Neutral Citation Number: [2010] EWHC 357 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1/3/2010

Before :

SIR THAYNE FORBES
Sitting as a Judge of the High Court

Case No: CO/12003/2008

Between:

THE QUEEN
(On the Application of Fatma Patha Matovu) **Claimant**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

Samantha Knights (instructed by Refugee Migrant Justice) for the Claimant

Rory Dunlop (instructed by the Treasury Solicitor) for the Defendant

Hearing dates: 25th and 26th November 2009

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Judgment

Sir Thayne Forbes :

1. **Introduction**. When these proceedings for judicial review were issued on 11th December 2008, they included a challenge to the Secretary of State's decisions of 11th December 2008, 8th January 2009 and 10th February 2009 whereby he refused to acknowledge that the further representations made on behalf of the Claimant in letters dated 9th, 10th and 11th December 2008 and 3rd February 2009, supported by reports from Dr Alec Frank and Professor Oliver Furley, amounted to a fresh claim within the meaning of paragraph 353 of the Immigration Rules. On 10th March 2009, following an oral renewal hearing before Frances Patterson QC, sitting as a Deputy High Court Judge, permission to apply for judicial review was granted on all grounds save in respect of Article 8 of the European Convention on Human Rights.

2. However, following the submission of yet further representations on 6th November 2009, supported by reports from Dr Nici Nelson and Ms Renee Cohen, on 18th November 2009 the Secretary of State decided to treat the Claimant's further representations as a fresh claim. On behalf of the Secretary of State, Mr Dunlop stressed that the decision to treat the further representations as a fresh claim was an

entirely pragmatic decision taken in the light of many factors and that it was not to be regarded as conceding that any previous decision by the Secretary of State in relation to the Claimant was either unreasonable or unlawful.

3. The practical effect of Secretary of State's decision to treat the Claimant's further representations as a fresh claim is that the only remaining live issue in these proceedings concerns the alleged unlawful detention of the Claimant and her children during the following two periods: (i) from 7th December to 22nd December 2008 and (ii) from 17th February to 12th March 2009. The circumstances relating to those periods of detention are part of the factual background to this case to which I now turn.

4. **The Factual Background**. The Claimant is a Ugandan national who was born on 1st October 1979. On 30th August 2007, she entered the United Kingdom using a false passport. At the time, she was 8 months pregnant. The following day she claimed refugee status on the basis that her husband had disappeared after having been involved in investigating corruption within the Ugandan Government.

5. On 7th October 2007, the Claimant gave birth to her first son, Nadir Matovu ("Nadir"), in Mayday Hospital, Croydon.

6. On 12th February 2008, the Secretary of State refused the Claimant's asylum claim. She duly appealed against that refusal. On 4th April 2008, her appeal was heard by an Immigration Judge. On 14th April 2008 the Immigration Judge dismissed the appeal on credibility grounds. The Claimant applied for reconsideration, but this was refused by the AIT and finally by the High Court on 5th September 2008. Accordingly, her appeal rights were exhausted on 20th September 2008.

7. On 17th October 2008, the Claimant gave birth to her second son, Abrah Sebyala ("Abrah-Javier"), at New Cross Hospital, Wolverhampton.

8. On 27th November 2008, the decision was taken to remove the Claimant and her children to Uganda. On 7th December 2008, the Secretary of State's officers visited the Claimant's home and interviewed her in order to ascertain whether there were any compassionate or mitigating circumstances that made detention or removal inappropriate, but no such circumstances were identified. The Claimant and her children were therefore detained pursuant to the provisions of paragraph 16(2) of Schedule 2 to the Immigration Act 1971 ("the 1971 Act"; as to which, see below), pending their removal to Uganda in accordance with removal directions set for 11th December 2008. At this stage, the Secretary of State could reasonably have thought it possible that the Claimant and her children could be provided with the medication "Malarone", as an appropriate malarial prophylaxis, which would provide effective treatment when started as little as 24 hours before the date set for removal.

