OUTER HOUSE, COURT OF SESSION

[2009] CSOH 35

OPINION OF LORD BRODIE

in the petition of

H K

Petitioner;

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

Petitioner: Gill; Drummond Miller, LLP
Respondent; Lindsay; Office of the Solicitor to the Advocate General

10 March 2009

Introduction

[1] The petitioner is a citizen of Iraq. He arrived in the United Kingdom during 2000 and claimed asylum. He was granted Indefinite Leave to Remain in the United Kingdom. He was subsequently convicted at Plymouth Crown Court of violent disorder and unlawful wounding and sentenced to three years imprisonment and recommended for deportation. He completed the custodial part of his sentence on

31 August 2007 and was due to be released on licence on that date. However, on that date, the respondent, the Secretary of State for the Home Department, served him with a notice that she intended to make a deportation order and detained him in immigration detention in terms of her powers under paragraph 2 of Schedule 3 to the Immigration Act 1971, as amended. The petitioner has remained so detained since that date. In this petition he seeks declarator that the decision of the Secretary of State to detain him on 31 August 2007 and continue his detention wasunlawful, unreasonable and irrational; reduction of that decision; payment of a sum of damages; liberation and liberation *ad interim*; and such other orders as may seem to the court to be just and reasonable in all the circumstances of the case.

[2] The petition came before me on 6 February 2009 on the petitioner's application for *interim* liberation. The petitioner was represented by Mr Gill, advocate. The respondent was represented by Mr Lindsay, advocate. I heard the motion immediately after having heard a similar motion in the petition of TP. Mr Lindsay had appeared for the respondent in relation to that motion and Mr Gill had sat in court while it was being argued. Both were accordingly aware as to how the argument had gone in TP's application and had heard the brief statement of reasons which I gave for refusing it (I later issued a short written opinion). This shaped the course of the argument before me in the application on behalf of the present petitioner. Mr Gill did not spend time with matters of law that had been explained to me and which were not controversial. He did, on the other hand, give particular emphasis to his submission that this should be treated as an application for an *interim* remedy and that accordingly the proper approach of the court was to consider whether the petitioner had made a *prima facie* case to the effect that his detention was unlawful and then, assuming that the court was satisfied that he had, determine the matter on the basis of balance of convenience.

This was because I had rejected a similar submission in the application at the instance of TP, taking the view that in that case it was unnecessary to approach the matter on an *interim* or provisional basis.

The petitioner's averments

[3] The petitioner's averments disclose that on 4 September 2007 he appealed against the respondent's decision that he should be deported. On 17 September 2007 the respondent revoked the petitioner's refugee status and served him with an amended notice of a decision to make a deportation order and reasons for deportation. The petitioner's appeal to the Asylum and Immigration Tribunal was dismissed and his appeal rights ended on 24 December 2007. On 19 February 2008 the respondent made a deportation order against the petitioner which was served on him on 20 February 2008. On 14 August 2008 the respondent notified the petitioner that following the decision of the Asylum and Immigration Tribunal in *HH (Criminal Records; Deportation; "War Zone") Iraq* [2008] UK AIT 0005 his case would be reviewed. On 12 December 2008 the petitioner requested temporary admission to the United Kingdom. On 30 December 2008 the respondent notified the petitioner that following the review of his case she had decided to revoke the deportation order of 19 February 2008 but her decision to deport him to Iraq had not changed. On the same date she refused his request for temporary admission. A notice of decision to make a deportation order was served on the petitioner on 2 January 2009. On 7 January 2009 the petitioner appealed against the decision that he should be deported. His appeal against that decision was due to be heard by the Asylum and Immigration Tribunal on 9 February 2009.

