Case No: C4/2007/2821

Neutral Citation Number: [2008] EWCA Civ 475
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(SIR GEORGE NEWMAN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 11th April 2008

Before:

LORD JUSTICE WALLER
LORD JUSTICE WILSON
and
LORD JUSTICE TOULSON

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IN THE MATTER OF BOSOMBI

- -

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THE APPELLANT APPEARED IN PERSON.

Mr S Kovats (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**.

- -

Judgment

(As Approved by the Court)

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Lord Justice Toulson:

1. This is an appeal against a judgment of Sir George Newman, given on 27 November 2007, dismissing a claim for habeas corpus. The appellant is currently held in Colnbrook Immigration Detention Centre. He has been held in custody since 2 August 2006 under Schedule 3 to the Immigration Act 1971 on the order of the Secretary of State. Prior to that date he had been in detention serving a prison sentence.

2. The background facts are these. The appellant is a national of the Democratic Republic of Congo ("DRC"). He was born on 12 November 1963. He arrived in the UK in October or November 1990 and claimed asylum. On 2 June 1995 he was convicted of assault occasioning actual bodily harm and indecent assault on a woman police officer and was sentenced to three years' imprisonment, reduced on appeal to two years.

3. On 7 July 1998 his asylum claim was refused but he was granted exceptional leave to remain until 7 July 1999. On 13 May 1999 at Wood Green Crown Court he was convicted of conspiracy to defraud the Department of Social Security and sentenced to three and a half years' imprisonment. On 1 September 2000, at the same court, he was convicted of a further offence of conspiracy to defraud and sentenced to two years' imprisonment. On 3 October 2001 he was granted indefinite leave to remain in the UK. On 3 April 2003 he was charged with a further offence of conspiracy to defraud. He was convicted of this offence at Kingston Crown Court and on 9 January 2004 sentenced to five years' imprisonment. The judge said in his sentencing remarks:

> "It is right that your role may be limited to that of manipulator but limited is hardly the right word because the role is such a vital one. Nothing could happen with these cheques via this particular route of disposal without you and the considerable skills you brought to bear on the cheques. You have previous convictions for doing precisely the same thing and you have received sentences of custody in the recent past but the only thing you appear to have learnt from periods in custody is how to be more careful and to leave fewer fingerprints behind and how not to be caught with the tools of the trade and the kit that you would need for this manipulation so obviously in your home. You have used your skills to such a degree over these recent years that the Department of Work and Pensions have suffered considerably at the hands of what you were prepared to do."

   In that case the fraud involved use of stolen giro cheques totalling over £40,000.

4. On 31 May 2006 the Secretary of State sent a letter to the prison governor inviting the appellant to make any representations why he should not be deported; none were

received. On 1 August 2006 the Secretary of State issued a decision to make a deportation order under s.3(5)(a) of the Immigration Act 1971. This section provides:

> "A person who is not a British citizen is liable to deportation from the United Kingdom if --
> (a) the Secretary of State deems his deportation to be conducive to the public good"

On the same day the Secretary of State issued an authorisation for the appellant's detention in the following terms:

> "Whereas the Secretary of State has decided to make a deportation order under Section 5(1) of the Immigration Act 1971 against Ekaza Bosombi
>
> a citizen of the Congo Democratic Republic who is, at present, detained in pursuance of the sentence or order of a court and is due to be released otherwise than on bail on 2 August 2006.
>
> The Secretary of State hereby, in pursuance of paragraph 2(2) of Schedule 3 to that Act, authorises any constable, at any time after notice of the decision has been given to the said Ekaza Bosombi
>
> in accordance with the Immigration Appeals (Notices) Regulations 1984 to cause him to be detained from the date of his release until the deportation order is made or an appeal against the decision under Part II of the Act is finally determined in his favour."

The relevant paragraph of Schedule 3 to the Act under which that order was made provides that:

> "Where notice has been given to a person in accordance with [the relevant regulations] of a decision to make a deportation order against him…he may be detained under the authority of the Secretary of State pending the making of the deportation order."

5. On 2 August 2006, the basis of the appellant's detention ceased to be the prison sentence that he had been serving because he then reached the notional release date. On 9 November 2006 the Secretary of State made a deportation order in the following terms:

> "Whereas the Secretary of State deems it to be conducive to the public good to deport from the United Kingdom Ekaza Bosombi, a person who

> does not have the right of appeal within the meaning of the Immigration Act 1971, and whereas the said Ekaza Bosombi is, accordingly, liable to deportation by virtue of Section 3(5)(a) of the said Act:
>
> Now therefore in pursuance of Section 5(1) of the said Act, the Secretary of State by this order requires the said Ekaza Bosombi to leave and prohibits him from entering the United Kingdom so long as this order is in force.
>
> And in pursuance of paragraph 2(3) of Schedule 3 to the said Act, the Secretary of State hereby authorises Ekaza Bosombi to be detained until he is removed from the United Kingdom."

The relevant paragraph of the Schedule under which that detention order was made provides that:

> "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 [subject to bail provisions which it is unnecessary to set out]."

6. On the same day an explanatory letter was sent by the Secretary of State to the appellant. The letter began:

> "On 31 May 2006 the Home Office wrote seeking reasons why you should not be deported from the United Kingdom following your conviction for Conspiracy to Defraud. No representations have been received but nevertheless having reviewed the facts known it has been concluded that your deportation would be conducive to the public good."

