

Neutral Citation Number: [2009] EWHC 1578 (Admin)

CO/2588/2009

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 5 June 2009

B e f o r e :

MR JUSTICE MITTING

Between:

THE QUEEN ON THE APPLICATION OF WANG

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
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(Official Shorthand Writers to the Court)

Miss N Finch appeared on behalf of the Claimant
Miss S Lambert appeared on behalf of the Defendant

J U D G M E N T

1. MR JUSTICE MITTING: By this claim, the claimant - a young man of 22 who asserts that he is a national of China - seeks a declaration that his detention under immigration powers has become unlawful and seeks an order for his release.
2. The bare facts which I am about to recite present a deeply troubling picture. The claimant arrived unlawfully in the United Kingdom on 1 June 2004. Seven days later he was arrested and served with notice of illegal entry. He then claimed asylum. The basis of his asylum claim was that he came from a village in a rural area in the Province of Fujian, that a local official was determined to take land belonging to his family and so he fled. Unsurprisingly his claim to asylum was refused on 4 August 2004 because, even if everything that he said was true, it did not give rise to a fear of persecution for a Refugee Convention reason.
3. The claimant did not appeal against that decision. He was not then detained. While at liberty he committed a number of criminal offences. On 17 or 18 March 2005, at Middlesex Guildhall, he was convicted of making an article for sale or hire which infringed copyright and for having on him in a public place an article with a blade that was sharply pointed. He was sentenced to a total term of 12 weeks' detention in a young offender institution. He asserts that the bladed article was a fork which he had with him for the purpose of eating noodles. It seems an improbable account but there is nothing in the documents which I have to gainsay it.
4. The first application he made for emergency travel documents to the Chinese Embassy was on 4 May 2005. He made the application because he had no identity card or passport himself. On 6 May 2005 the Chinese Embassy refused to issue travel documents because it could not, it claimed, verify his address, a theme which, over the course of the next four years, became a repeated theme.
5. When he made that application he was in detention. He was released on 11 May 2005. Meanwhile he had committed further offences of a commercial nature, selling goods bearing false trade marks and one offence of failing to surrender to custody at the appointed time, for which he was sentenced to a short period in a young offender institution.
6. On 13 January 2006 at West London Magistrates' Court he was convicted of an offence of common assault, committed on 12 December 2005, and sentenced to 30 days' detention concurrent in a young offender institution. As by now had become part of a familiar pattern, he was also fined for engaging in street trading in a prohibited street. On 28 February 2006 he was fined for failing to surrender to custody at the appointed time and served one day in lieu. On 30 March 2006 he was sentenced to four months' imprisonment for an offence of offering or exposing for sale goods bearing false trade marks with offences taken into consideration. On 12 July 2006 he was given a conditional discharge for having negatives for publication of obscene articles for gain. On 19 September 2006, for possessing an article infringing copyright and engaging in street trading in a prohibited street, he was fined and sentenced to 12 weeks' detention in a young offender institution. He was sentenced to 16 weeks' detention on 6 October 2006 for further offences.

