Neutral Citation Number: [2015] EWCA Civ 931

Case No: A2/2014/3122

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
Andrew Edis QC, sitting under s.9(1) of the Senior Courts Act 1981

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/08/2015

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LADY JUSTICE BLACK
and
LORD JUSTICE UNDERHILL

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Between:

Mustafa Fardous	**Respondent**
- and -	
Secretary of State for the Home Department	**Appellant**

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- -

Julie Anderson and Ivan Hare (instructed by **Government Legal Department**) for the **Appellant**
Stephanie Harrison QC and Greg O'Ceallaigh (instructed by **Wilsons LLP**) for the **Respondent**

Hearing dates: 5 and 6 May 2015

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Judgment

Lord Thomas of Cwmgiedd, CJ:

Introduction

1. The Secretary of State, the appellant in this appeal, contends that the decision of Mr Andrew Edis QC (as he then was) given on 5 September 2014 was wrong in concluding that the respondent to the appeal (to whom it is convenient to refer as the claimant) had been unlawfully detained pending his removal to Morocco between 8 November 2010 and his release on bail on 4 July 2011 prior to his removal in October 2011. The judge had reached this conclusion, despite the fact that the claimant had a track record of dishonesty, by applying the principles in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704 as restated in the judgment of Lord Dyson in *R (Lumba) v the Home Secretary* [2011] UKSC 12, [2012] 1 AC 245. In essence it was contended by the Secretary of State that the judge misdirected himself in the application of the *Hardial Singh* principles in that he did not give proper consideration, given the claimant's track record, to the risk of absconding.

Facts

2. The judge made his findings principally on the basis of the documents, as it appears he was invited to do. There were witness statements by two Home Office officials, but their evidence was not subjected to substantial challenge in cross examination. The claimant provided two witness statements, but there was no application on his behalf to give oral evidence from Morocco by video link. The judge therefore approached the case on the documents, giving the claimant's statements such weight as they should be accorded.

3. In the light of the invitation to the judge, the extensive documentation and the fact that the claimant had a significant record of dishonesty, no criticism can properly be made of his approach to the findings of fact he made.

(a) The claimant's deception on initial entry into the UK

4. The claimant is a national of Morocco. When he left Morocco is not clear. It appears that he came to the UK travelling at least through Italy as he was fingerprinted there and taken into custody in October 1998 for illegal border crossing. He arrived in the United Kingdom in 2001 and sought asylum. His application for asylum was refused by the Secretary of State. That decision was overturned on appeal in April 2002 and he was given indefinite leave to remain.

5. He told three lies in his application for asylum. First he gave a false name, saying his name was Mustafa Mansouri. Second he said that he was a national of the Western Sahara and that it was his home country. Third he said that he had left the Western Sahara in 1996 because he was in great danger, having been required to serve in the army on pain of death. He said he feared that if he was returned to Western Sahara as an absconder he would disappear and be killed by the highest generals.

(b) His movements in 2004-9

6. What he then did is not entirely clear, save for the following:

   i) He was prosecuted in the UK for offences in 2004, 2005 and 2006. It is not clear if he was convicted.

ii) He applied for naturalisation in the United Kingdom in 2006, telling the same three lies that had been the basis of his asylum application. He also failed to disclose the pending prosecutions. The last failure was detected and his application for naturalisation failed.

iii) Between 2006 and September 2009, he visited Norway and possibly other European countries. On 7 August 2007 he applied for asylum in Norway. Although he gave the Norwegian authorities his correct name, he claimed to have originated from Western Sahara and said that the reason for his application was that he had deserted from the military. He did not tell the Norwegian authorities about his status in the United Kingdom.

iv) The Norwegian authorities over the period to September 2009 made a number of enquiries. They obtained fingerprints from the Italian authorities to which we have referred and, using those, obtained information from Germany and Spain saying that he had visited those countries under the name of Salah Ben Kadour and given the place of his birth as Algeria.

v) On 28 May 2009 Interpol in Rabat confirmed his Moroccan citizenship. In September 2009 he was expelled from Norway.

