Neutral Citation Number: [2011] EWHC 365 (Admin)

Case No: CO/1167/2010

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2011

**Before** :

**MR. JUSTICE BEAN**

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**Between :**

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|---|---|
| **Choy** | **Claimant** |
| **- and -** | |
| **Secretary of State for the Home Department** | **Defendant** |

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**David Chirico** (instructed by **Bhatt Murphy**) for the Claimant
**Julie Anderson** (instructed by the **Treasury Solicitor**) for the Defendant

Hearing date: 8 February 2011

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# Judgment

**Mr Justice Bean :**

1. The Claimant was born in Nigeria on 10th September 1975. His father was Chinese. It is common ground between the parties that he did not have Nigerian citizenship. In 2002 he held a Chinese passport but spent, on his account, no more than 12 days in China, specifically in Hong Kong.

2. On 26th June 2002 he arrived in the United Kingdom from Hong Kong, using a Chinese passport, and claimed asylum. The claim was refused by the Home Office. On 17th December 2003 his appeal to an Adjudicator was dismissed.

3. On 18th June 2004, following his conviction for offences of deception, the Claimant was sentenced to 3 years imprisonment and recommended for deportation. He was served on 5th August 2005 with a notice of intention to deport him. In the same month he walked out of the open prison where he was serving his sentence. The Defendant says that he absconded; the Claimant argues that he simply left as a free man at the end of the custodial part of his sentence. I think it is plain that he absconded from prison; but even if that were wrong, it is quite clear that he absconded in the sense of not abiding by any requirements of his licence nor reporting to police or immigration officials to regularise his status. In short, he went off the radar. On 21st November 2005 a deportation order was signed in his case.

4. On 28th June 2008 the Claimant was arrested and detained. He was also charged with an offence of causing grievous bodily harm. The criminal proceedings came to an end on 26th January 2009 when no evidence was offered.

5. In a document dated 24th March 2009 a UK Border Agency official set out the Claimant's immigration history and observed that it was in his own interests to provide his valid Chinese passport without delay "as failure to do so may result in being detained longer than necessary". The UKBA took the view that the claimant was withholding his passport in order to impede his removal. Solicitors then acting for him were asked whether they had the original passport; they replied that they did not, although they did have a copy.

6. A progress report dated 16th June 2009 again expresses the Defendant's view that the Claimant's "continued failure to co-operate with the Emergency Travel Documentation process is a factor in the decision to maintain detention". The claimant responded to this document the next day by fax pointing out that he had grown up in Nigeria, had only spent two weeks in China, mostly at a shelter for the homeless, in 2002 and had never acquired Nigerian nationality. He alleged that ever since had come to the UK his Chinese passport had been held by the Home Office. The next day he was refused bail by an immigration judge who stated that he was not satisfied that the claimant had told the truth about his knowledge of the whereabouts of his Chinese passport. The UKBA did, however, possess a clear and legible copy of that passport. This fact was apparently not mentioned to the immigration judge.

7. The Claimant had already been interviewed in April 2009 in connection with a possible ETD application. A further interview took place on 19th June. The Defendant's officials subsequently completed an application form which it appears the Claimant was not asked to check or sign. It gave as his last address in China a particular floor or section (the court copy is difficult to read) of a building at 2-8 Dundas St, Hong Kong. That address was taken from a document held on file which had been submitted on 31st January 2002 to the German authorities by Isaac Bolorinwa, a Nigerian citizen resident in Frankfurt who was sponsoring an application by the claimant for admission to Germany to work.

8. On 14th October 2009 the Chinese Embassy in London refused the application for an ETD. It appears that the address taken from the German sponsorship form was false. A file note of the UKBA dated 2nd November 2009 stated:

> "The subject would not provide an address in Hong Kong when he had his ETD interview as he claims not have lived there for any length of time so we had to use an address found on his file which Mr. Choi used when he applied for a German work permit. However, given the fact that we have provided a copy of his Hong Kong passport with an ID as supporting evidence, it is not clear why the Chinese authorities have refused the ETD merely on account of being unable to verify the address."

9. The matter was taken up with the Hong Kong authorities who indicated what alternative documents would be acceptable in the circumstances. On 15th January 2010 the Claimant agreed to sign a Hong Kong Immigration Service form and for the first time his representatives provided the UKBA with his father's certificate of

identity as a supporting document for the ETD application. These documents were submitted to the Embassy on 21st January. A successful interview with the Chinese authorities took place on 5th March resulting in the issue of an ETD. Following a further decision by an immigration judge granting bail, the claimant was released on bail on 6th April 2010.