9. On 9th and 10th December 2008, the Claimant's legal advisers made further representations against her removal. These representations included express reference to the Secretary of State's policy with regard to the provision of malarial prophylaxis prior to removal (as to which, see below) and stated (*inter alia*):

> "… 8. It is submitted that it would be a violation of the ECHR rights of Ms Matovu and of her children, and also a breach of the Secretary of State's policy … to remove the family to Uganda without offering them the option of malaria prophylaxis. …
>
> 9. It is submitted that the Removal Directions must therefore be deferred for a minimum of 3 weeks to allow for the malaria prophylaxis treatment to be commenced. …"

10. On 10th December 2008, the deputy healthcare manager at Yarl's Wood Health Care Centre ("Yarl's Wood"), Lesley Quinn RN ("Nurse Quinn"), indicated that both Nadir and Abrah were of insufficient weight for Malarone and that there was no alternative prophylaxis capable of providing them with effective treatment in time for removal on 11th December, as follows:

> "Just to confirm that both these children [*i.e. Nadir and Abrah*] weigh under 11kg, therefore malarone is not licensed for use as a malarial prophylaxis. There is no alternative that can be used if RDs [*Removal Directions*] are tomorrow due to the length of time needed for the drug to be effective. Hence we have not been able to issue malaria prophylaxis at this time. …"

11. On 11th December 2008, the Claimant issued these proceedings for judicial review. On the same day the Secretary of State cancelled the removal directions that had been set for 11th December and, having considered the further representations, decided they did not amount to a fresh claim. So far as material, the Secretary of State's letter of 11th December 2008, in which that decision (*inter alia*) was communicated to the Claimant's advisers, was in the following terms:

> "… 6. I do not consider that it would be appropriate to grant your client leave to remain in the United Kingdom. I have carefully considered whether your client should qualify for Humanitarian Protection or Discretionary Leave in the United Kingdom but no issues have been raised which would give rise to such a grant of leave.
>
> 9. (*sic*) With regard to the issue of malaria prophylaxis for your client's children Health Care at Yarl's Wood have confirmed that they cannot give the children malarone as they are underweight for that particular drug. I consider that detainees are made aware of the availability of prophylaxis when they first enter detention. I also consider that your client will have seen a nurse when she first arrived and has had twenty four hour access to a doctor while in detention. As it has been an option for your client since entering detention … I consider that removal remains appropriate in this instance. You have provided no evidence from a doctor to show that it has been deemed necessary for your client's children have prophylaxis and I also consider that the UK Border Agency have acted appropriately and according to our published policy in this regard.
>
> 10. Paragraph 353 of the Immigration Rules … states that … the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been

considered. The submissions will only be significantly different if the content had not already been considered and taken together with the previously considered material, created a realistic prospect of success, notwithstanding the rejection.

10. (*sic*) Some of the points raised in your submissions have been considered previously. The remaining points in your submission would not have created a realistic prospect of success.

…

12. Your representations are therefore rejected. The arrangements for your client's removal will proceed. …"

12. In a faxed letter dated 11th December 2008, the Claimant's legal advisers requested the release of the Claimant and her children on the grounds that their removal was no longer imminent and that they did not pose a risk of absconding. On the same day, the Claimant applied for bail.

13. On 12th December 2008, the Secretary of State wrote the Claimant's advisers, giving reasons for refusing to release the Claimant and her children, as follows:

"Your request has been given due consideration. However, your request for release is refused at this time.

The reasons for refusal are given as follows:

1. Your client is likely to abscond if given temporary admission or release.

2. Your client does not have enough close ties (e.g. family or friends) to make it likely that they will stay in one place.

3. On initial consideration it appears that your client's application may be one which can be decided quickly.

4. Your client has used or attempted to use deception in a way that leads us to consider your client may continue to deceive.

5. Your client has not produced satisfactory evidence of your client's identity, nationality or lawful basis to be in the UK." …

14. On 15th December 2008, when reviewing the Claimant's detention, the Secretary of State's Executive Officer ("EO"), Sarah Stuart, indicated that the Midlands Enforcement Unit wished to maintain the Claimant's detention at least until a decision was made as to whether her judicial review proceedings could be expedited and that such a decision was expected in the next couple of days. On the following day, a Higher Executive Officer ("HEO"), Stuart Skaife, to whom the necessary authority had been delegated by a Senior Executive Officer ("SEO"), decided to maintain the detention until it was known whether the judicial review proceedings could be expedited.

15. As it happens, at about that time, the Claimant fell ill and was admitted to hospital on 16th December 2008 with stomach pains and suspected appendicitis, leaving her children behind to be cared for by the Secretary of State's employees. The Claimant remained in hospital for one day and was discharged on 17th December. On the same day, the judicial review bundle of documents was served.