[4] During the time that the petitioner has been detained on the authority of the respondent he has applied on eight occasions for a grant of bail by the Asylum and Immigration Tribunal. At the first five of the bail hearings, the last of which was on 7 February 2008, those representing the respondent indicated that the respondent would sign a deportation order in respect of the petitioner imminently and that the petitioner would be removed "in a few weeks". At the subsequent bail hearings, including two hearings held at the time when the deportation order of 19 February 2008 was still in force, the respondent did not seek to argue that the petitioner's removal was imminent. The respondent has a policy in respect of removals to Iraq. Where a person will travel to Iraq voluntarily, they are removed when flights are available. Where a person is unwilling to be removed they are escorted by an officer instructed by the Foreign and Commonwealth Office. Since at least 3 September 2003 the Foreign and Commonwealth Office has declined to provide such escorts to Iraq as a result of fears for their safety. The petitioner has throughout the period of his detention demonstrated that he is unwilling to be returned to Iraq voluntarily and therefore throughout his detention, so he avers, there has been no prospect that his removal could be effected.

Submissions of parties

[5] In making his submissions in support of the application for the *interim* liberation of the petitioner, Mr Gill explained that while the petition presented a more extensive attack on the legality of the petitioner's continuing detention under reference to the respondent's failure to apply her own policies, as developed at statement 7.1 to 7.16 of the petition, in applying for *interim* liberation he only sought to rely on what have become known as the *Hardial Singh* principles. This is a reference to a judgment by

Woolf J, as he then was, in *R* v *Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704. Mr Gill submitted that this should be treated as an application for an *interim* remedy, which was what *interim* liberation was, and that I should accordingly consider whether the petitioner had made out a *prima facie* case to the effect that his continued detention was unlawful and, if so, then consider whether he should be liberated on the basis of an assessment of the balance of convenience. *Interim* liberation was a distinct remedy for which the petitioner was entitled to apply in terms of section 47(1) of the Court of Session Act 1988. That was what the petitioner was seeking in terms of his motion. He was not looking for a Human Rights adjudication at this stage. The court's view of the facts must necessarily be incomplete. There may be disputed facts or circumstances which required to be established by oral or affidavit evidence. Pleadings had not been finalised and it would be wrong to reach any concluded decision on the issues at this stage in the proceedings: *WAC Ltd* v *Whillock* 1989 SC 397. The appropriate approach was that described by Lord Fraser in *NWL Ltd* v *Woods* [1979] 1 WLR 1294 at 1309H to 1310H. The approach of deciding whether or not to grant an *interim* remedy by reference to the balance of convenience was very familiar. It applied to *interim* interdict: *Boehringer Ingelheim GMBH* v *Munro Medical Supplies Ltd* 2004 SC 468, but also to other *interim* remedies: *Mackenzie's Trustees* v *Highland Regional Council* 1994 SC 693, *Napier* v *Scottish Ministers*, 26 June 2001, Lord Macfadyen, paragraph 15. Mr Gill accepted that what he described as the right to apply for *interim* liberation fell at the point of the court making its final disposal and that, depending on circumstances, it might fall at an earlier stage. He accepted that the decision as to remedy was a matter within the discretion of the court. However, his argument focussed on when it was appropriate for the court to exercise that discretion. In the

present case there were issues of fact which have not been determined upon and therefore final disposal was impossible at this stage. Nevertheless, the court could be satisfied that the petitioner had made out a *prima facie* case and therefore, depending on the assessment of where the balance of convenience lay, that he was entitled to be liberated. It was not a question of the pursuer seeking an *interim* remedy because it was any easier to obtain than a final remedy. One yet to be resolved question in the present case was the effective reason for the petitioner's continuing detention. Was it properly a question of the petitioner's disinclination to be voluntarily repatriated or was it a question of the respondent being unable to remove him?

[6] Turning to the application of the *Hardial Singh* principles, Mr Gill reminded me that they had been distilled and re-stated by Dyson LJ in *R (I)* v *Secretary of State* [2003] INLR 16 at paragraph 46. In relation to the respondent's power to detain in terms of paragraph 2 of Schedule 3 to the 1971 Act Dyson LJ put forward four propositions:

> "(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 that reasonable period, he should not seek to exercise the power of detention;
>
> (iv) The Secretary of State should act with a reasonable diligence and expedition to effect removal."