(c) His return to the UK in September 2009

7. On 6 September 2009 he returned to the United Kingdom and was detained in Scotland. The Secretary of State wished to remove him to Morocco but, in order to so, an Emergency Travel Document had to be issued by the Moroccan authorities. Between 16 September and 23 October 2009 he continued to use a false name and false place of origin. On 23 October 2009 he relinquished his refugee status and indefinite leave to remain, stating he wanted to return to Morocco. An application for an Emergency Travel Document was immediately submitted to the Moroccan Embassy. As will appear, the Moroccan authorities took two years to provide it. Although every effort was made by the Secretary of State to chase the provision of this document, this was the sole cause of delay in his removal.

8. On 1 December 2009 he sought bail but was refused. He subsequently applied for bail on 12 January, 11 March, 19 April, 27 May and 2 July 2010. Each application was refused. The judges rightly attached considerable weight to the lies he had repeatedly told.

(d) The attempts to obtain an Emergency Travel Document 2009 - November 2010

9. It became clear in the course of early 2010 that it might take some time to obtain the Emergency Travel Document. The International Organisation for Migration indicated that it had never obtained an Emergency Travel Document for a Moroccan in detention. It was only in June 2010 that the Moroccan authorities accepted that the claimant was a Moroccan national.

10. It was only then that discussions began about his attendance at the Embassy in person to secure his Emergency Travel Document.

11. On 21 June 2010 the British Embassy in Rabat obtained official confirmation that the fingerprints which had been supplied were those of the claimant in his true

name; his Moroccan nationality was then confirmed. However on 30 June 2010 his application for an Emergency Travel Document was rejected a second time. On 14 July 2010 the International Organisation for Migration advised that the only course of action that could be followed was to restart the Emergency Travel Document application process. A further Emergency Travel Document application was prepared over a period of weeks. It was submitted on 12 August 2010.

12. On 1 September 2010 judicial review proceedings were begun in Scotland on the basis that the Secretary of State had taken no steps to take the claimant to the Moroccan Embassy to collect his travel document. It appears that this was a misapprehension, as it was thought that an Emergency Travel Document had been granted. It was contended that the decision of the Secretary of State to detain him was therefore unreasonable and irrational. In the Secretary of State's defence to those proceedings, it was asserted that the detention was lawful on *Hardial Singh* principles.

13. In September 2010 the claimant was moved to detention in England and his detention continued. The proceedings in Scotland lapsed as he was no longer there.

14. Efforts to secure the Emergency Travel Document continued to be made by officials on behalf of the Secretary of State. On 27 October 2010 a telephone interview was arranged. On 2 November 2010, when the call was made, the Embassy telephone was not answered. No interview took place.

(e) Position in November 2010

15. On 6 November 2010 the 14 month detention review was undertaken on behalf of the Secretary of State. It again reiterated that the claimant was "accustomed to practise deception between the concerned immigration authorities" and had "a transient record". It was unlikely that he would comply with the terms of any temporary admission granted and was therefore detained. The review recorded that officials were of the view that the claimant wished to return to Morocco. A contemporaneous exchange of e-mails between officials noted that, unless the Emergency Travel Document was obtainable in a short time, the claimant's release would have to be considered as his continued detention might not be proportionate if there was no realistic prospect of removal within the short to medium term.

(f) Further attempts to secure an Emergency Travel Document

16. Thereafter vigorous attempts continued to be made to try and secure an Emergency Travel Document for the claimant. Very frequent telephone calls were made to the Moroccan Consulate but they were not put through to anyone who could discuss the case. On 13 June 2011 an interview finally took place between the claimant and a Moroccan official and it was agreed that the process for an Emergency Travel Document would be expedited. Further fingerprints were then requested.