16. On 19th December, the Claimant's application for bail went ahead. The Immigration Judge who heard the application refused to grant bail because he considered that the Claimant was still not well enough to be released and that it was in her interest that she continued to be detained. However, on the same day, the Secretary of State's A/AD, M. Williamson, indicated that the family should be released if the judicial review proceedings could not be expedited by the Judicial Review Unit.

17. By the 22nd December 2008 the Claimant had recovered sufficiently to be able to return to her former accommodation and the Secretary of State released her. The EO caseworker (Sarah Stuart) recorded the reasons for release in her case notes, dated 23rd December 2008, in the following terms:

> "Reasons for Release:
>
> The family were detained to effect their removal from the UK. However removal directions were deferred as an application for a JR was received. The Courts are currently in the Christmas recess and the likelihood of a speedy outcome is unknown.
>
> Yarl's Wood have considered the family unsuitable for detention and the family have reported as required in the past. As removal is no longer imminent, I consider release to be appropriate at this stage."

18. On 9th January 2009, the Secretary of State's Acknowledgment of Service in the judicial review proceedings was served and (inter alia) requested urgent consideration of the matter.

19. On 14th January 2009, the Claimant's advisers wrote to the Treasury Solicitor and requested a short stay of the proceedings on the basis that additional objective evidence was being sought in support of a fresh asylum claim, in particular a psychiatric report in respect of the Claimant. On 21st January 2009, the Treasury Solicitor refused to agree a stay, but indicated that the Claimant could prepare and make further submissions in respect of her claims whilst the judicial review proceedings were pending and that any such submissions would be given appropriate consideration and response.

20. On 26th January 2009, the Claimant's advisers wrote to the Administrative Court stating that they did not consider the case was suitable for urgent consideration because that would prevent the Claimant from fully preparing her fresh claim and that CLS funding had only recently been granted on 20th January 2009.

21. On 27th January 2009 and having considered the matter on the papers, Geraldine Andrews QC (sitting as a Deputy High Court Judge) refused the Claimant permission to apply for judicial review, declared that the case was wholly without merit and directed that renewal should be no bar to removal.

22. On 3rd February 2009 the Claimant's advisers made further representations in support of a fresh asylum and human rights claim and enclosed a psychiatric report from Dr Alec Frank in support. On 10th February 2009 the Secretary of State rejected this further material as amounting to a fresh claim. On 17th February 2009, the Claimant and her children were detained pending their removal on 23rd February 2009. An application for interim relief against the removal directions was then made on the Claimant's behalf.

23. On 19th February 2009, both children were provided with malarial prophylactic medication prior to removal. However, in order to be effective, the treatment had to be started one week prior to travel in the case of Abrah and two days prior to travel in the case of Nadir. The removal directions for the 23rd February were therefore cancelled, the UK Border Agency's letter to that effect concluding as follows:

> "In the circumstances please defer the removal directions, and arrange for them to be re-set **after obtaining confirmation that the family are fit to travel and that they are immune from catching Malaria on their arrival in Uganda.**" (original emphasis).

The removal directions were then reset for 2nd March 2009.

24. On 23rd February 2009, Cranston J, who appears to have been unaware that the original removal directions had been cancelled, refused the interim relief sought and observed that he could "*see nothing unlawful about the detention of the claimant and her children pending removal*."

25. On 27th February 2009, the removal directions had to be cancelled again in the light of an outbreak of chickenpox. They were reset for the 10th March 2009, the day on which Frances Patterson QC granted permission at the oral renewal hearing. When granting permission, she observed that the unlawful detention claim was "*arguable, just about*" and should be considered in the light of the full evidence. The removal directions were then cancelled.

26. **Legal Framework**. So far as material, the 1971 Act, the case law and the relevant published ministerial policy and guidance provide as follows.

27. (a) *Immigration Act 1971*. Paragraph 16(2) of Schedule 2 to the 1971 Act is in the following terms:

> "16(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12, that person may be detained under the authority of an immigration officer pending –
>
> (a) a decision whether or not to give such directions;
>
> (b) his removal in pursuance of such directions. …"

28. However, there are limitations on the lawful exercise of the power under paragraph 16(2), as described in *R (Hardial Singh) v. Governor of Durham Prison (1984) 1 WLR 704* ("*Hardial Singh*"), namely that there needs to be a reasonable prospect of

removal within a reasonable period of time, having regard to all the relevant circumstances.