As examples of cases in which the *Hardial Singh* principles had recently been applied, Mr Gill referred me to *R (on the application of Bashir) v Secretary of State*

for the Home Department [2007] EWHC 3017 and *R (on the application of MMH*) v *Secretary of State for the Home Department* [2007] EWH 2134. Looking to the whole circumstances averred in the petition, it was Mr Gill's submission that the petitioner's continuing detention was unlawful on an application of the principles. Thus far the petitioner had been detained for a period of 17 months subsequent to the date on which he was entitled to be released from his prison sentence but it was not necessary for the petitioner to satisfy the court that 17 months detention, looked at in isolation, was unreasonable. Here the respondent had, by reason of her policy, disabled herself from effecting the petitioner's removal from the United Kingdom. There was no reason to believe that she proposed to alter that policy. The petitioner admittedly had been convicted of a serious offence but it was not of such a nature that the risk to the public could not be adequately managed without the petitioner being detained. The petitioner had put forward a strong *prima facie* case. The inconvenience to him of continuing to be detained was self evident. In so far as he posed a risk of re-offending or absconding, these risks could be managed other than by detention.

[7] Mr Lindsay submitted that for the reasons that he had put forward in responding to the application at the instance of TP, this application should not be treated as an application for an *interim* remedy to be determined by an assessment as to whether there was a *prima facie* case and then a decision as to where the balance of convenience lay. However, in the event that the court was minded to liberate the petitioner, Mr Lindsay saw advantage in describing the liberation as being *ad interim* and, accordingly susceptible to the imposition of conditions. Mr Lindsay did not seek to dispute the facts which were relied on by the petitioner. If an Iraqi citizen is prepared to return voluntarily to Iraq he will be allowed to do so but the respondent is unable to effect involuntary deportation as of the present date because of the risk to

escorts. Accordingly the reason why the petitioner had not returned to Iraq was because he was not prepared to do so voluntarily. The respondent had reviewed a decision as to the deportation of the petitioner in the light of the decision of the Asylum and Immigration Tribunal in *HH Iraq supra*. The policy not to return persons to an "active war zone" had been revoked on 14 January 2008. This was the explanation for the setting aside of the first deportation order. The fresh notice was not tainted, having regard to the revocation of the previous policy. The availability of voluntary return was an important factor in pointing to the lawfulness of a detention of a person who declined to return to the country of his nationality on a voluntary basis: *R (on the application of A)* v *Secretary of State for the Home Department* [2007] EWCA Civ 804, *R (on the application of Lumba)* v *Secretary of State for the Home Department* [2008] EWHC 2090. The decision of Lord Gill in *Mohammed Butt, Petitioner* 1999 GWD 16-905, referred to in the annotation to Rule of Court 58.7.1, was authority for dealing with an application on a final basis, albeit at an early stage in proceedings, where both parties were represented and there was no material dispute as to fact. In the event that the court was minded to liberate the petitioner, the respondent would wish the opportunity to explore the question as to where he would be living and to which police office it might be appropriate that he be required to report.

Discussion and decision: *prima facie* case

[8] As is illustrated by the authorities referred to by Mr Gill, the availability of *interim*, in the sense of provisional, remedies and the approach of the court in deciding whether to grant them, are very well established. Where the remedy depends upon one party or the other having or not having a right, the court may be prepared to grant the remedy on an *interim* or provisional basis before the question of right is