10. By this time these proceedings had been issued, on 27th January 2010. The paper application was adjourned into open court by Burton J and was heard by Sales J on 29th April. He granted permission.

11. The claimant applied to the Secretary of State to revoke the deportation order. That application was certified as unfounded on 15th July 2010. The effect of the certificate was that no in-country appeal could be brought against the refusal to revoke the deportation order. The claimant was accordingly removed to Hong Kong on 30th July 2010. He exercised his right of appeal from there by notice of 23rd August. That appeal is pending before the First-Tier Tribunal.

12. This claim does not challenge the lawfulness of the removal. Rather it seeks a declaration that the claimant's detention was unlawful for all or part of the period from 26th January 2009 (when the criminal charges were dropped) and 6 April 2010 (when he was granted bail), and damages for that detention. Mr. Chirico accepts that the 7 month period (June 2008 – January 2009) during which the Claimant was facing a significant criminal charge cannot reasonably be complained of in these proceedings, but submits that it must be borne in mind in assessing the reasonableness of continued detention between 26th January 2009 and 6th April 2010.

13. In oral argument Mr. Chirico narrowed his complaint to three periods: (a) from 9th April 2009 to 18th June 2009, when UKBA were attempting, pointlessly in Mr. Chirico's submission, to track down the Claimant's original passport; (b) a delay which Mr. Chirico estimates as being "at least 45 days" in the ETD application process caused by the Defendant's submission to the Chinese Embassy of an application not signed or checked by the Claimant; and (c) the further delay of nearly six months caused by the submission of a form with a false address, not verified by the Claimant, resulting in the refusal on 14th October 2009 of an application which would otherwise have been granted. As to this final period, from 14th October 2009 to 6th April 2010, the submission is both that the period of detention was longer than reasonably necessary and that it must have been apparent by this time to the Defendant that the Claimant could not be removed within a reasonable period.

14. Mr. Chirico was frankly hesitant about the first of these three periods, and in my view rightly so. I do not think that the attempts to obtain the original passport between April and June 2009 demonstrate any lack of diligence on the part of the Defendant's officials. It was a reasonable enquiry to have made. I accept Mr. Chirico's submission that it is unlikely that the original passport would have been returned to Mr. Choy when he claimed asylum immediately on arrival in the UK, or at any subsequent point in the history; and experience indicates that it is quite possible for such documents to be lost by the agencies acting on behalf of the Defendant. It is also right to say that in the present case, after some persuasion by the Foreign Office, the Chinese authorities issued an ETD and did so having seen only a copy and not the original of the Claimant's passport. But this last point is the wisdom of hindsight. In any event the search for the original passport involved at most a few weeks of delay.

15. As to the remaining periods, Mr. Chirico submits that "it was the Defendant's reliance upon an incorrect address [in Hong Kong] compounded by the failure to check this address with the Claimant or even to disclose it to him, which prevented his being provided with a travel document" while he was in custody.

16. The use of the Hong Kong address in the ETD application submitted on 26th August 2009 is not a matter for which the Defendant should be criticised. They had on file the 2002 work permit application to the German authorities, made by Mr Bolorinwa as sponsor for the Claimant, giving the Dundas Street address as the Claimant's address in Hong Kong. It was not unreasonable of the Defendant to put it forward to the Chinese authorities as the Claimant's last known address in China. It is true, as Mr. Chirico emphasises, that in 2003 the Adjudicator had accepted that the Claimant had spent only some two weeks in Hong Kong and had been forced to resort to a shelter in place of proper accommodation. If the official who compiled the form and submitted it to the Embassy had read the Adjudicator's decision he or she would have discovered this, but I do not consider that it was incumbent on the Defendant's officials to read the entire file before submitting the application for an ETD.

17. The period from October 2009 to April 2010 likewise did not involve any lack of due diligence on the Defendant's part. It is possible that between 2nd November 2009 and 15th January 2010 negotiations with the Hong Kong authorities might have proceeded a little more quickly: I have no evidence about that, but again any element of delay was limited to a few weeks. After 15th January the matter was in the hands of the Chinese Embassy. Certainly there was no permanent or long term impasse such as can be found in cases concerned the prospective removal of a deportee to a failed state. I find that there was at all times a reasonable prospect of removal within a reasonable period.

18. I was referred to numerous cases about the lawfulness of prolonged immigration detention. The starting point is the decision of Woolf J (as he then was) in *R v Durham Prison Governor ex p. Hardial Singh* [1984] 1 WLR 706.

> "Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise 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. In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to

> ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."

