OUTER HOUSE, COURT OF SESSION

[2011] CSOH 30

P1369/10

OPINION OF LORD STEWART

in the Petition of

JMK [Assisted Person]

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

9 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. Having heard parties' submissions and made *avizandum* I have formed the opinion that the petitioner's motion should be refused.

Background

[2] The petitioner is an illegal immigrant, currently detained at Dungavel Immigration Removal Centre [Dungavel IRC] and awaiting deportation.

[3] The petitioner claims to be a national of the Democratic Republic of Congo [DRC] with a date of birth of 27 October 1988. (Immigration Judges in 2004 and 2010 reached the view that the petitioner was older than he claimed.) The petitioner entered the United Kingdom illegally on 4 April 2004 and claimed asylum the next day. The claim for asylum was refused and the petitioner's appeal was dismissed on 26 August 2004. He was declared rights of appeal exhausted on 10 December 2004. The petitioner did not leave the United Kingdom and remained illegally.

[4] On 31 March 2008 at Warwick Crown Court the petitioner was convicted of using a false instrument and sentenced to 12 months imprisonment with a recommendation for deportation. On the petitioner's account the "false instrument" was a false passport bought by him for £150 [Production No 6/1]. I was told by his counsel that the purpose was to enable the petitioner to obtain employment - something he was not permitted to do. On 25 June 2008 a notice of intention to deport was served on the petitioner. The petitioner appealed against deportation on the ground that his life would be in danger if deported to DRC. His appeal was allowed on 24 November 2008. The Home Office applied to the High Court for review. The review was granted on 28 May 2009 and the reconsideration hearing was scheduled for 21 January 2010.

[5] In the meantime the petitioner had been taken into immigration detention. He was released from detention on 30 October 2008 while his appeal was pending subject to residency, electronic monitoring and reporting conditions. On 22 July 2009 he boxed up his electronic tag and refused to have it re-fitted. On three occasions, namely 22 July 2009, 14 December 2009 and 19 January 2010 the petitioner was reminded

that his release from detention was subject to conditions and an attempt would be made to re-install the tag. He refused to comply with each of the three attempts to re-install his equipment.

[6] The reconsideration hearing on 21 January 2010 found that the petitioner's life would not be in danger if he were deported and refused the petitioner's appeal against deportation. On 21 January 2010 the petitioner was re-detained for failure to comply with the conditions of his release. He was recorded as being rights of appeal exhausted on 26 February 2010.

[7] On or shortly after 21 January 2010 the petitioner's representatives on his behalf requested his return to DRC as soon as possible. The Home Office sent a letter to the petitioner advising him to comply fully with the Emergency Travel Documentation [ETD] interview and offering him the benefits of the Facilitated Return Scheme [FRS]. On 27 February 2010 the petitioner applied for FRS. Approval was given on 2 March 2010. The petitioner had his ETD interview and his ETD application was forwarded to the Removals Group Documentation Unit [RGDU] on 15 March 2010. A deportation order was signed on 19 March 2010 and served on the petitioner the same day.

[8] At about the end of January 2010 a Rule 35 report was made under the Detention Centre Rules 2001 reporting the petitioner's claim to have been tortured in DRC. By reply dated 2 February it was explained to the petitioner that his torture claim had been considered with his asylum claim and dismissed; and that the torture claim had been considered again with his appeal against deportation and dismissed.

[9] The petitioner was transferred to Dungavel IRC and instructed new representatives. By letter dated 4 May 2010 the petitioner claimed that his life would be in danger if he were deported. The letter was treated as an application to revoke the

deportation order dated 19 March 2010 under the Immigration Act 1971 s 5 (1), as a Rule 353 "fresh claim" application under the Immigration Rules (HC 353 as amended) and as an Article 8 ECHR claim [Production No 6/1]. By letter dated 14 September 2010 the Border Agency rejected the petitioner's application.

[10] Meanwhile, following his transfer to Dungavel IRC the petitioner lodged a bail application and then withdrew it. He lodged a further bail application on 2 June 2010 which was refused on 3 June 2010. In refusing bail the Immigration Judge recorded:

> "I considered the position for continued detention to be reasonable. There had to be some factor in this particular case which indicated that there was a materially greater risk of absconding than the risk inherent in the normal cases. I considered that there are such features... it seemed to me that this is an applicant who would simply abscond if afforded the opportunity to do so... Bail is refused *in hoc statu*."

The petitioner has not made a further application for bail.

[11] The obstacle to deportation has been the unavailability of identity papers for the petitioner that would permit him to obtain a travel document from the DRC authorities. According to counsel for the petitioner the DRC authorities will 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] On 30 March 2010, at a time when the petitioner was still apparently willing to return to DRC, an ETD application was sent to the RGDU. The application was returned to the Criminal Casework Directorate [CCD] with the explanation that the ETD application could not be forwarded to the DRC Embassy without supporting documentation. The photos were also of poor quality. The petitioner was asked to submit any documentary evidence of identity in his possession; he was asked to

contact his Embassy directly to request a copy of his birth certificate; he was asked to contact friends and relatives in DRC who might be able to forward identity documents or to apply for them on the petitioner's behalf; and he was asked to provide details of friends and relatives in DRC whom the Border Agency could contact via the Country Targeting Unit [CTU] to help support the petitioner's application for a travel document.