finally determined where the applicant puts forward a *prima facie* case for the existence or non-existence of the right and where, balancing the various interests, the benefit of the grant of the remedy outweighs the detriment. Mr Gill pointed, correctly, to section 47(1) of the Court of Session Act 1988 as the current source of the court's power to grant the remedy of liberation *ad interim* on the motion of a party to a cause. This is not a recent innovation. Section 47(1) is a re-enactment of a provision that appeared in section 6(7) of the Administration of Justice (Scotland) Act 1933 and much earlier instances can be found of the court granting warrant for liberation (typically of debtors) "in the meantime", without any reference to statute: eg. *Muir v Barr* (1849) 11 D 487, and see Shand, *The Practice of the Court of Session* (1848) p. 810. However, taking section 47(1) of the 1988 Act (and previously section 6(7) of the 1933 Act) as having superseded the common law power of the court, I do not accept that the statute confers an entitlement on a party to have an application for liberation decided in any particular way. The statute confirms that the court has the option of entertaining an application for liberation before the relevant questions of right are determined and of granting the remedy on a provisional basis but that does not mean that the court is thereby prevented from dealing with the application as it would on a final basis. It will depend on the circumstances but I agree with Mr Lindsay that an analogy can be drawn with what was said by Lord Gill in *Butt* v *Secretary of State for the Home Department*, *supra* as to the circumstances in which it would be appropriate to determine a petition at a motion for a first hearing. These are: (1) where the respondent is represented, (2) all necessary documents are to hand, (3) the respondent wishes to dispose of the petition then and is in a position to present a fully prepared case, and (4) there is no dispute of a factual nature such as to prevent the court from making a properly informed decision at that stage. *Mutatis mutandis*

these considerations appear to me to be apposite in determining whether it is possible to determine a matter on a final basis or whether it is necessary to make a merely provisional or *ad interim* decision. As I have already said, whether the court is in a position to make a properly informed decision or merely a provisional assessment, depends entirely on the circumstances of the case, the nature of the issues and the amount and quality of available information. In relation to the application at the instance of TP, I considered that I could properly deal with the matter on a final basis, although by using that expression I do not mean that it would not be open to the petitioner in that case to renew her application on a change of circumstances, including simply the passage of a material period of time. In the present case I came to the view that I could not confidently deal with the matter on a final basis. The decision appeared to me to be a more difficult one than that I had to make in TP. The gist of the problem lies in the respondent's admitted inability to enforce involuntary deportation to Iraq by reason of fears for the safety of escorting officers, a situation described by Mitting J in his judgment in *R (on the application of Mohamed Bashir)* v *Secretary of State for the Home Department supra* at paragraphs 8 and 9. Mr Lindsay described this as the situation "as of today" but as is averred in the petition, it has obtained since at least 3 September 2003 and there was nothing put before me to suggest when it might change. Borrowing what was said by Mitting J in paragraph 14 of *Bashir*, Mr Gill characterised the facts of this case as raising acutely the choice between two unacceptable alternatives: on the one hand, that the execution of what may be a lawful deportation order as is put at risk by releasing someone who has been convicted of a serious and nasty crime and who may fail to keep in touch with the immigration authorities before he can be forcibly removed, on the other, that the man is detained administratively for an indefinite period in circumstances where there is

not and never has been any immediate prospect that he will be removed to his home country. Mr Gill did not shrink from accepting that the alternative of liberating his client might appear to be unattractive. However, he stressed that the other alternative: indefinite administrative detention was more unattractive and, critically, unlawful. I see force in Mr Gill's argument. The facts are not far from those in *Bashir* where Mitting J admitted the claimant to bail on what he described as stringent conditions, including a 12 hour curfew, tagging, daily reporting to an immigration office or police station, and residence at an address to be identified or agreed by the respondent. Mr Gill was also able to point to these conditions as providing examples as to how the risk of the petitioner in the present case either absconding or re-offending could be managed other than by his continuing detention. In relying on *Bashir*, Mr Gill did not omit reference to *R (on the application of MMH)* v *Secretary of State for the Home Department supra*, again a case involving the detention of claimants from Iraq, where Beatson J refused applications for release on bail. Whatever may have been the case when *Sokha* v *Secretary of State for the Home Department* 1992 SLT 1049 and *Singh* v *Secretary of State for the Home Department* 1993 SLT 950 were decided, parties before me were agreed that now the role of the Court in reviewing an exercise of the respondent's power in terms of paragraph 2 of Schedule 3 to the 1971 Act is as explained by Toulson LJ in *R (on the application of A)* v *Secretary of State for the Home Department* [2007] CWCA Civ. 804 at paragraphs 60 and 61. It is accordingly for the court, in the exercise of a primary jurisdiction, to decide what is the scope of the power of detention and whether it is being lawfully exercised in a particular case. The fact that the respondent, with all the information available to her, has exercised her discretion to invoke the power is a factor to be had regard to but only a factor. The Court requires to come to its own view as to the reasonableness, and therefore the

