Case No: C4/2014/2638

Neutral Citation Number: [2014] EWCA Civ 1270
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HONOURABLE MR JUSTICE OUSELEY
[2014] EWHC 2245 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2014

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE PATTEN
and
THE RIGHT HONOURABLE LORD JUSTICE RYDER

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Between:

THE QUEEN (ON THE APPLICATION OF DETENTION ACTION)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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- -

Ms Nathalie Lieven QC & Ms Charlotte Kilroy (instructed by **Sonal Ghelani, Islington Law Centre**) for the **Appellant**
Miss Cathryn McGahey (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates: 29th August 2014

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Judgment

Lord Justice Longmore:

1. The Detained Fast Track ("DFT") system introduced in 2000, in relation to applicants for asylum, continues to raise problems both for policy makers and for the courts, since the Secretary of State for the Home Department's policies change from time to time as do the methods by which the system is operated. It has always been intended to apply only to straightforward claims but the method by which it is assessed whether a claim is straightforward and the consequences of that assessment have varied over the years.

2. In R (Saadi and Ors) v SSHD [2002] UKHL 41, [2002] 1 WLR 3131 and Saadi v UK (2008) 47 EHRR 17 the system by which applicants were detained at Oakington Reception Centre to facilitate expeditious determination of their asylum applications was upheld as being proportionate and reasonable. Essentially the system provided for a period of 3 days between arrival and substantive interview, 2 further days to decision allowing time for further representations, on-site legal advice, a relaxed and spacious regime with detention averaging 7-10 days. The House of Lords' decision was followed by this court in R (L and Anr) v SSHD [2003] EWCA Civ 25, [2003] 1 WLR 1230 where it was held that there was no reason why the fast track procedure should not afford adequate opportunity for asylum applicants to demonstrate that they had a case, although it was recognised that there might be cases where for example, medical evidence was required which could not be fairly dealt with in the compressed timetable within which decisions were to be taken.

3. A somewhat different scheme in operation at Harmondsworth Removal Centre (limited to single males from countries where there was in general no serious risk of persecution) was considered by this court in R (Refugee Legal Centre) v SSHD [2004] EWCA Civ 1481, [2005] 1 WLR 2219. There was a screening process to determine suitability; a solicitor was provided who would usually have a morning in which to interview the client and the interview would take place in the afternoon. A decision would be taken the day after the interview; a right of appeal could be exercised within 2 days and, if exercised, the appeal would be heard on the next day with a tribunal decision shortly thereafter. This court held that, if a whole system (rather than an individual case) was under challenge, the question for the court was whether there was an unacceptable risk of claims being processed unfairly; an unacceptable risk had to be more than the risk of a wrong decision and had to inhere in the system itself, in respect of which there had to be an "irreducible minimum of due process". The question was then whether a decision making process compressed into 3 days failed to pass that test. This court held that it did pass that test provided that there was sufficient flexibility to ensure that the three day timetable was a "guide and not a straitjacket" (para 23). Since the Home Office accepted that there should be that flexibility, this court held that the judge was correct to have refused relief.

4. Now for the first time it has been held that the system (as currently operated) does operate unfairly and thus unlawfully but only in a specifically limited way. Despite expressing concerns about the screening process and the way in which the system applied to vulnerable groups such as the victims of torture or trafficking, Ouseley J's only finding of an unacceptable risk of claims being processed unfairly was that (para 196):-

> "... in too high a proportion of cases and in particular for those which might be sensitive, the conscientious lawyer does not have time to do properly what might need doing."

5. On being told at the subsequent relief hearing on 17th July this year that the Secretary of State had now arranged that those who entered the DFT before 14th July would, on request, be allowed sufficient time (namely 4 days) between the allocation of a lawyer and their substantive interview, he decided on 25th July that he would make no order other than a declaration that:-

> "... as at 9th July 2014 the manner in which the DFT was being operated, as set out in the judgment, created an unacceptable risk of unfair determinations for those vulnerable or potentially vulnerable applicants, referred to in paragraphs 114, 198 and 221 of the judgment, who did not have access to lawyers sufficiently soon after induction to enable instructions to be taken and advice to be given before the substantive interview and was to that extent being operated unlawfully."

This is an expedited appeal against Ouseley J's refusal to make any further order.

