October 2009 RGDU contacted the DRC authorities for an update regarding the

outstanding EDT application. On 19 April 2010, apparently consequent on information received from the DRC authorities, RGDU advised that the DRC authorities had stopped issuing ETDs without supporting documentation.

[17] Also on 19 April 2010 the CCD contacted the petitioner's solicitors seeking further documentation for an ETD application. A further ETD interview was arranged for the petitioner at Campsfield House, Oxfordshire, on 18 May 2010. At the interview the petitioner provided additional information and completed DRC passport application forms. (This was apparently the third time the petitioner had completed passport application forms.) The petitioner stated that he was willing to attend for interview at the DRC Embassy if this would help his case. This was at a time when the Embassy interview scheme had been suspended.

[18] On 6 June 2010 CCD contacted Glasgow Enforcement Unit to request assistance in obtaining evidence from the petitioner to support his ETD application. On 10 June 2010 Glasgow Enforcement Unit was asked to arrange a visit to the petitioner to seek supporting evidence. On 30 June 2010 Glasgow Enforcement Unit informed CCD that they did not have the resources to send officers to Dungavel IRC to request the petitioner's cooperation. Also on 30 June CCD sent a letter to the petitioner asking him to cooperate; and on 7 July CCD spoke with the petitioner's solicitor and requested that he ask his client to cooperate.

[19] In the meantime CCD, on 24 June 2010, requested the petitioner's father's file from the Case Resolution Directorate [CRD], Liverpool. The petitioner's father is M L. He lives in Birmingham. He was granted refugee status in the United Kingdom on 14 February 2003. The petitioner is estranged from his father.

[20] Examination of the father's file revealed an address which was entered on the Case Identification Database [CID]. The father's file also contained the father's birth

certificate. As I understand it the father's birth certificate showed the father's name to be the same as that declared by the petitioner in the petitioner's "bio-data". On 6 October 2010 a further ETD application was submitted to the DRC Embassy supported by his father's birth certificate. On 3 November 2010 the DRC Embassy advised RGDU that the father's birth certificate was not sufficient evidence for issuing an ETD.

[21] On 4 December 2010 CCD consulted with the Country Targeting Unit [CTU] who agreed to take the petitioner's file and examine it to obtain information for a further ETD application.

[22] On 23 December CCD consulted with the Border Agency Section 35 prosecution team. I infer that the team manages prosecutions under the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 35 (failure without reasonable excuse to comply with a requirement to take action to enable a travel document to be obtained etc). It appears that the Border Agency is not organised to undertake section 35 prosecutions in Scotland.

[23] The CCD 28 Day Detention Review dated 23 December 2010 lists among the concluding action points: "Contact DEPMU [*Detainee Escorting and Population Management Unit*] and make arrangements to transport [*the petitioner*] to within CCD Leeds catchment area." It was also proposed to "ask for an assertive Section 35 interview to be undertaken with a view to prosecution".

[24] The petitioner was first offered the benefit of the Facilitated Return Scheme [FRS] in May 2010 and has consistently rejected it. CCD's current [*23 December 2010*] action points include continuing to offer FRS to the petitioner.

Statutory framework and case law

[25] The warrant for the petitioner's detention is said to be a decision to detain made by the Secretary of State in terms of the Immigration Act 1971 as amended, sched 3, 2 (3):

> "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 State directs otherwise)."

In accordance, I am told, with standard practice the Border Agency reviews the petitioner's detention at 28 day intervals. The last review apparently took place on 23 December 2010 which led to authority being renewed to maintain detention for a further 28 days on 30 December 2010.

[26] The European Convention of Human Rights, Article 5, provides:

> "1. Everyone has the right to liberty and security of person.
>
> No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> [...]
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

[27] Parties were in substantial agreement as to the relevant case law, namely that the *Hardial Singh* principles, as articulated by Dyson LJ in *R (I)*, applied [*R* v *Governor, Durham Prison,* ex p *Singh sub nom R* v *Secretary of State for the Home Department,*

ex p *Singh* [1984] 1WLR 704 at 706, Woolf J; *R (on the application of I)* v *Secretary of State for the Home Department* [2002] EWCA Civ 888 at § 46 *per* Dyson LJ; *AAS* v *Secretary of State for the Home Department* 2010 SC 383 at 387-388, § 14, Opinion of the Court, *per* Lord Osborne].