19. It is important not to lose sight of the statutory provisions under which the Claimant was detained. (The automatic deportation provisions of s 32 of the UK Borders Act 2007 did not apply in his case.) Schedule 3 to the Immigration Act 1971, as amended, provides, so far as material, as follows:

> "2(1) Where a recommendation for deportation made by a court is in force in respect of any person, and that person is not detained in pursuance of the sentence or order of any court, he shall, unless the court by which the recommendation is made directs that … be detained pending the making of a deportation order in pursuance of the recommendation, unless the Secretary of State directs him to be released pending further consideration of his case or he is released on bail. …
>
> 2. Where notice has been given to a person … of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.
>
> 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 subparagraph (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)."

20. In *R (WL (Congo)) v SSHD [2010] 1 WLR 2 168* at paragraph 88, Stanley Burnton LJ, giving the judgment of the court, said:

> "88. We consider, first, that it is necessary to distinguish between the detention of FNPs [foreign national prisoners] under sub-paragraph (1) of paragraph 2 of Schedule 3 to the 1971 Act and detention under sub-paragraphs (2) or (3). Sub-paragraph (1) is itself legislative authority for the detention of a FNP who has been sentenced to imprisonment and who has been the subject of a recommendation for deportation. If an unlawful decision is made by the Secretary of State not to direct his release, the court may quash the decision and require it to be retaken, but the legislative authority for his detention is unaffected. It follows that the FNP will have no claim for damages for false imprisonment in such circumstances. Furthermore, *SK* is authority, binding on us, that a failure in

> breach of procedural rules to review his detention does not necessarily render the detention unlawful.
>
> 89. The position is different when the decision to detain is made under sub-paragraph (2) or (3). In these cases, there is no lawful authority to detain unless a lawful decision is made by the Secretary of State. The mere existence of an internal, unpublished policy or practice at variance with, and more disadvantageous to the FNP than, the published policy will not render a decision to detain unlawful. It must be shown that the unpublished policy was applied to him. Even then, it must be shown that the application of the policy was material to the decision. If the decision to detain him was inevitable, the application of the policy is immaterial, and the decision is not liable to be set aside as unlawful. Once again, however, once a decision to detain has lawfully been made, a review of detention that is unlawful on *Wednesbury* principles will not necessarily lead to his continued detention being unlawful."

21. Mr. Chirico has three submissions about this passage. Firstly, he argues, when read in context, it has nothing to say about the assessment of the legality of a paragraph 2(1) detention by reference to the Hardial Singh principles. Secondly, even if it did, it means no more than what it says. There can be no claim for false imprisonment when detention is pursuant to a recommendation for deportation (paragraph 2(1) of the Schedule), but once the deportation order is made, even in a case where it had been recommended by the court, the authority to detain derives from paragraph 2(3) and damages for false imprisonment are therefore available. Thirdly, he submits, the observations of the Court of Appeal are in any event *obiter* and erroneous and I should not follow them. (I should add that the Claimants in *WL(Congo)* and its associated case *KM (Jamaica)* appealed to the Supreme Court who heard the appeals in November 2010 and whose judgment is awaited; both Mr. Chirico and Ms. Anderson, however, asked me not to adjourn this case until the Supreme Court delivers judgment).

22. I do not accept that on proper analysis the decision in *WL(Congo)* indicates that a convicted offender recommended for deportation by a court, though excluded from claiming damages for false imprisonment until the deportation order is made, is not excluded thereafter. Such a distinction would be irrational, and would render the words in brackets in paragraph 2(3) otiose. In paragraph 2(1) Parliament created a presumption of detention deriving from the criminal court's recommendation. Paragraph 2(3) continues that presumption in favour of detention following the making of the deportation order where the prospective deportee was already detained before the making of the order pursuant to a recommendation. The origin of the detention continues to be the recommendation of the court. In a paragraph 2(2) case, since there has been no recommendation, the origin of the detention is a discretionary decision of the Secretary of State. I therefore reject the submission that the Claimant is entitled to damages for false imprisonment on a daily or weekly basis if he can show any delay in the handling of his case.

23. I note that in *R(MC)(Algeria)) v SSHD* [2010] EWCA Civ 347 the Court of Appeal held that the Defendant "could and should have acted with greater diligence" during

the 30 month period of the Claimant's immigration detention. Nevertheless the claim was dismissed. I do not interpret that case as establishing that 30 months of detention will invariably be lawful; but I do read it as confirming my view that to show a lack of due diligence is not of itself enough to give a claimant a cause of action in public law.

24. I therefore accept the submission of Ms. Anderson that it is not for the court to conduct what she described as a "detailed time and motion study" of each day or week of the Claimant's period in detention and decide whether the Defendant was at all times acting with due diligence. No authority cited to me suggests that this is a proper approach to a public law claim based on Article 5 of the ECHR.