6. The further orders which the claimant asked the judge to make were as follows:-

i) The defendant be prohibited from processing asylum and human rights claims in DFT until she has taken the necessary steps to remove the unacceptable risk of unfairness identified in the judgment, those steps to include at least a period of consultation with key firms with exclusive contracts to represent individuals processed in DFT, the First Tier Tribunal and the Legal Aid Agency;

ii) The defendant consent to orders under Rule 30 of the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 that parts 2 and 3 of those Rules no longer apply to the appeals of those in detention in the places specified at Schedule 2 to those Rules; and

iii) The defendant be prohibited from removing from the jurisdiction those whose claims have been processed in DFT until they have had the opportunity of seeking legal advice on the impact of this ruling on their asylum and human rights claims.

The main submission

7. The main submission made by Ms Lieven QC, for the appellant action group Detention Action, was that once the judge had decided that the manner in which the DFT was being operated created an unacceptable risk of unfair determinations and was to that extent being operated unlawfully, the judge had no discretion to exercise but was bound to make the orders asked for and bring the whole DFT operation to a halt until it was operating lawfully. She submitted that the judge had not understood how serious his judgment was and she reminded us of the dicta of Lord Dyson JSC in R (WL (Congo)) v SSHD [2011] UKSC 12, [2012] 1 AC 245 at paras 65-68 that, once it was shown that a particular applicant had been detained, the burden was on the Secretary of State to justify that detention as being authorised by law; a system which

was operating unlawfully could not constitute such justification. The logical consequence of this would, I suppose, be that all detainees in the DFT system should now be immediately released, unless their detention could be justified on other common law grounds such as the risk of absconding or the risk of committing criminal offences. It is perhaps noteworthy that even the orders asked for by Ms Lieven do not expressly go as far as that.

8. I would reject this general wide-ranging submission. It is a commonplace of judicial review that the court has a wide discretion when it comes to remedy, see Wade and Forsyth, Administrative Law 10th ed. (2009) pages 599-602. Of course, a court cannot view continuing unlawfulness with equanimity and, if the Secretary of State was ignoring the court's judgment, no doubt some such relief as Ms Lieven proposes would be appropriate. But the judge was entitled to take into account that the Secretary of State was actively addressing the unlawfulness disclosed in the judgment by ensuring that applicants were given four days within which to consult their lawyers and reconsidering the cases of those who had not been given such time in the past.

9. As the judge pointed out the form of claim in this case is unusual. It is not a claim by any one individual that he or she has been detained unlawfully but a claim that a system is being operated unlawfully. It is essentially a prospective claim requiring changes to be made for the future; it is not a retrospective claim seeking to re-open cases where there may have been no unfairness in fact or cases in which no individual applicant seeks to say that he or she has been unfairly treated. In these circumstances the court has, as it seems to me, a wide discretion and may think it right to make no order other than a declaration of unlawfulness. Whatever order a judge does make, this court is unlikely to interfere with the conclusions of a judge who received a large amount of evidence and lived with a case for a lengthy period while considering his judgment.

10. I turn, therefore, to the particular orders asked for by the appellant but refused by the judge.

Prohibition of further process until risk of unfairness removed?

11. The Secretary of State has made it clear that, in the light of the judgment, as from 14th July (5 days after the hand-down of what I may call the substantive judgment) all those entering the system would be allowed 4 clear working days from allocation of lawyer to substantive interview; she has also made it clear (see para 5 above) that those who entered the DFT before 14th July would be allowed on request sufficient time for the proper instruction of lawyers. The judge then made it clear that all applicants should indeed have 4 clear days between allocation and interview and that he expected that to happen without any formal order. He said that if that did not happen in any individual case an application could be made to the court under the liberty to apply in the order. He added (para 5):-

> "A blanket approach that would remove from [the DFT] many whose decisions were entirely fair, or who could find remedy within the DFT itself, with the improvements under way, is not necessary."

12. That decision is well within the ambit of the judge's discretion.

13. I would add that an order in the form proposed to the judge would be highly problematic. The phrase "until she has taken the necessary steps to remove the unacceptable risk of unfairness ... to include at least a period of consultation with key stakeholders" is likely to give rise to yet further dispute which might have to be resolved by the court, since the appellant and the Secretary of State may not agree what steps are necessary to remove the risk of unfairness. Ms Lieven does not accept that a four day instruction period would make the system lawful but does not say what instruction period would make the system lawful. That is hardly surprising since it must all depend on the facts of the individual case. That, as the judge said, should be dealt with under the liberty to apply in the order. A court-mandated period of consultation would almost certainly run into similar problems.