17. On 4 July 2011 the claimant was granted conditional bail.

(g) The claimant's removal to Morocco on 21 October 2011

18. On 21 October 2011 the Emergency Travel Document was issued. The claimant was removed to Morocco on 25 October 2011.

The Hardial Singh principles

19. The power of the Secretary of State to detain pending removal is set out in paragraph 16(2) of Schedule 2 to the Immigration Act 1971. That power must be exercised on the basis of the well-known *Hardial Singh* principles as reformulated in *R(I) v Secretary of State for the Home Department* [2003] INLR 196 at paragraph 46 and accepted as correct in the judgment of Lord Dyson JSC in *Lumba* as follows:

    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 a reasonable period, he should not seek to exercise the power of detention.

    iv) The Secretary of State should act with reasonable diligence and expedition to effect removal.

    As Moore-Bick LJ observed in the context of detention after conviction and pending removal in *R(Francis) v Secretary of State for the Home Department* [2015] 1 WLR 567 at paragraph 45, the *Hardial Singh* principles are to be viewed as an expression of Parliament's presumed intention to restrict the scope for detention.

20. It was common ground at the hearing before the judge that the first and fourth principles had been met in this case. The Secretary of State had used the power to detain the claimant for the purpose of removal. He had acted with reasonable diligence and expedition to effect removal. What was in issue before the judge and on this appeal was the application of the second and third principles.

The decision of the judge

21. The judge decided that the detention became unlawful on 8 November 2010. His reasons were as follows.

22. First he concluded that the risk of absconding would not automatically outweigh all other relevant factors. Dyson LJ (as he then was) had made it clear in *R(I)* at paragraph 48 that the relevant factors included at least:

> "The length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences."

23. The judge went on to conclude at paragraph 13 that the passage which I have set out:

> "makes it clear that a risk of absconding is a factor to beconsidered alongside other factors and also, in my judgement, that a risk of absconding might justify detention up to a point but that there may come a time when the length of the detention can no longer be justified by it and it alone. Whether that is so, and if so when it becomes so, are matters of judgement on the facts of each case. There are no guidelines as to the length of the detention which may be justified by this or any other factor."

24. The judge's review of those factors showed that the Secretary of State was doing all he could. The nature of the obstacle which stood in the path of the Secretary of State was the lack of an Emergency Travel Document. There was no doubt that it would eventually be provided, but those conducting the periodic reviews had not fully appreciated the unprecedented delays that had and would occur in obtaining the Emergency Travel Document, despite the mounting evidence. There were no relevant matters relating to the conditions of detention of the claimant. As to the effect of detention on the claimant and his family, the claimant had left Morocco voluntarily in the 1990s and had not returned; although he had family there, this was not a factor of great weight. As to the danger that if released he would commit criminal offences, there was no identifiable risk. The only significant factor justifying detention was the risk of absconding; his knowledge of the system meant that if he did abscond, it might prove difficult to find him again.

25. Given the record of the claimant in relation to his asylum applications there was initially an obvious risk of absconding. As at 21 June 2010, nine months into the period of detention, it appeared that obtaining an Emergency Travel Document was on the verge of success and it was therefore reasonable to continue to detain him.

26. However in cases where the detention was very long, a risk of absconding would carry less weight than would a risk of harm to the public. In cases where public safety was at risk from the detainee, long periods of detention might be justified; in other cases that was less likely to be true. The judge therefore considered that a period of detention of 12 months or more would always require anxious scrutiny. Such periods of detention might well be lawful and might continue to be so for substantially longer periods. However, great care was required in concluding that this was so in a particular case.

27. It should have been apparent to the Secretary of State that at the first anniversary of the detention in September 2010 a reappraisal of its purpose and its reasonableness was required. On the facts of the case it would have been reasonable, in the light of the evidence of the claimant's real desire to return home, to approach the case on the basis that the risk of absconding was lower than it had seemed at the start of the detention. It was not a case where the detainee presented any threat to public safety.