25. Where the Claimant can point to an arbitrary and unreasonable decision not to release, as for example in *R(MXL and others) v SSHD* [2010] EWHC 2397 (Admin), the position may be different. Otherwise, I agree with the summary of the law set out in the judgment of Hickinbottom J in *R(Mahfoud) v SSHD* [2010] EWHC 2057 (Admin) at paragraph 6 where he said:

> "(i) The power of detention exists for the purpose of deporting the relevant person ("the deportee").
>
> (ii) The power exists until deportation is effected: but it can only be exercised to detain the deportee for a period that is reasonable in all the circumstances.
>
> (iii) Whilst in some cases a reasonable time will have expired already and immediate release will be inevitable, in most cases the crucial issue will be whether it is going to be possible in the future to remove the deportee within a reasonable time having regard to the period already spent in detention. In considering such prospects, it is necessary to consider by when the Secretary of State expects to be able to deport the deportee, and the basis and degree of certainty of that expectation. Where there is no prospect of removing the deportee within a reasonable time, then detention becomes arbitrary and consequently unlawful under Article 5, and the deportee must be released immediately.
>
> (iv) There is no red line, in terms of months or years, applicable to all cases, beyond which time for detention becomes unreasonable. What is a "reasonable time" will depend upon the circumstances of a particular case, taking into account all relevant factors.
>
> (v) Those factors include:
>
> (a) The extent to which any delay is being or has been caused by the deportee's own lack of cooperation in, for example, obtaining an emergency travel document ("ETD") from his country of origin.

> (b) The chances that the deportee may abscond (which may have the effect of defeating the deportation order).
>
> (c) The chances that the deportee, if at large, may reoffend. If he may reoffend, of particular importance is, not simply the mathematical chances of reoffending, but the potential gravity of the consequences to the public of reoffending if it were to occur.
>
> (d) The effect of detention on the deportee, particularly upon any psychiatric or other medical condition he may have. The conditions in which the deportee is detained may also be relevant, although less so if he is required to be detained in particular conditions (e.g. in prison estate as opposed to a detention centre) because of his own behaviour.
>
> (e) The conduct of the Secretary of State, including the diligence and speed at which efforts have been made to enforce the deportation order including obtaining an ETD.
>
> That list of factors is not, of course, exhaustive.
>
> (vi) Any relevant factor may affect the length of time of detention that might be regarded as reasonable. Whilst in a specific case one or more factors may have especial weight, no factor is necessarily determinative. There is no "trump card". Therefore, even where there is a high risk or even inevitability of reoffending and/or absconding, nevertheless there may still be circumstances in which Article 5 requires a deportee's release.
>
> (vii) The burden of showing that detention is lawful lies upon the Secretary of State."

26. As to the prospect of removal within a reasonable time, in *R(MH) v SSHD* [2010] EWCA Civ 1112 at paragraph 65 Richards LJ said:

> "Of course, if a finite time can be identified, it is likely to have an important effect on the balancing exercise: a soundly based expectation that removal can be effective within, say, two weeks, will weigh heavily in favour of continued detention pending such removal whereas an expectation that removal will not occur for, say, a further two years will weight heavily against continued detention. There can, however, be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonable be expected to occur and without any certainty that removal will occur at all. Again, the extent of certainty or uncertainty as to whether and when removal can be effected will affect the balancing exercise. There must be a *sufficient*

> prospect of removal to warrant continued detention when account is taken of all other relevant factors."

27. I do not consider that the Defendant has shown that lack of co-operation on the part of the Claimant was a significant factor in the delay in obtaining an ETD from the Chinese authorities. Neither do I consider that this is a case involving a significant chance of absconding. As to the prospects of re-offending I bear in mind that the offences for which the Claimant was sentenced to imprisonment were sufficiently serious to attract a sentence of three years, but they were offences of deception rather than of a violent or sexual nature.

28. I do not consider that at any point during the Claimant's detention there was no prospect of removing him within a reasonable time. The Chinese bureaucracy was somewhat slow and exacting in its requirements but there was no impasse and no prospect of indefinite detention.

29. I do not find there was any significant lack of due diligence on the part of the Defendant. The highest that it can be put is that during certain short periods, amounting to no more than a few weeks in all, things might have been progressed a little faster than they were.

30. Bearing all these factors in mind I do not consider that the length of time for which the Claimant was detained was more than reasonably necessary or that the Defendant has been in breach of the *Hardial Singh* principles. The claim for judicial review and for damages therefore fails.