Tribunal Appeal Process

14. The second order sought by the appellant was that the DFT should not apply to those who served notice of appeal from an adverse decision made by the Secretary of State. This raises two issues namely (1) whether the DFT process should apply to appeals at all and (2) whether, in light of Ouseley J's judgment, appellants should be taken out of the process and (presumably) released until the Secretary of State has made the changes necessary for compliance with the judgment.

15. The first issue is an appeal from the substantive judgment of Ouseley J which held that, if appeals were not originally in the DFT system, they were within the system from 2008 onwards. Moreover, since the point had not been raised in the appellant's original claim form, the Secretary of State had had no adequate opportunity to present her justification for applying the DFT system to appellants. The judge therefore declined to make any ruling on the matter save (para 77) to reject the suggestion that the inclusion of the appeals process in the DFT was unlawful as a matter of principle and similarly (para 80) to reject the contention that the policy was so obviously unlawful that no reasoning could save it. He said that, if the matter was to be further pursued, it would have to be pursued in a separate case. Ms Lieven wishes to contend that there has never been a policy to include appeals in the DFT process but that, if there was, it cannot be justified and this court should so declare.

16. This expedited appeal in the vacation was arranged before us for one day because the appellant wishes to argue that, in the light of the substantive judgment, further relief than that granted by the judge should now be granted by this court. There was no time to consider a substantive appeal as well. As it was, the hearing on the limited question of relief took the whole day. At the conclusion of the hearing, the court ruled that the proposed substantive appeal was suitable for expedition but not for hearing in the vacation. If it is to be pursued, it will have to be pursued during normal sittings.

17. The second issue is whether, in the light of the judgment, appellants to the FTT (and presumably those seeking permission to appeal to the Upper Tribunal) should be taken out of the system and released from detention until the Secretary of State has taken final steps to ensure adequate time for lawyers to be instructed. On the basis that the substantive judgment is correct, this is an application for an order which is very similar to the first order asked for and must be rejected for the same reason. There was evidence before the judge which suggested that some FTT judges may have thought that his decision had nothing to do with the appeal process. In the light

of that, the judge made it clear that his judgment did require FTT judges to consider whether the process and the speed of processing the claim affected the fairness of the decision made at the initial stage and also that his judgment should inform FTT decisions and adjournments and removal from the DFT until the final changes made by the Secretary of State are in place. Further than that he was not prepared to go, saying:-

> "I simply do not think that the removal of all appeals from the DFT is required. This, again, is a wholly excessive and unnecessary blanket remedy."

18. The conclusion was also well within the ambit of the judge's discretion. The systemic objection to the DFT has been fully dealt with by the judge. If any individual unfairness occurs, it should be dealt with by individual application, rather than by bringing the whole appellate process within the DFT to a halt.

Persons whose appeal rights are exhausted who await deportation

19. These persons are designated by the doubtfully euphonious acronym "ARE". Ms Lieven submitted that there should be no removals of any such person until he or she had the opportunity of obtaining legal advice on the impact of the substantive judgment on their claims. The judge said that that was quite unnecessary and that the judgment did not mean that every such case had to be re-examined:-

> "The applicant may have had a hopeless case; they may have been advised already to make a fresh claim; the processing of their claim may have been quite fair."

20. The judge then went on to say, correctly in my view, that it is for the individual to raise the point that his or her claim was processed too quickly for fairness; that would involve a fresh claim which

> "... would have to be based on more than that the applicant was in the DFT, with a wave of the main judgment."

In other words there would have to be individualised evidence of a specific effect.

21. Ms Lieven submitted that it was wrong for the Secretary of State to continue to remove persons who had been through the system without giving them the opportunity of taking advice on the question whether the judgment meant that they could assert that their claim to asylum had been processed unfairly. But, like the judge, I can see no reason why that question cannot be determined, in any specific case, on an application to stay or set aside a particular removal direction. If (as may often be the case) an appeal has been dismissed and permission has been refused to appeal to the Upper Tribunal that will usually be the end of the matter, subject to the residual Cart jurisdiction in relation to the refusal of such permission to appeal. If, however, there is a genuine ground for a fresh claim, in respect of a vulnerable person whose lawyers have not been given sufficient time to take instructions to do whatever is necessary to enable his or her claim to be fairly determined, that fresh claim can be presented to the Secretary of State in the normal way.