7. That concludes his criminal history. The pattern which it demonstrates is one of repeated petty crime, of repeated failures to surrender to custody when required to do so and some indication of minor violence and the possession, on one occasion, of a bladed article.
8. On 22 November 2006 he was served with notice of intention to make a deportation order while at the young offender institution to which he had been committed on 6 October 2006. He waived his right of appeal against that decision. In December 2006 he was released into immigration detention. On 13 April 2007 he was transferred to Oakington Immigration Reception Centre. He has been in immigration detention ever since. On 9 May 2007 he was interviewed by a Mandarin-speaking interpreter. According to a note in the UK Border Agency Authority's file, he spoke a local dialect with a Chinese official. The Chinese Embassy apparently informed UKBA officials that the Ministry of Public Security had provided a report, stating that the claimant "may be" Chinese.
9. On 1 June 2007 the claimant was served with a deportation order dated 25 May 2007. He did not attempt to have that order revoked. On 22 June 2007 he applied for voluntary assisted return under the United Kingdom's voluntary assisted return and re-integration programme. On 25 June 2007 that application was refused on two grounds. First, a deportation order had already been signed and served and, secondly, he had been disruptive and aggressive towards other detainees in the detention facility.
10. On 9 July 2007 he was interviewed by the Chinese Embassy who stated that they were unable to verify his identity. On two occasions - in July and November 2007 - he was involved in a fight in the detention centre, said to have been caused by stress. On 26 November 2007 he was interviewed by the Ministry of Public Security, and a report was submitted to the Embassy which rejected it on 7 March 2008.
11. On 25 February 2008 he applied again for voluntary assisted return which was refused again on the following day. On 11 June 2008 a further application for an emergency travel document was made. On 2 July 2008 the Chinese Embassy notified the UKBA that it was unable to confirm his identity and nationality.
12. Meanwhile there arose concern about his mental state, to which I shall refer later. A report was obtained by Professor Katona, a consultant psychiatrist.
13. In August, he was again involved in a fight with another detainee caused by "stress". On 24 October 2008 he was granted NASS Section 4 accommodation in principle were he to be admitted to bail. He applied to an immigration judge for bail but, on 31 October 2008, bail was refused. The reasons given were that he was likely to commit an offence unless detained in detention and that he was suffering from mental disorder, and continued detention was needed in his interests or for the protection of others and that there were substantial reasons for believing that, if admitted to bail, he would abscond. The tick-box form was supplemented by a handwritten note of the decision to like effect. On 7 December 2008 he was again involved in a fight with a detainee and relocated to a cell under Rule 42 of the Prison Rules.

14. On 10 December 2008 he was examined by another psychiatrist, Dr Ahmed, on behalf of the UKBA. I will refer to his conclusions later.
15. On 15 January 2009 a further application was made to the Chinese Embassy for an emergency travel document. He was again interviewed and the Embassy refused to issue him with such a document. On 21 February 2009 he was returned to the residential unit from his cell. On 24 February 2009 he was transferred to Harmsworth Immigration Removal Centre. Meanwhile this litigation commenced.
16. Throughout the period of his detention periodic monthly reviews were carried out, and on each occasion the decision to continue to detain him was made. The latest such decision - dated 12 May 2009 - summarises the history which I have recited and gives the reasons for maintaining detention. It is not necessary to refer to earlier decisions. Such as I have seen are broadly the same. In any event, I am only concerned with the lawfulness of detention as of now and not in the past. The reasons given are as follows:

"The only barrier to Mr Wang's removal is the issue of an ETD. However Mr Wang has failed repeatedly to provide accurate information on his bio-data and registration forms for verification of identity, the consequence of which is that the Chinese embassy has been unable to document him. The timescale for Mr Wang's removal depends on how long he remains non-compliant. As soon as he is documented, arrangements will be made for him to be removed from the United Kingdom."

17. The conclusions are stated under the heading "Proposal":

"Mr Wang's case has been considered against the current criteria in favour of presumption of release. The presumption to release is balanced against the probability of removal within a reasonable time scale, harm to the public and whether the subject is likely to adhere to the release conditions. Mr Wang is an illegal entrant and failed asylum seeker. He is an habitual offender with eight convictions, and previously he has failed to surrender to custody at some point in time. He has no settled address, no family and no close connections with the United Kingdom. And subsequent to the decision to refuse his asylum claim he has made no further attempt to regularise his status, nor has he sought to leave the United Kingdom voluntarily.

Mr Wang has been served with a deportation order and he is fully aware that it is our intention to deport him from the United Kingdom immediately upon receipt of an ETD. However having signed a disclaimer on 22 November 2006 waiving his appeal rights against the decision to deport him, Mr Wang has repeatedly frustrated the process of obtaining an ETD by providing insufficient or inaccurate details of his circumstances in China which has resulted in the Chinese authority refusing to issue him with an emergency travel document on two occasions. Another ETD interview will be requested specifying the

details needed."

