OUTER HOUSE, COURT OF SESSION

[2009] CSOH 32

OPINION OF LADY SMITH

in the Petition of

M.A.S.

Petitioner;

Against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

for

Judicial Review of decision of the Secretary of State in respect of his continued detention

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Petitioner: Komorowski; Drummond Miller LLP
Respondent: Lindsay; C Mullin, Solicitor to Advocate General

3 March 2009

[1] This is a petition for Judicial Review at the instance of a man who claims to be a Palestinian whose name is as in the instance. The case came before me for a first hearing on 11 February 2009.

Introduction

[2] The petitioner is currently detained at Dungavel Immmigration Removal Centre, awaiting deportation. He has been detained there since 10 January 2008 in the circumstances undernoted. He seeks, by means of this application for Judicial Review, to achieve his release from Dungavel, whilst accepting that he has no right to be present in the United Kingdom.

Background

[3] Parties were largely in agreement regarding the factual background which is as follows :

[4] The petitioner arrived in the United Kingdom on 9 February 2004 and sought asylum. He claimed that he was a Palestinian with the name under which he presents this petition.

[5] His claim for asylum was rejected on 22 March 2004.

[6] He appealed, his appeal was dismissed on 16 November 2004 and his appeal rights expired on 3 December 2004.

[7] Although the petitioner was thereafter, required to attend regularly at an Immigration Office, he failed to do so and was regarded as an absconder from 16 January 2005.

[8] On 10 July 2005, the petitioner was found by the Immigration Authorities, working at Sutton Bridge, near Grantham, using a copy of some French passport papers as evidence of his entitlement to work. They were not his papers.

[9] On 11 July 2005, the petitioner was convicted, at Grantham Magistrates Court, of using a false instrument and, on 20 August 2005, was sentenced to 12 months imprisonment at Lincoln Crown Court.

[10] When the petitioner was found in the Grantham area, the flat where he was staying was searched. An Egyptian Koran was found there. Also, the authorities found a mobile telephone, which was the petitioner's telephone. Amongst the numbers stored on its SIM card was the number of an Egyptian person.

[11] By "cold calling" numbers on the telephone, the respondent, via the British Embassy in Cairo, made contact with two persons who claimed to be the father and brother of "A R El A" who had disappeared to the United Kingdom two years earlier.

[12] Thereafter, the respondent entertained a belief that the petitioner was A R El A.

[13] On 9 January 2008, the Secretary of State for the Home Office, the respondent, served a notice on the petitioner intimating that it was proposed that he be deported. The notice identified the petitioner as A R El A. The petitioner denied that he was that person and continues to do so.

[14] The petitioner was formally served with detention papers on 7 February 2008, again giving him the Egyptian name referred to above.

[15] The petitioner was thereafter interviewed by staff from the Egyptian Embassy and he denied that he was Egyptian. Those staff undertook to look into the matter.

[16] The petitioner appealed against the deportation notice on the basis that he was not A R El A and his appeal was heard on 3 June 2008. He stated that he was Palestinian.

[17] At the time of his appeal, it was made clear to the petitioner that, to progress investigation with the Palestinian authorities as to whether or not he was the Palestinian person that he claimed to be, he should produce some documentation to assist such as an identity card.

[18] The petitioner claims to come from the West Bank in Palestine. Identity cards are used there. He states that he has such a card but he left it behind when he travelled to

the United Kingdom. The petitioner claims to have four brother and sisters left behind in Palestine but to have lost touch with them.

[19] The respondent cannot send the petitioner to Palestine unless travel documents have been issued by the Palestinian authorities authorizing him to travel to that state. Such documents serve as the equivalent of a passport.

[20] The respondent cannot send the petitioner to Egypt unless travel documents have been issued by the Egyptian authorities authorizing him to travel to that state. Such documents would, similarly, serve as the equivalent of a passport.

[21] The respondent contacted the Egyptian Embassy on 30 April 2008 with a view to obtaining travel documents for the petitioner. The respondent has provided them with a photograph of the petitioner. The respondent has made further enquiries of the Egyptian Embassy on 4 June, 4 October 24 October, 8 December, and 9 December 2008, and 27 January 2009, all to enquire whether or not travel documents will be issued by the Egyptian authorities for the petitioner but has, as yet, had no response one way or the other.

[22] The petitioner sent a letter to the respondent, on or about 20 December 2008, in the following terms:

> "Dear Sir/Madam
>
> .....
>
> Further to above in my monthly report, I was advised by you to try and obtain an original travel document from Palestine. I wish to state that I made several efforts to contact my family back home but to no avail.
>
> This is because I lost all contacts relating to my family. I however wish to help you with my details below for you try again to secure me the necessary

documents to effect my removal from this country. I do this to demonstrate my ever preparedness to co-operate with you in all your dealings with my case.