lawfulness, of any particular detention. The exercise is fact sensitive. It involves an assessment of the degree of risk: *R (on the application of A)* v *Secretary of State for the Home Department supra* at paragraph 35. In the circumstances of the present case I did not feel able to come to a final view as to the legality of the petitioner's continued attention. As I have already indicated, I considered that the respondent's inability to effect removal of the petitioner to Iraq in the event that his current statutory appeal is unsuccessful is of central importance but I do not wish to suggest that the other relevant factors: risk of re-offending, risk of absconding, the respondent's assessment of the case and refusal to return voluntarily to Iraq are not also important. I was not satisfied that I am able to make an informed judgment properly balancing the various factors on the basis of the information which has thus far been put before me. I therefore accepted Mr Gill's invitation to deal with his application on an *interim* rather than final basis.

[9] On the approach that I have indicated, I was satisfied that the petitioner has set out a *prima facie* case to the effect that his continuing detention is unlawful. That therefore brings me to consider the balance of convenience. The detriment to the petitioner associated with his continuing detention was self evident: he is deprived of his liberty. That matter does not appear to be capable of being elaborated but I accept that it is a substantial detriment. I accepted that there would be detriment associated with his liberation: the risks of re-offending and absconding are also real. They are, however, difficult to evaluate and, as matters stood at the end of the hearing on 6 February 2009, I did not feel able to evaluate them.. Mr Lindsay had requested that he be given the opportunity to further address the court in the event that I was contemplating liberating the petitioner. I therefore acceded to Mr Lindsay's suggestion that I hear any further argument that either party might wish to put forward in relation

to the balance of convenience. I continued the application for that purpose until 20 February 2009. Difficulties as to the availability of counsel, the obtaining of information and the need to take instructions led to further continuations until 26 February and then 27 February and finally 3 March 2009. I was addressed on balance of convenience on 26 February and, having given an indication that I considered that the balance of convenience lay on the side of liberation subject to conditions, I was addressed on a possible mechanism for giving effect to my decision on 3 March 2009.

Further submissions of parties: balance of convenience

[10] Mr Gill began by reminding me of the reference in *Bashir* to the imposition of "stringent conditions" as a means of managing the risks of re-offending and absconding which he accepted might be inferred from the petitioner's history. Once the respondent had identified what she would regard as an acceptable address for the petitioner he would be prepared to accept the imposition of tagging, a 12 hour curfew, caution or money bail in the sum of £500, a weekly reporting condition and a condition, equivalent to the standard bail condition, that the appellant would commit no further offences. Similar conditions had been proposed by the respondent when the petitioner had applied to the Immigration and Asylum Tribunal for release on bail. In determining the balance of convenience regard should be had to the possibility of imposing such requirements as conditions of *interim* liberation. Moreover, it was to be borne in mind that his pending statutory appeal provided the petitioner with an incentive to comply with anything required of him by the respondent. If not liberated the petitioner faced detention for an indeterminate period. The risk of re-offending applies equally to a United Kingdom national who has been convicted but at the end

of the custodial part of his sentence a United Kingdom national is released. Why should the petitioner not be also?

[11] Given his acceptance that the court is exercising a primary jurisdiction in deciding on the legality of administrative detention, I was anxious to learn from Mr Lindsay whether he wished to elaborate upon his previous entirely general references to the risks that might be associated with the petitioner's release. Mr Lindsay did not particularise the risks associated with the petitioner or attempt to quantify them. He relied simply on the inferences to be draw from the petitioner's immigration history and his conviction while living in the United Kingdom. He mentioned but did not elaborate upon the petitioner's involvement in a rooftop protest at his continuing detention. He pointed to doubts as to the power of the Court of Session to impose conditions on the release of someone in administrative detention. These may be resolved by the Inner House in the pending appeal against my decision refusing the application for interim liberation at the instance of TP. However if I were to pronounce declarator to the effect that the petitioner's continuing detention was *prima facie* illegal and the balance of convenience favoured his *interim* liberation but without making any further order then the respondent might decide to liberate the petitioner conditionally on her own authority.