The letter then set out the background facts and the Secretary of State's reasons for coming to that conclusion. It also dealt with the question whether there were European Convention grounds for not making a deportation order. Copies of that letter and the deportation notice were sent to solicitors then acting for the appellant.

7. On 24 November 2006 the appellant sought to appeal against the deportation order to the Asylum and Immigration Tribunal. On 27 November 2006 his purported appeal was rejected by Immigration Judge Astle because it was long out of time and the judge concluded that there were no "special circumstances" to entertain it under the relevant procedure rules.

8. On 7 November 2007 the appellant issued his application for habeas corpus. The grounds were diffuse but principally he complained that he had not been given any proper explanation why he had been detained, that his detention violated Article 8 and that he had not received any indication that his detention had been kept under proper review. Evidence put in by the Secretary of State showed that he had refused to accept service of the deportation papers and that his continued detention had been subject to regular reviews. As to the Article 8 point, the letter of 9 November 2006 to which I have referred had addressed that issue in some detail and could have been the subject of an appeal if brought in proper time but it was not.

9. The Secretary of State also explained in the evidence placed before the judge that there had been two practical obstacles to the appellant's removal. First, the Secretary of State needed to obtain an emergency travel document to effect the appellant's removal to the DRC but attempts made by the Department to achieve this had been thwarted by the appellant's continued refusal to cooperate in the process. Secondly, on 23 August 2007, the Secretary of State had given an undertaking to the High Court not to remove failed asylum seekers to the DRC until completion of the Country Guidance case of BK (DRC).

10. On 18 December the Asylum and Immigration Tribunal delivered its decision in that case ([2007] UKAIT 00098) and concluded that failed asylum seekers were not, as such, at risk on return to the DRC. However, at the time when this case was before Sir George Newman, that decision was awaited. It was the Secretary of State's position that there was a real prospect of being able to remove the appellant within a reasonable time notwithstanding those two current impediments and that his detention in the meantime was justified because of the significant risk of his failure to cooperate with any restrictions which might be placed on his temporary release.

11. Having summarised the facts the judge concluded as follows:

> "I am satisfied that the claimant's criminal record and his refusal to cooperate with procedures for obtaining travel documents all go to indicate a risk that if he is released he will abscond. His criminal record, involving as it does three serious offences of conspiracy to defraud, is a record of re-offending. There has been delay, which is largely of his own making, to the deportation process produced as a result of his refusal to cooperate with the documentation process.
>
> In so far as the Secretary of State is maintaining detention whilst she is awaiting the outcome of the decision in the AIT case of **BK**, the detention, in my judgment, cannot be categorised as unlawful. For all those reasons, this application for *habeas corpus* is dismissed."

12. The applicant applied for bail on a number of occasions, most recently last month. Bail has been refused on each occasion because of the risk of absconsion.

13. The principles which govern the exercise of the Secretary of State's power to authorise detention of a person under Schedule 3 to the Act were considered by this court in A v Secretary of State for the Home Department [2007] EWCA Civ 804 and it is unnecessary to repeat them. In my judgment the decision of the judge was fully in line with those principles.

14. In his written Grounds of Appeal the appellant has reiterated that his removal from the UK would breach his Convention rights but that is not an issue open to him to take at this stage. There were full opportunities for him to have advanced a human rights appeal at an earlier time. He sought to do so, unsuccessfully. The detention remains lawful.

15. As a footnote, we have been told that both obstacles to removal which existed at the time of the hearing before the judge have now been removed: a travel document for the appellant is now available and the Asylum and Immigration Tribunal has given its decision in the case of BK. Mr Kovats, appearing for the Secretary of State, has told us that there is an attempt to bring that decision before this court. The tribunal itself refused permission to appeal but there is an outstanding application to a single judge of this court for permission to appeal. Mr Kovats has indicated that the Secretary of State does not intend to hold up the deportation process in this case on that account, nor do I consider that she is lawfully required to do so. It should be noted here that in this particular case the appellant's asylum claim is really nothing more than an early part of the history, because it was after that that he was given indefinite leave to remain. The ground for his proposed deportation now is simply and straightforwardly because of his conviction for serious offences triggering a deportation order.

16. In his brief submissions to us this morning the appellant did express real anxiety about knowing where he stands. He insists that he has not been uncooperative and he wants his position finalised as quickly as possible. It seems to me that it is in everybody's interests, his interest, the Secretary of State's interest and the public interest that this matter should now be finalised as quickly as possible and that the deportation should be carried through with a minimum of further delay.

17. There are certain internal procedures which have to be gone through, as explained by the Secretary of State in his skeleton argument. The deportation has to be approved by the Border Agency's Children's Champion, because the appellant has a wife who is a British citizen and four children who are all British citizens and deporting the appellant is liable to split the family, and it has also to be approved by the Criminal Casework Director. The Secretary of State does not anticipate that these necessary steps will cause any impediment to carrying out the order but I reiterate that it is, in my view, highly desirable that those steps should now be addressed as speedily as possible.

18. I would dismiss this appeal.

Lord Justice Waller:

19. I agree.

Lord Justice Wilson:

20. I entirely agree.

Order: Appeal dismissed