29. In *R (Nadarajah) v SSHD (2003) EWCA Civ 1768* ("*Nadarajah*") the Court of Appeal held that detention was unlawful if it did not accord with the Secretary of State's published policy with regard to maintaining detention in the light of a threat of judicial review. However, in *SK (Zimbabwe) v SSHD (2008) EWCA Civ 1204* ("*SK*") the Court of Appeal found that the Claimant's detention was not unlawful, notwithstanding the Defendant's failure to follow her own policy in relation to reviewing detention, because lawfulness under the common law and under Article 5 of the ECHR is not contingent upon whether the Defendant's policy on reviews has been followed.

30. On behalf of the Secretary of State, Mr Dunlop acknowledged that there was difficulty in reconciling the decisions in *Nadarajah* and *SK*. However, he made it clear that, for the purposes of this case only and entirely without prejudice, the Secretary of State accepts that detention will be unlawful if either: (i) the detention is in breach of the principles of *Hardial Singh* or (ii) the detention would not have occurred if the Defendant had applied her policy properly. Furthermore, Mr Dunlop accepted that if the only factor weighing in favour of detention is the imminence of removal, detention will cease to be lawful at the moment when the Secretary of State should have concluded that removal would not be imminent.

31. (b) *Ministerial Policy and Guidance*

(i) *Chapter 55 of the Secretary of State's Enforcement Instructions and Guidance*. The following are the relevant terms of Chapter 55 of the Enforcement Instructions and Guidance.

"**55.2. Power to detain**

The power to detain an illegal entrant … or a person liable to administrative removal (or someone suspected to be such a person) is in paragraph 16(2) to the 1971 Act …

…

Detention can only lawfully be exercised under these provisions where there is a realistic prospect of removal within a reasonable time.

…

55.3 Decision to detain …

1. There is a presumption in favour of temporary admission or temporary release – there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.

…

55.3.1. Factors influencing a decision to detain

All relevant factors must be taken into account when considering the need for initial or continued detention, including:

- What is the likelihood of the person being removed and, if so, after what timescale?
- Is there any evidence of previous absconding?
- Is there any evidence of a previous failure to comply with conditions of temporary release or bail?
- …
- What are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which afford incentive to keep in touch?
- **…**

Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.

…

Imminence

55.3.2.4 In all cases, caseworkers should consider on an individual basis whether **removal is imminent**. If removal is imminent, then detention or continued detention will usually be appropriate. As a guide, and for these purposes only, removal could be said to be imminent where a travel document exists, removal directions are set, there are no outstanding legal barriers and removal is likely to take place in the next four weeks. …

…

55.9.4 Families

The decision to detain an entire family should always be taken with due regard to Article 8 of the ECHR … Families, including those with children can be detained on the same footing as all other persons liable to detention. This means that families may be detained in line with the general detention criteria (see 55.1). …

Detention of an entire family must be justified in all circumstances and there will continue to be a presumption in favour of granting temporary release. … Detention must be authorised by an Inspector/SEO at whatever stage of the process it is considered necessary and, although it should last only for as long as is necessary, it is not subject to a particular time limit. …

…

55.14. Detention for the purpose of removal

In cases where a person is being detained because their removal is imminent the lodging of a suspensive appeal or other legal proceedings that need to be resolved before removal can proceed will need to be taken into account in deciding whether continued detention is appropriate. Release from detention will not be automatic in such circumstances: there may be other grounds justifying a person's continued detention, e.g. a risk of absconding, risk of harm to the public or the person's removal may still legitimately be considered imminent if the appeal or other proceedings are likely to be resolved reasonably quickly. An intimation that such an appeal or proceedings may or will be brought would not, of itself, call into question the appropriateness of continued detention. …"

(ii) *Immigration Directorates' Instructions*. Medical considerations are dealt with in Section 8 of Chapter 1 of the Immigration Directorates' Instructions. So far as material, paragraph 5.7 of Chapter 1 provides as follows:

"**Malaria Prophylaxis**

5.7 Preventive treatment for malaria is a special case in that medication must be taken shortly before travel. People detained prior to removal may not therefore be able to make the necessary arrangements for themselves. Any malaria prophylaxis recommended as appropriate by the removal centre medical staff should normally be provided and **time allowed for it to take effect before removal** ..."

32. **The Parties' Submissions**. On behalf of the Claimant, Ms Knights made it clear that there were two limbs to the claim for unlawful detention, namely (i) breach of the Family Detention Policy and (ii) breach of the Malaria Policy.