My details

Port Ref: SP/413445

HO Ref/A1216395

First name/ M

Surname/ A

D.O.B. :11/11/1974

Country / Palestine

Zayta/ Nablus / West Bank

Police Station / Nablus central police station

I hope reading from you.

Thank you

M.A."

and he attached a sketch of what an identity card would look like if he had had one to produce.

[23] In the respondent's experience, it is very difficult indeed to make progress with applications to Palestine for travel documents for deportation purposes. Matters are usually long winded but can be speeded up if some valid documentation to identify the particular individual to be deported can be produced. In the respondent's experience persons in the petitioner's position who find themselves in the United Kingdom subject to deportation and without such documentation do often manage to get in touch with family members who are able to send documents to assist. The Red Cross have facilities to assist in tracking down relatives and the respondent will put

persons in circumstances such as the petitioner in touch with them if they request that she do so.

[24] The petitioner has not requested Red Cross assistance.

[25] The respondent now has in hand the submission of a travel document application to the Palestinian authorities. If they accept that the petitioner is Palestinian, judging by experience, it could take them six months to process the application. The respondent also continues to follow the route of seeking to establish whether the Egyptian authorities will issue travel documents for him.

[26] The respondent has no interest in establishing that the petitioner is of either nationality. Her sole purpose is to establish whether one of the two identified states will issue travel documentation for him.

[27] The respondent fears that if the petitioner is released, he will abscond again.

[28] There is no tagging system available for the respondent to use in Scotland in respect of persons awaiting deportation.

[29] The petitioner has sought bail from both the Immigration Judge (4 November 2008 and 3 February 2009) and this court (28 and 29 January 2009), without success.

[30] The petitioner accepts that he is liable to deportation but asserts that he should be deported to Palestine and not to Egypt.

[31] Finally, the respondent has been carrying out monthly reviews of the petitioner's position during his detention. The last review was on 6 February 2009. The respondent considered the whole circumstances and addressed the question of whether the petitioner's continued detention was proportionate and reasonable. She concluded that it was and determined to maintain his detention. The petitioner challenges that decision in this application for judicial review.

Relevant Law

[32] The respondent's power to detain the petitioner derives from section 5 of the Immigration Act 1971 and paragraph 2 of Schedule 3 to that Act. It was accepted on behalf of the petitioner that there has been a valid deportation order in force in respect of him since February 2008 and that, therefore, the terms of paragraph 2(3) of Schedule 3 apply, namely:

> "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 .....shall continue to be detained) unless he is released on bail or the Secretary of State directs otherwise."

[33] Parties were in agreement that the test was as set out in *R* v *Governor of Durham Prison ex parte Hardial Singh* [1984] WLR 704 namely that the power to detain a person pending deportation was limited to such period of time as was reasonably necessary to carry out the process of deportation. In particular, as set out by Woolf J, as he then was, at p.706:

> "First of all, it can only authorize 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."

Thus, Woolf J said that the Secretary of State must intend to deport the individual concerned, that he may only be detained for a period that is reasonable in all the circumstances, that if it becomes apparent that he will not be able to removed within whatever is, in his case, a reasonable time, then the Secretary of State should not exercise the power of detention and that the Secretary of State should act with reasonable diligence and expedition.

[34] That passage was referred to by the Board of the Privy Council in *Tan Te Lam* v *Tai A Chau Detention Centre* (PC) 1997 AC 97 at page 111, as being an appropriate statement of the limitation of on the statutory power of detention pending removal . It was also applied in the case of *R (I)* v *SSHD* [2003] INLR 196 where the Court of Appeal took the view, on the particular facts of the case, that it had become clear that removal was not going to be possible within a reasonable time and therefore ordered the release of the applicant.

[35] Mr Komorowski very properly drew my attention to the opinion of Lord Penrose in the case of *Singh* v *SSHD* 1993 SLT 950 where it was stated that the principle that applied in a case such as the present one, on judicial review, was that the court had no wider power than its general power to review administrative acts; in particular it had no independent discretionary power to review the merits of the administrative decision. However, Mr Lindsay indicated that the respondent did not seek to rely on Lord Penrose's opinion. Matters had moved on and it was accepted by the respondent that it was for the court to determine, itself, whether or not the continued detention of

the petitioner was reasonable in all the circumstances, that being the approach that has been adopted in all the English decisions in similar cases.