[28] In *R (I)* at § 46 Dyson LJ said:

> "There is no dispute as to the principles that fall to be applied in the present case. They were stated by Woolf J in *Re Hardial Singh* [1984] 1 WLR 704, 706D in the passage quoted by Simon Brown LJ at paragraph 9 above. This statement was approved by Lord Browne-Wilkinson in *Tan Te Lam* v *Tai A Chau Detention Centre* [1997] AC 97, 111A-D in the passage quoted by Simon Brown LJ at paragraph 12 above. In my judgment, Mr Robb correctly submitted that the following four principles emerge:
>
> (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."

[29] Beyond that parties diverged. Counsel for the petitioner cited paragraph 14 of *AAS* [*supra*] which ends with the following quotation from *R (I)* [*supra*] at § 51 *per* Dyson LJ:

> "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."

Counsel for the respondent cited in addition paragraph 15 of *AAS* [*supra*] from which it appears that there was a three-way split in *R (I)* as to the weight to be attached to the refusal to accept voluntary repatriation, otherwise "self-induced detention"; and from which it also appears that the majority of a differently constituted Court of Appeal in *R (on the application of A)* v *Secretary of State for the Home Department* [2007] EWCA Civ 804 took the view 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" [at § 54 *per* Toulson LJ, at § 67 *per* Longmore LJ]. Keene LJ, in a minority on this question, thought that refusal to remove could not be "a trump card" but that it was a relevant factor in the circumstances of the case [§§ 79, 82].

[30] Counsel for the respondent explained that in *AAS* [*supra* at § 19] the Extra Division was prepared to give weight to the detainee's vacillating attitude to the option that was open to him of voluntary repatriation. Counsel also referred to *KM Petitioner* [2010] CSOH 8 at §§ 66-72 where Temporary Judge Reid held that "self-induced detention" was or could be a weighty consideration; that it may be open to the Court to infer from a refusal of an offer of voluntary repatriation that a detainee will abscond if released; and that the risk of absconding and the danger of re-offending are "obviously" relevant considerations in determining whether continued detention pending removal is lawful. Counsel cited *AM Petitioner* [2010] CSOH 111 at §§ 66-76 where Lord Bannatyne commended the analysis in *KM Petitioner* and reached the

view that he could have regard to self-induced detention as a factor of fundamental importance. (According to counsel a reclaiming motion has been marked.)

[31] As to the nature of the Court's task, counsel for the petitioner submitted that it was for the Court to decide for itself whether the detention is proportionate and compliant with Article 5 (1) (f) ECHR [*R (A)* v *Secretary of State for the Home Department* [2007] EWCA Civ 804 at §§ 69-75 *per* Keene LJ.] Counsel for the respondent accepted, for the purpose of the present hearing, that whether or not the petitioner's Article 5 ECHR rights are infringed is a "black-and-white" question of law; and that the function of the Court is to decide the matter for itself. Counsel cited *KM Petitioner* [2010] CSOH 8 at § 52.

[32] Counsel for the petitioner further submitted under reference to *SK (Zimbabwe)* v *Secretary of State for the Home Department* [2008] EWCA Civ 1204 at § 35 *per* Laws LJ that it was for the respondent to demonstrate that the *Hardial Singh* principles are being complied with. (Counsel explained that *SK (Zimbabwe)* was under appeal, but on a different point.) Counsel for the respondent accepted that the onus is on the respondent.

[33] Counsel for the petitioner confirmed that for the purposes of this interim application there are no issues about (1) the diligence of the respondent in attempting to effect removal, (2) the conditions of detention and (3) the effect on the petitioner of continued detention.

***Prima facie* case and balance of convenience**

[34] Counsel were agreed that the issues at this interim stage were (1) whether the petitioner has a *prima facie* case and (2) whether the balance of convenience lies in favour of liberation *ad interim*.

[35] Counsel for the petitioner submitted that there is a *prima facie* case for liberation on the basis that the petitioner is not deportable in the foreseeable future for the reason that he cannot be provided with the documentation that would permit his return to DRC. The interview by the Immigration Officer was not going to happen. Two years' detention was long enough on any view. If being in detention were supposed to be an incentive to produce documentation the petitioner had had two year's of incentive and had stated consistently that he did not have any documentation. This petitioner had a broadly similar history to that of JMK [see paragraph 2 above]: there were weightier negative factors in this case that were offset by the longer period in detention. The balance of convenience was in favour of release. Counsel submitted that the petitioner could be released with a tagging (electronic monitoring) condition and residency and reporting conditions.