[13] The petitioner failed to respond to the invitation of 30 March 2010. Little seems to have been done by way of taking proactive steps to document the pursuer's identity pending resolution of the petitioner's "fresh claim" and revocation applications in the period 4 May to 14 September 2010. Shortly after the applications were resolved CTU confirmed that the petitioner had been listed as a candidate for future documentation exercises at the DRC Embassy. On 16 November 2010 a further invitation to assist with gathering documentation of his own identity was sent to petitioner. As at the date of the four-week Detention Review dated 7 January 2011 he had failed to respond. By that date the petitioner had initiated the instant proceedings for Judicial Review which are premised on the proposition that there is no realistic prospect of the petitioner acquiring a travel document for re-admission to DRC.

[14] On 13 December 2010 the petitioner informed the CCD team that he no longer wished to remain in detention and that he wished to be released so that he could continue his life in the United Kingdom. On 23 December 2010 the petitioner informed staff at Dungavel IRC that he did not wish to return to DRC. On 5 January 2011 the petitioner was withdrawn from the FRS scheme.

[15] I gather that a complicating factor has been the attitude of the DRC Embassy. It seems that in March 2010 the DRC Embassy withdrew the service previously provided of interviewing candidates for re-admission to DRC who have no supporting

evidence of identity. The service was apparently intended to facilitate the granting of travel documents. On 21 June 2010 the petitioner's case was first added to the CCD CTU list "for if and when the officials agree to start conducting interviews." His inclusion was confirmed some time after 14 September 2010. As at the date of the four-week Detention Review of 7 January 2011 there was still no DRC Embassy interview scheme in progress.

[16] The Detention Review of 7 January 2011 discloses that the Border Agency has in view further measures to be undertaken as soon as possible to facilitate the obtaining of a travel document for the petitioner to permit him to be re-admitted to DRC: a landing card check on the petitioner's British Airways flight from Angola on 4 April 2004 is planned; and a further interview of the petitioner by an Immigration Officer is planned to obtain details of fellow national contacts in the United Kingdom, presumably with a view to confirming the petitioner's identity. It has been pointed out to the petitioner that his continued failure to co-operate with the ETD process is a factor in the decision to maintain detention. The Detention Review expresses the view, I assume on the basis of past experience of similar cases, that cooperation from the petitioner is now more likely.

Statutory framework and case law

[17] 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, sch 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 7 January 2011 when authority to detain was renewed for a further 28-day period.

[18] 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 unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

[19] 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].

[20] 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."

[21] 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]. 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.)

[22] 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.

[23] 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.

[24] Counsel for the petitioner confirmed that for the purposes of this interim application there were 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**

[25] 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*.

[26] 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. 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).

[27] Counsel for the petitioner submitted that the petitioner could be released with a tagging (electronic monitoring) condition and residency and reporting conditions. Although the petitioner had previously removed his tag, he did not abscond. Counsel

for the respondent 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

[28] 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 it will be possible to effect deportation within a reasonable period and that, 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.

[29] Assuming without deciding that the proper approach for the Court, even at the interim stage, is to decide for itself whether the decision to continue detention is correct and whether detention at this time and *ad interim* is proportionate, I have reached the conclusion that the decision is correct and that detention is proportionate. I am not persuaded that the petitioner has a *prima facie* case and I take the view that the balance of convenience favours the continuation of detention.

[30] The power to detain in terms of Immigration Act 1971 as amended, sch 3, 2 (3) is conferred where a deportation order is in force. The detention order in this case has been in force since 19 March 2010 *i.e.* for less than a year. The deportation order was made in circumstances where the petitioner's representatives had requested his return to DRC as soon as possible and where he had applied for FRS and was apparently willing to comply with the ETD procedure. There was a marked change of attitude after the petitioner's transfer to Dungavel IRC when he instructed new representatives. Between 4 May and 14 September 2010 the Border Agency had under consideration

the petitioner's "fresh claim" for asylum etc and his application to revoke the detention order. The applications were refused.

[31] The petitioner has since made it clear that he wishes to be released from detention to continue his life in the United Kingdom and that he does not wish to return to DRC. In all the circumstances 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.

[32] The Detention Review dated 7 January 2011 discloses that the Border Agency has in view further measures to be undertaken as soon as possible to facilitate the obtaining of a travel document for the petitioner to permit him to be re-admitted to DRC: a landing card check is planned; and a further interview of the petitioner by an Immigration Officer is planned. It has been pointed out to the petitioner that his continued failure to co-operate with the ETD process is a factor in the decision to maintain detention. The latest Detention Review expresses the view, I assume on the basis of past experience of similar cases, that cooperation from the petitioner is now more likely.

[33] 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.

[34] I agree that the important question 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's attitude has vacillated and that he has apparently failed to cooperate in obtaining and producing documentation of his own identity. To that extent his detention is self-induced.

[35] From his past conduct and his current attitude including his now stated objections to being removed 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.

[36] 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. To apply *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."

[37] 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.