28. The judge therefore considered the first period of 12 months was lawful as it was anticipated at the outset that such a period might be required as the claimant clearly demonstrated a risk of absconding which might prevent his removal from the United Kingdom. His expressed wish to leave the United Kingdom was at the outset not simply to be taken at face value in the light of his history of manipulative dishonesty.

29. At the 12 months stage in September 2010 a review would have concluded that the risk of absconding was lower than it had been but was still present. The claimant was still to be regarded as a manipulative and dishonest man. However, the detention should be brought to an end within a short further time. During that time all possible steps to secure an Emergency Travel Document should have been taken vigorously. There was still in September 2010 a prospect of obtaining an Emergency Travel Document within the next two months. It would therefore have been reasonable to detain him at the first anniversary date for a further two months.

30. However after the Moroccan Embassy had not answered the telephone call on 2 November 2010, it should have been clear in the detention review in November that the detention was longer than was lawful. Even if the reasonable period had not elapsed, there was not likely to be a removal during the reasonable period for detention that remained. The detention therefore ceased to be lawful on 8 November 2010.

31. It can be seen, therefore, on analysis, that this was a relatively straightforward case where the judge reached his decision on the reasonableness of the period of detention by balancing the risk of absconding as against the length of the detention.

The application of the *Hardial Singh* principles

(a) The issue in the case is the second and/or third Hardial Singh principle

32. It is accepted that the power of the Secretary of State was being exercised for the purpose of removal and the Secretary of State was acting throughout with reasonable diligence. Indeed

    i) On the facts of this particular case, no more could have been done by the Secretary of State to secure the removal of the claimant than was in fact done. The Moroccan authorities would not cooperate in producing the one essential document in a timely manner.

    ii) The monthly reviews of detention carried out by officials on behalf of the Secretary of State were careful and conscientious.

33. The sole issue relates to the application of the second and/or third *Hardial Singh* principles as to whether it was lawful for the Secretary of State to detain the claimant until he was released on bail in July 2011 or whether he should have been released on 8 November 2010 or at some point in time between then and July 2011. It involves a careful and objective balance of (1) the length of detention at particular points of time, (2) the uncertainty as to when the Emergency Travel Document would be provided by the Moroccan authorities and (3) the risk of absconding.

(b) The approach of an appellate court

34. It was common ground that in considering the decision of the judge in his balance of the factors and the assessment of the reasonableness of the period of detention in all the circumstances, we should follow the approach set out by Richards LJ at paragraph 46 of his judgment in *R (Muqtaar) v Secretary of State for the Home Department* [2013] 1 WLR 649. As in this kind of case there was a significant area of judgment open to the judge in the assessment of

what a reasonable period was in all the circumstances, it was necessary for an appellant to show that the judge's decision was either inconsistent with his findings of fact or that he had misapplied the principles of law or had reached a decision that was outside the ambit of judgment open to him.

(c) Submissions of the Secretary of State

35. The Secretary of State submitted that the judge had misdirected himself in two principal respects. First, as it could not be disputed that there was a lawful basis to detain as the purpose of the detention was to remove the claimant and there was a high risk of absconding, the judge had misapplied the *Hardial Singh* principles. He had downgraded the paramount importance of the risk of absconding. He had made it dependent on the risk of committing further offences. He had wrongly assessed the reasonable period.

36. Second, the judge had failed to make an objective assessment of the facts as they appeared to those acting for the Secretary of State at the time, but had applied his own subjective views with the benefit of hindsight. This was inconsistent with the rule of law, as the Secretary of State had to be able to determine the lawfulness of detention on the facts as they appeared at the time the decision to detain was made.

(d) No tariffs or yardsticks

37. The Secretary of State acting through his officials has to determine whether the period of detention is reasonable when deciding whether or not to continue the detention, subject to the right of any detainee to apply for bail. It is a judgment which has to be made on the evidence and in the circumstances as appear to the officials in each case.

38. There is no period of time which is considered long or short. There is no fixed period where particular factors may require special reasons to make continued detention reasonable.