18. The document also goes on to refer to Dr Ahmed's report about his mental condition, a topic with which I will deal separately.
19. Miss Lambert, who appears for the Secretary of State today, suggests - apparently for the first time, at least in documents to which I have been referred - that one of the reasons why the Chinese Embassy may not accept that he is a Chinese national is that he has not pro-actively attempted to obtain documentary information from his family in China or from those who may have known him in the village in which he says he lived. That may or may not be a fair point, but it is one that should have been explored many, many months ago if it is, in truth, to be relied upon against the claimant as demonstrating a wilful and continued refusal by him to refuse to provide proper information to the Chinese authorities and so permit his deportation.
20. In fact, he has provided some information on the application for an emergency travel document - and to his solicitors - which has permitted some contact to be made with someone who claims to be his mother. The information provided on the application forms has always contained the following: his date of birth; his name, Yan Yun Wang; his claimed nationality and the Chinese year in which he was born; his place of birth - Nanping City, Fujian Province; and the place where his residence was registered - Nanping City, Fujian Province; and such details of his address as he claims he can provide - Fujian Province, Nanping City, Jian O Tan, Shia Jing Village - but no house number or name because, he says, the village in which he lived did not have any road names or house numbers. He stated that he could no longer remember the land-line telephone number of his family. He gave details of his parents' names, both of whom he said were living, and the name of a sister. He gave the name also of an uncle. He identified the school which he had last attended, the Shia Jing Primary School, from 1994 to 1997.
21. Because when the claimant arrived in the United Kingdom he was only 17, he had not worked for an employer and so was unable to provide any details of employment.
22. His solicitors instructed an interpreter, Mr Yz Jun Ye, who telephoned a number given by the claimant - apparently a Chinese mobile telephone number which the claimant said was his mother's telephone number - and spoke to somebody who identified herself as Mrs Lin Ying, the name given by the claimant for his mother. The interpreter asked her to confirm her home address, to which she replied, "Nanping City." When asked for a street name and number, Mrs Ying indicated that she was busy and terminated the telephone call. The interpreter confirms that the claimant speaks Mandarin with a dialect which he recognises as that of someone from the Fujian Province.
23. The claimant's case is that he has done everything open to him to provide details to the Chinese authorities sufficient to satisfy them that he is a Chinese national. The Secretary of State's case, as I have noted, is that he has provided insufficient or inaccurate details to the Chinese authorities; hence, their refusal to accept that he is a Chinese national.

24. In judicial review proceedings it is not possible to resolve such issues. There is however a means by which the issue could be resolved and it is one which has occurred to the UKBA. Section 35 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 permits the Secretary of State to -

"(1) require a person to take specified action if the Secretary of State thinks that —

(a) the action will or may enable a travel document to be obtained by or for the person, and

(b) possession of the travel document will facilitate the person's deportation

Sub-section (2) contains a list of specified actions which, in particular, the Secretary of State may require a person to take. Sub-section (3) makes it an offence for a person to fail, without reasonable excuse, to comply with the requirement of the Secretary of State under sub-section (1), punishable by up to two years' imprisonment or a fine or both.

25. No prosecution has been undertaken against the claimant. If it had been, then the truthfulness or otherwise of his assertion that he had done all that he could to fulfil his obligation to take specified actions could have been put to the test.
26. I raised with Miss Lambert, counsel for the Secretary of State, what information the UKBA would require to permit the claimant to be prosecuted. She readily conceded that on the information presently available he could not sensibly be prosecuted. It seems to me, on the information to which I have referred, he would inevitably be acquitted of an offence under Section 35.
27. On any view, he has been detained for a very long time. The latest review form states that the period of his detention has been 30 months. On any view that is a very long time and right at the outer limit of the period of detention which can be justified on Hardial Singh principles except in the case of someone who has in the past committed very serious offences and who may go on to commit further such offences or who poses a risk to national security.
28. There is an additional feature here. The claimant undoubtedly suffers a mental illness. He did not when he was first taken into detention; but he has been examined by Professor Katona and Dr Ahmed who have reached broadly similar conclusions about his condition, namely that he suffers from schizophrenia.
29. In his first report on 21 August 2008, Professor Katona noted that he had a serious psychotic mental illness that was contributing to episodic violent behaviour and that his symptoms were likely to be exacerbated by the stress of continued detention.
30. On 10 December 2008 Dr Ahmed, for the UKBA, examined him. He noted that the claimant's mood was anxious and distressed because of his situation in the detention centre, but agreed to take medication. The impression that Dr Ahmed formed was that

he was suffering from schizophrenia. He believed that a prolonged detention period "might add to his stress which might lead to further deterioration in his mental state". It was Dr Ahmed's opinion that if he were released into the community he would need close monitoring by the community mental health team.