22. That is the formal position and the judge was, in my view, entitled to treat the application for relief in the formal way which he did. But it would be wrong not to record that just as the Secretary of State has, since the judgment, ensured that persons going through the DFT do have at least 4 days between instruction of their lawyers and attendance at interview, so she has been taking active steps to reconsider the cases of ARE applicants which she considers ought to be reconsidered. On 5th August 2014 she circulated an instruction to case-workers (superseding an earlier instruction in similar terms) which provides as follows:-

> "**Detained Fast Track: Interim Appeal Rights Exhausted case Instructions (Amendment)**
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> 1. Taking account of the Court's criticisms of Detained Fast Track in R (Detention Action) v SSHD, case owners should undertake a case review of those cases who have been through the DFT process and are now appeal rights exhausted and are awaiting removal from the UK, particularly where the applicant may have been vulnerable and where no steps were taken at an early stage of the process to remedy the insufficiencies described in the judgment.
>
> 2. These cases must have been allocated and inducted into the DFT process prior to **14 July 2014**; were provided with legal representation in accordance with the Legal Aid Agency's fast track scheme; have exhausted their appeal rights and remain in detention at the time the review is undertaken.
>
> 3. If an applicant has exhausted their statutory appeal rights and in turn is subject to enforcement action, they may have a further opportunity to make submissions in support of their asylum and human rights claim provided that:
>
> a) They were allocated a duty legal representative whilst their case was allocated to the detained fast track;
>
> b) They have not (i) already lodged asylum and human rights submissions, having received legal advice, since becoming appeal tights exhausted, or, (ii) had an appeal before the First Tier Tribunal adjourned in accordance with Rule 28 of the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005; and
>
> c) There is a risk that the applicant might not have had sufficient time to present their asylum and human rights claim or they were not afforded further time to present further evidence under the flexibility guidance in order to substantiate their claim when requested.
>
> 4. Where the above criteria apply to a case that is appeal rights exhausted, the case owner should contact the applicant in writing (followed by a meeting

in person where possible), to make the applicant aware that they may make further submissions in their case should they so wish.

5. When writing to the applicant the case owner will include information relating to duty representatives provided by the Legal Aid Agency, in addition to the locations and timings of Duty Legal Advice Surgeries held in the relevant Immigration Removal Centre. The case owner must also explain to the applicant at this stage that if they wish to make any further asylum and human rights submissions, they must do so within **5 working days of receiving legal advice**."

23. Ms Lieven criticised this instruction in various respects. In the first place it was not clear that the letter contemplated in the fourth paragraph would go to everyone whose appeal rights had been exhausted; secondly the requirement in para 3(a) that a duty legal representative had been allocated to the applicant in the fast track overlooked the fact that some applicants had retained legal representatives of their own choosing; thirdly there was no provision for those who should never have been in the fast track in the first place and ought to have been (but were not) excluded by the screening process; fourthly, the requirement that submissions must be made within 5 days of receiving legal advice did not allow enough time for proper submissions to be made. But all these matters can, if appropriate, be taken into account in an individual case and do not have to be addressed globally at the time when the court is considering whether to grant relief in the light of the unlawfulness found in the systemic process as a whole.

24. The evidence about this instruction was, in any event, not before the judge. I only refer to it to show that the Secretary of State is taking active steps to comply with the judgment. If it is thought that she has failed to do so, that is a matter (in the first instance) for the Administrative Court, not for this court. The task of this court is to determine whether Ouseley J ought to have given any relief in addition to the declaratory order which he made. I do not think that he should.

25. Both Ms Lieven for the appellant and Ms McGahey for the Secretary of State spent considerable energy attempting to show that the measures put in place by the Secretary of State since the hand down of the judgment were not or, as the case might be, were a compliance with the judgment and that unlawfulness was therefore continuing or, as the case might be, had ceased. A considerable amount of new evidence was filed in support of these respective assertions. In my respectful view, that energy was misplaced because the true questions for this court are whether the judge had a discretion to refuse relief other than a declaration and, if so, whether his discretion was wrongly exercised. Those are questions which must be determined on the material available to the judge at the time he made his decision. For the reasons I have given, the answers to those questions are Yes and No respectively. I would dismiss this appeal.

Lord Justice Patten|:

26. I agree.

Lord Justice Ryder:

27. I also agree.