[36] Counsel for the respondent submitted that there is no *prima facie* case: there is no issue about *Hardial Singh* principles (a) and (d); and at this time the respondent can satisfy principles (c) and (d). The petitioner's lack of co-operation coupled with the risk of absconding was virtually conclusive against him. Counsel submitted that the balance of convenience favours continued detention: there is a relatively early First Hearing, on 9 March 2011; and there is a clear risk that if the petitioner is released before then he will abscond and disappear, effectively determining the application.

Decision

[37] I have to make a decision so as to regulate the situation *ad interim.* The reason that the petitioner is in detention is that in the judgement of the Border Agency, with the threat of deportation hanging over him, the petitioner is at high risk of attempting to evade immigration controls, of absconding and of committing further offences if he is not detained.

[38] According to the latest information available to me the Border Agency accepts that removal is not imminent. On the other hand the Border Agency is continuing to take steps to achieve removal; and the assessment of the Border Agency is that the process of obtaining an EDT is taking longer than would otherwise be the case because of the petitioner's failure to co-operate [Productions No 7/1, pages 3, 4 and 5 of 6, and 7/2]. Counsel for the petitioner has expressly accepted for the purposes of this interim application that there has been no lack of diligence on the part of the Border Agency. On the information available *ad interim* I accept the Border Agency's belief that the petitioner can obtain or assist in obtaining documentation of his identity, in preference to the petitioner's account that he cannot obtain such documentation.

[39] Assuming without deciding that the proper approach for the Court, even at the interim stage, is to make up its own mind whether the decision to continue detention is correct and whether detention at this point in time and *ad interim* is proportionate, I have reached the conclusion that the decision is correct and that detention is proportionate.

[40] While the period in detention has been substantial and while it is clear that obtaining an EDT for the petitioner will not be straightforward, I take the view that the petitioner does not have a *prima facie* case. Separately, I take the view that the balance of convenience clearly favours the continuation of detention. The Border

Agency strongly asserts that the petitioner's failure to co-operate is a material factor in relation to the failure so far to obtain an EDT. (That matter could be better documented and better explained than it is in the paperwork available to me which, I recognise, was mostly prepared for internal use.)

[41] The power to detain in terms of Immigration Act 1971 as amended, sched 3, 2 (3) is conferred where a deportation order is in force. The deportation order in this case has been in force since 6 November 2009 *i.e.* for one year and three months. Technically that seems to be the relevant period on the basis that the petition founds on the implied limitations in the 1971 Act, sched 3, para 2 (3).

[42] I do not disregard the fact that the petitioner was in immigration detention before that for a period of over six months. However for a large part of his time in detention the petitioner has been contesting deportation. The petitioner has also consistently refused the offer of FRS benefits. In these circumstances, in my opinion, detention to date cannot be said to have been disproportionate; and continued detention - as opposed to release on conditions - cannot be said to be a disproportionate measure provided of course there is a realistic prospect of resolution in the foreseeable future.

[43] The Detention Review dated 23 December 2010 discloses that the Border Agency has in view further measures to facilitate the obtaining of an EDT for the petitioner to permit him to be re-admitted to DRC.

[44] Counsel for the petitioner submitted that issues about self-induced detention, the risk of absconding and the risk of re-offending were "red herrings": the only question was whether the petitioner's removal would take place within a reasonable period. Without documents there was no prospect whatsoever, counsel said, of the petitioner going to DRC and, accordingly, *Hardial Singh* principle number three was breached.

[45] I agree that the important question on the authorities cited to me is whether the petitioner's removal will take place within a period that is reasonable. On the other hand, so long as there is a realistic prospect of obtaining documents, what constitutes a reasonable period in detention is to be assessed having regard to, among other things, the factors described by counsel as "red herrings". In this connection I attach substantial weight to the fact that the petitioner has consistently failed to avail himself of FRS and has consistently failed to cooperate in obtaining and producing documentation of his own identity. To that extent his detention is self-induced.

[46] From his past conduct and his current attitude it is a reasonable inference that, if released *ad interim*, the petitioner will probably not cooperate with the conditions of his release and will probably abscond and disappear. It is not unreasonable to suspect that he will again attempt to obtain false papers and generally attempt to evade immigration controls. These are also factors of substantial weight in arguing for continued detention.

[47] On the information made available to me, I find that the prospect of obtaining a travel document for the petitioner in the foreseeable future is not merely fanciful. Applying *Hardial Singh* principle number three in terms, it simply cannot be said that it is now "apparent that the Secretary of State will not be able to effect deportation within a period that is reasonable in all the circumstances."

[48] Bearing in mind also that the First Hearing is set down for 9 March 2011, a mere five weeks away, I have decided to refuse the petitioner's motion.