[12] In my judgement the balance of convenience favours the *interim* liberation of the petitioner. On the one hand he is the subject of indefinite detention in terms of powers that are ancillary to the power to remove him from the United Kingdom where there is no immediate prospect of him being removed. On the other hand there are the risks of absconding and re-offending but it is not said that these risks are any greater in the case of the petitioner than might be inferred from the bare facts of having attempted to avoid immigration controls and having committed a relatively serious offence. The

petitioner is prepared to submit to conditions which would seem to offer real prospects of materially reducing these risks. Although the matter of what powers the Court of Session does have was not explored before me in any detail, I share the doubts referred to by Mr Lindsay as to whether I have power to impose conditions or at least to impose conditions that require the cooperation of parties other than the petitioner. That is not to say that a scheme of conditional interim liberation could not be arrived at, at least with the cooperation of both parties, that would be consistent with a proper exercise of the court's powers, although the sophistication of electronic monitoring might not be achievable. Equally, the problem would be rendered academic if the respondent were to exercise her powers and release the petitioner subject to restrictions. It was with a view to exploring this option and allowing Mr Lindsay to take instructions that the motion was finally continued to 3 March 2009.

Further submissions of parties: mechanism for conditional liberation *ad interim*

[13] On 3 March Miss Maguire QC appeared for the respondent. Mr Gill again appeared for the petitioner. Mr Gill advised that parties were agreed on a mechanism whereby the court's previously indicated view that the petitioner should be liberated subject to conditions aimed at managing the risks of absconding and reoffending could be put into effect. The mechanism would be explained by Miss Maguire. Miss Maguire then confirmed that parties were agreed that the petitioner should be released given the court's view that his continued detention would be unlawful. She therefore invited the court to ordain the respondent to exercise her powers under the Immigration Act 1971 to release the petitioner from immigration detention subject to restrictions that had been agreed between the parties and contained in an unsigned

document headed "Joint Minute" but referred to as "the Agreed Restrictions". Miss Maguire explained that parties had not thought it appropriate to leave matters on the basis that the conditions of interim liberation depended or appeared to depend on a Joint Minute to which authority had been interponed by the court in circumstances where the power of the court to impose conditions was questionable. There was the added complication that the petitioner would be released to an address in England. However, parties were agreed that on release the petitioner should be subject to these restrictions: he will live at a specified address; he will report to a Reporting Centre, once per week; he will be subject to curfew in that he will be present at the specified address from 8pm each day until 8am the following day; he will submit to and cooperate with arrangements made by the respondent for electronic monitoring of his whereabouts and not tamper with or intentionally damage any electronic equipment or device; he will allow a representative of the respondent or her nominee access to the specified address to check, repair or replace any electronic equipment; and he will not commit an offence.

[14] Miss Maguire then identified the statutory provisions upon she relied as giving the respondent the power act as she proposed I should order her to act. These were: of the Immigration Act 1971, as amended, Schedule 3, paragraph 2 (2), (3), (5) and (6); the Human Rights Act 1998, section 6; and the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, section 36. As far as the court's power was concerned, she referred me to the Court of Session Act 1988, section 45 (b); the 1998 Act section 8; and the decision of the House of Lords in *Davidson v Scottish Ministers* 2006 SC (HL) 41.

[15] Given my view that the continuing detention of the petitioner in circumstances where conditions or restrictions could be imposed upon his liberation

which would materially reduce the risks apprehended by the respondent would be unlawful and the agreement of the parties that I should make an order ordaining the respondent to release the petitioner subject to the restrictions specified in the Agreed Restrictions I so ordered. Mr Gill moved for the expenses of the application. There was no opposition to this motion which I granted.