39. McFarlane LJ said in *R (JS (Sudan) v Secretary of State for the Home Department* [2013] EWCA Civ 1378 at paragraphs 50-51 that fixing a temporal yardstick might cause the courts to accept periods of detention that could not be justified on the facts of a particular case. In *R (NAB) v Secretary of State for the Home Department* [2010] EWHC 3137 (Admin) Irwin J made clear at paragraphs 77-80 that a tariff would be repugnant and wrong. He added:

> "It would be wise for those preparing legally for such cases to abandon the attempt to ask the courts to set such a tariff by a review of the different periods established in different cases"

40. Despite this clear discouragement by as experienced a judge as Irwin J, attempts were made on behalf of the claimant in the argument before us to try and show that justifiable periods of detention could be ascertained by a careful study of other decisions. As much as lawyers and others might like to derive tariffs or guideline periods to be derived from the cases, there are none. Continued attempts to do so are not helpful. They result in the excessive and wholly unnecessary citation of authorities; they waste court time and resources. I hope that there will be no further attempts to do this before the courts or elsewhere.

41. Each deprivation of liberty pending deportation requires proper scrutiny of all

the facts by the Secretary of State in accordance with the *Hardial Singh* principles. Those principles are the sole guidelines.

(e) The objective review by the court

42. In determining the lawfulness of the decision made by the Secretary of State, the court examines the decision on the basis of the evidence as known to the Secretary of State when she made the decision. Although the decision of the court is necessarily *ex post facto,* the court does not take into account matters that subsequently occurred. As Sales J explained in *R (MH) v Secretary of State for the Home Department* [2009] EWHC 2506 (Admin), at paragraph 105:

> "In my view, although the court is the judge of whether reasonable grounds for detention existed at any particular point in time, it makes that assessment by reference to the circumstances as they presented themselves to the Secretary of State. The Secretary of State needs to have means of assessing the legality of his actions at that time, in order to know what his legal duty is. Rule of law values indicate that the Secretary of State should be entitled to take advice and act in light of the circumstances known to him, without fear of being caught out by later circumstances of which he could have no knowledge."

His decision was upheld by this court: [2010] EWCA Civ 1112.

43. It is this objective approach of the court which reviews the evidence available at the time that removes any question that the period of detention can be viewed as arbitrary in terms of Article 5 of the European Convention on Human Rights.

(f) The risk of absconding

44. It is self-evident that the risk of absconding is of critical and paramount importance in the assessment of the lawfulness of the detention. That is because if a person absconds it will defeat the primary purpose for which Parliament conferred the power to detain and for which the detention order was made in the particular case. This has been made clear in a number of cases: see for example paragraph 54 of the judgment of Keene LJ in *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 and the judgment of Lord Dyson in *Lumba* at paragraph 121.

45. Although the risk of absconding will therefore always be of paramount importance, a very careful assessment of that risk must be made in each case, as the magnitude of that risk will vary according to the circumstances. It may be very great, for example, where the person has, as in this case, a clear track record of dishonesty and a knowledge of how to "work" the controls imposed to regulate immigration in the European Union. Another example where the risk may be high is where the person refuses voluntary repatriation that is immediately available to him. It is important to emphasise that the risk of absconding is distinct from the risk of committing further offences and not dependent on that further risk. The risk of re-offending requires its own distinct assessment.

46. However, as is accepted on behalf of the Secretary of State, the risk of absconding cannot justify detention of any length, as that would sanction indefinite detention. It is therefore not a factor that invariably "trumps" other

factors, particularly the length of detention. It is nonetheless a factor that can, depending on the circumstances, be a factor of the highest or paramount importance that may justify a very long period of detention.

(g) My conclusion on the assessment made by the judge

47. The judge approached the case on the basis, as we have set out, that it was common ground that the claimant was being detained for the purpose of removal and that every effort was being made to secure his removal. These were important factors to which the judge plainly had proper regard.