[36] Reference was also made to the cases of *R (Qaderi)* v *SSHD* [2008] EWHC 1033, *R (Ashori)* v *SSHD* [2008] EWHC 1460 and *R (Jamshidi)* v *SSHD* C)/134/2008 as examples of the application of the above principles.

Submissions for the Petitioner

[37] It was submitted on behalf of the petitioner that he had been detained longer than was reasonable. That was because the respondent could and should have approached the Palestinian authorities sooner. It was accepted that it was quite appropriate for the enquiries to be made of the Egyptian Embassy that had taken place. But the Palestinian ones should have begun sooner. The petitioner was not looking for an open ended release. He accepted that it should come to an end once the respondent had appropriate travel documents to remove him. Although tagging was not available in Scotland, the respondent had a contract with a company that could provide electronic tagging in England and the petitioner ought to be able to be housed in accommodation provided by the National Asylum Support Service. The authorities showed that his detention had become unreasonable.

Submissions for the Respondent

[38] Mr Lindsay submitted that a reasonable time had not elapsed and that it was not the case that it should be concluded that the petitioner will not be able to be removed within a time that is reasonable in all the circumstances.

[39] The respondent did not accept that she was open to criticism. Active enquiries had been made repeatedly of the Egyptian Embassy and, drawing on her experience of

difficulties in dealing with the Palestinian authorities, it had been made plain to the petitioner that documentation was needed if the application for travel documents for him was to be processed efficiently. He had not provided them. He had not taken up the offer of being put in touch with the Red Cross, to trace his relatives with a view to getting documentation sent to him. The respondent was concerned that if the petitioner were to be released, he would abscond. He had no family in the United Kingdom and no reason to stay in any particular place. He had absconded before.

Discussion and Decision

[40] I require to consider whether, bearing in mind the whole facts and circumstances of this case, it is reasonable to continue to detain the petitioner.

[41] There is no particular period of time beyond which it can categorically be said that it is unreasonable to continue detention. All cases are fact sensitive and a shade or nuance in one direction may cause that which would otherwise seem unreasonable to appear reasonable, and vice versa. The fact that it can, broadly, be commented that a person has been detained for a "long time" may well raise the question of whether it is so long as to be unreasonable but does not of itself point to it being unreasonable nor does it raise any presumption that it is unreasonable. Thus, whilst it is undoubtedly the case that the petitioner could be said to have been detained for a long time in this case, that does not lead to any particular conclusion. It is necessary to examine why it is that that has happened and what is likely to happen now.

[42] I am entirely satisfied that in the circumstances of this case the petitioner has not been detained for an unreasonable length of time. The respondent has acted responsibly in following up the Egyptian enquiries. On the facts, she was well entitled

to entertain a belief that the petitioner is an Egyptian with the name to which I have referred. Indeed, it was not suggested that she should not have gone down that route and whilst it is unfortunate that she has no definitive answer from Egypt as yet, that does not appear to be her fault. She has sent reminders and it is to be hoped that they will, ere long, produce a response.

[43] As regards Palestine, the respondent has not rejected the petitioner's assertions. Far from it. Whilst she has not, until now, undertaken to put in hand the matter of seeking travel documents from them the reason for that is, as the petitioner is well aware, that she sought before doing so, to see if he could produce any documents to vouch his identity. It was not unreasonable to proceed in that way in the circumstances, particularly since experience tells her that persons in the position of the petitioner do manage to obtain relevant documents when asked. It has been in the petitioner's hands to make progress in that regard since June and nothing has been forthcoming. He has not sought the assistance of the Red Cross to trace his family, as he could have done.

[44] Then there is the matter of the risk of absconding. Not only has the petitioner breached the trust of the authorities in the past by failing to "sign in" and absconding, he did so in circumstances where he used a false identity to obtain and carry out work. That is also against a background of the Immigration Adjudicator who heard his application for asylum having found his account of having had to leave the West Bank in circumstances of persecution to be lacking in credibility. The conclusion has to be, in my view, that there is a very real risk of him absconding if he is released. Even if he could be transferred to England and tagged, I do not see that that would necessarily prevent his absconding if he were determined to do so. Whilst tagging will identify

that a person has left the tagged "field" it does not operate like a "GPS" system and would not identify where the petitioner had gone once he was outwith that field.

[45] Looking ahead, matters are now in hand with the Palestinian application and although it could take six months to process, if the Egyptians revert with a positive response before then or if the petitioner (perhaps having accessed Red Cross assistance to trace his family) produces documentary vouching of his identity, matters will move faster.

[46] In all the circumstances, I am satisfied that it is not unreasonable to continue to detain the petitioner and, in particular, that it was not unreasonable to continue to detain him as at 6 February 2009. I will, accordingly, pronounce an interlocutor dismissing the petition.