31. In his latest report, dated 25 April 2009, Professor Katona expressed the opinion that the claimant's illness was sufficiently severe to justify sectioning under the Mental Health Act. He agreed with Dr Ahmed that if released into the community he would require close monitoring by a community mental health team but if he were provided with such close supervision the risk of mental deterioration or poor self-care would be low. He was also of the opinion that with close monitoring and supervision of his medication the risk that he posed to others would likewise be low. He reached the conclusion that his aggressive behaviour in detention "reflects the high level of stress he experiences as a result of being detained as well as delusions of being attacked".
32. Miss Lambert, for the Secretary of State, does not seek to argue that he should be detained under immigration powers because of his mental condition although, under paragraph 30 (2) (d) of Schedule 2 to the Immigration Act 1971, that is a consideration which an immigration judge considering bail is entitled to take into account.
33. It is common ground that if he were to be released it would not be necessary for him to be admitted under Section 3 of the Mental Health Act 1983 and compulsorily detained because he is apparently willing to seek medical assistance voluntarily and to take the medication necessary to control or alleviate his condition. It is a disturbing feature of this case that a young man who apparently did not suffer from any mental condition when taken into detention now does so and that his continued detention may be a contributory cause to the development and continuance of that condition.
34. There is no issue as to the law. Both counsel accept that it is accurately stated in my judgment in A and Others v Secretary of State for the Home Department [2008] EWHC Admin at paragraphs 3 to 7; I do not need to repeat them in this judgment. Hardial Singh principles apply. From the history that I have recited it is obvious that imminent deportation or removal is not possible.
35. It is also the case that he has been detained for such a period that it is no longer possible to justify his continuing detention. I reach that conclusion notwithstanding that I acknowledge there is a significant risk he will abscond and commit further low level crimes if at liberty. I am not satisfied on the facts that it has been demonstrated that he has persistently and deliberately refused to provide information to the Chinese authorities necessary to permit them to verify his Chinese nationality. But even if I had been, I would have reached the conclusion that so long has elapsed since he was first detained that - against the background I have recited - it would be no longer reasonable to detain him.
36. For those reasons I am satisfied that his continued detention would be unlawful and that he should be admitted as soon as can reasonably be arranged to bail. The terms of bail will be that he resides at an address to be identified by NASS, that he agrees to be fitted with an electronic tag and to wear that tag at all times, and that he reports weekly

at either a local enforcement office identified by the UKBA or a police station if a local enforcement office convenient to him is not identified. The fitting of the tag and the arrangement of accommodation will inevitably take a short period. Miss Lambert requests that 48 hours is allowed for that. I accept that that period - even though it may result in his detention for a further 48 hours - is reasonable. The history of failing to surrender to custody and low level criminality require that all reasonable steps are taken to minimise the risks of both and, to that end, a short further period of detention to permit an address to be identified and a tag to be fitted are justified.

37. MISS FINCH: I am obliged. I will instruct those instructing me to get in contact with the UKBA so that they can sort out some of these details.
38. MR JUSTICE MITTING: Yes. So that I get it right - if I am required to correct a transcript - about when he was detained, can you repeat again what the dates are?
39. MISS FINCH: Our understanding is that his last conviction was on 6 October 2006 at City of Westminster Magistrates' Court and he was sentenced to 16 weeks' detention. It is likely he served eight weeks of that detention which brings him to some time - 6 December 2006. I understand that is when both parties think he was transferred into immigration detention. I could not find the exact dates in any papers I looked at.
40. MR JUSTICE MITTING: That would be consistent with the 30 months, or more or less consistent with 30 months, on the last report.
41. MISS FINCH: Yes.
42. MR JUSTICE MITTING: Thank you for that. If I am required to correct a transcript I will adjust the chronology to reflect that.
43. MISS FINCH: I ask for an order for costs.
44. MISS LAMBERT: There is no basis on which I can resist costs.
45. MR JUSTICE MITTING: No. The defendant will pay the claimant's costs to be subject to detailed assessment if not agreed. There will be an order for public funding assessment of the claimant's costs. I emphasise what I said in the judgment. I found this a troubling case. I hope there are not too many others in the system like it.