48. He directed himself correctly on the *Hardial Singh* principles as to the issue in dispute. His comments about the way in which the risk of absconding was treated in some of the authorities were referable to the facts of those authorities; they were not of wider application. He did not, reading the judgment as a whole, depart from the principle that the risk of absconding is of paramount importance and that it is a risk that is not dependent on the risk of committing other offences. As he made clear the reasonableness of a period of detention must be judged taking that risk into account by reviewing all the facts of the case.

49. He carefully weighed the risk of absconding. He was, in so doing, entitled on the facts of this case to conclude, as I have set out at paragraph 27, that the risk of absconding could be assessed as reducing to some extent on the basis that the claimant's wish to return to Morocco had become more genuine and determined. This was a finding of primary fact which the judge was entitled to make. It is of course correct that the claimant was a man with a track record of dishonesty, but that did not mean that by November 2010 his wish to return to Morocco could not be assessed as genuine.

50. I accept that criticism can be made of the judge's observation in his judgment (which I have summarised at paragraph 26) that:

> "I consider that a period of detention of 12 months or more will always require anxious scrutiny. Such periods of detention may well be lawful and may continue to be so for substantially longer periods, but great care is required in concluding that it is so in any particular case."

51. As was submitted by the Secretary of State, proper scrutiny is always required when a person is detained; it is not dependent on a particular period of detention having elapsed. However, as I have made clear, there are no particular periods of time where the level of scrutiny differs; there is no particular period of detention that may require special justification. An assessment must be made in each case. In each case the risk of absconding is a risk of paramount importance in that assessment. Reading the judgment as a whole, it is clear that that is what the judge did.

52. As at 8 November 2010, the judge was entitled to conclude that the risk of absconding, though it remained a paramount factor, had lessened. More important the claimant had been detained for 14 months. The judge was, in my view, entitled to conclude as he did that by that time the period of detention was no longer reasonable. If it was not already unreasonable at that time, there was no certain prospect of the receipt of the Emergency Travel Document at any point in time. On that basis, taking the period of 14 months detention and the uncertain prospect, the reasonable period had certainly elapsed by 8 November 2010. The unexplained failures of the Moroccan authorities to provide the document, as the

judge observed, should not have resulted in the view expressed by officials in September or November 2010 that the documentation would have been available within weeks. They should have appreciated that it would not be.

53. That assessment by the judge was an objective one based entirely on the information available to the Secretary of State in November 2010. He did not apply his own subjective view. He reached an objective judgment based on what ought to have been apparent in November 2010 to the officials.

54. In my judgment it was therefore open to the judge, applying the *Hardial Singh* principles, to decide that in November 2010 the risk of absconding did not provide a sufficient justification for continued detention. It may or may not have been a conclusion I would have reached, but it was one which was within that area of judgment that was open to him to reach in his careful and correct application of the *Hardial Singh* principles to the facts of the case.

55. I would therefore dismiss the appeal.

Lady Justice Black

56. I agree.

Lord Justice Underhill

57. I also agree. I must confess to some sympathy with the wish of the Secretary of State for guidance from the Courts as to the periods beyond which detention is liable to be regarded as unreasonable for the purpose of the application of the *Hardial Singh* principles. It is a feature of this area of the law, unlike others, that the conscientious decision of a public official about the reasonableness of a period of detention can nevertheless be overturned if the Court reaches a different view on that issue, albeit that the Court will be careful to avoid any use of hindsight. It is understandable that in those circumstances officials would welcome some measurable criteria to guide their decisions. For the reasons given in the authorities to which the Lord Chief Justice refers at paragraph 39 of his judgment, it is simply not possible for the Courts to promulgate any kind of tariff. That does not, however, mean that those who have to take these difficult decisions are left wholly in the dark, as the various reported cases may provide such officials with useful illustrations of the application of the *Hardial Singh* principles. I emphasise that that is not the same as saying that it is useful or appropriate for such cases to be deployed in Court in order to seek to uphold or undermine a decision taken in a particular case by reference to the decisions taken by other Courts in other circumstances.