33. Ms Knights submitted first that the Claimant and her children should have been released from detention in accordance with relevant Home Office policy shortly after the lodging of the Claim Form and the cancellation of removal directions on 11th December 2008. She stressed that, in the event, the Claimant and her children were not released until 22nd December 2008. Ms Knights referred to the Secretary of State's letter of 12th December 2008 (see above). She submitted that none of the reasons given for continuing detention after the cancellation of the removal directions was appropriate in the circumstances of this case (see paragraph 60 of Ms Knights' written skeleton argument), the continued detention was therefore not justified and removal was not imminent. Accordingly, the continued detention until 22nd December was in breach of the relevant provisions of Chapter 55 of the Enforcement Instructions and Guidance (see above) and was therefore unlawful.

34. For his part, Mr Dunlop submitted (correctly, in my view) that the correct question is not so much whether removal was "imminent" as at 11th December 2008 but, insofar as there is any difference between the two ways of expressing the matter, whether there remained a reasonable prospect of removal within a reasonable period of time: see *Hardial Singh*. As he pointed out, it is clear that there was initially every reason

in this case for considering that the judicial review proceedings could be expedited so as to be concluded within a period of 28 days or so and that the issue of appropriate malarial prophylaxis could be properly addressed within the same general timescale (although not so as to enable removal to go ahead on 11th December 2008: see paragraph 10 above). In my view, on that basis the Secretary of State was entitled to conclude that removal remained "imminent" and/or possible within a reasonable period of time (see *R (WM) v SSHD (2007) EWHC 2562 (Admin)* at paragraph 56) even though fresh removal directions had not been set: see *R (Ahmed*) *v SSHD (2008) EWHC 1533 (Admin).*

35. Furthermore, as Mr Dunlop pointed out, from the 16th to 22nd December 2008 the Claimant was too ill to be able to return to the only accommodation available for her and her children needed to be cared for whilst she was in hospital.

36. Ms Knights' second submission was that the Secretary of State's decision to maintain removal directions in breach of the relevant Home Office policy on removal and malarial prophylaxis rendered both periods of detention from 7th to 11th December 2008 and from 17th February to 12th March 2009 unlawful.

37. As to the first of those two periods (i.e. 7th to 11th December 2008), Ms Knights submitted that it was manifestly unreasonable for the Secretary of State to proceed with removal in the light of the information with regard to the children being underweight for treatment with Malarone as indicated in Nurse Quinn's letter of 10th December 2008 (see paragraph 10 above). However, as indicated above (see paragraph 34), I agree with Mr Dunlop's submission that the Secretary of State was still in a position to provide an alternative form of malarial prophylaxis (if the underweight problem persisted) that would enable removal to take place within a reasonable timescale in accordance with the *Hardial Singh* principles.

38. As for the second period (i.e. 17th February to 12th March 2009), Ms Knights submitted that the maintenance of removal directions in breach of policy on malarial prophylaxis because of insufficient time for effective treatment by each of the dates set for removal (i.e. 23rd February, 2nd March and 10th March) rendered this entire period of detention unlawful. However, I accept Mr Dunlop's submission that, throughout this period and until the outcome of the renewal hearing before Frances Patterson QC, it was reasonable for the Secretary of State to believe that, following the administration of effective malarial prophylactic treatment, removal could be effected within a reasonable time in accordance with the *Hardial Singh* principles (see paragraphs 37 to 40 of Mr Dunlop's written skeleton argument).

39. Having regard to the facts of this case, I am satisfied that it was reasonable for the Secretary of State to conclude that the judicial review proceedings would be determined within a short time (particularly in the light of Ms Anderson QC's observations when refusing permission on the papers) and, even if treatment with Malarone remained inappropriate for either of the Claimant's children, that there was alternative medication available such as Mefloquine that would provide effective treatment so as to enable removal to take place within a reasonable time.

40. As for the period from 10th March to 12th March 2009, I accept Mr Dunlop's submission that a period of two days for the Secretary of State to respond to the

outcome of the renewal hearing was not unreasonable, given the size of the Home Office, its workload and the administrative steps that are necessary when releasing a family into appropriate publicly funded conditions.

41. **Conclusion**. For all the foregoing reasons, I have come to the firm conclusion that this claim for unlawful detention and damages fails. Accordingly, it is hereby dismissed.