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Case No: CO/8991/2005

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2008

Before :

THE HON. MR JUSTICE BURNETT

- -

Between :

The Queen on the application of Ahmed	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

John Walsh (instructed by **North Kensington Law Centre**) for the **Claimant**
Lisa Busch (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 21 May 2008

- -

Judgment
As Approved by the Court

The Hon. Mr Justice Burnett :

1. In 2005 the Claimant twice lodged claims for permission to apply for judicial review of decisions of the Secretary of State for the Home Department to refuse to treat new representations made on her behalf as fresh asylum claims. She had exhausted her rights of appeal against an earlier decision to refuse her asylum.

2. This is an application for judicial review of two decisions of the Secretary of State to maintain detention of the Claimant and her children after those claims for permission to apply for judicial review were lodged. The first period of detention that is in issue is between 28 August and 14 September 2005, when the Claimant and her children were released on bail. Although they had been detained on 24 August no complaint is made about the first part of the period because the detention is accepted as being pending imminent removal for which directions had been set for 29 August. Judicial review proceedings were issued on the 27 August. The second period in issue is between 4 November 2005 and 18 November 2005, when the Secretary of State agreed to release the claimant and her family. The family had been detained again on 21 October to effect removal, but judicial review proceedings were not lodged until 4 November 2005. The family was fact released on 22 November but no complaint is made about the detention after 18 November because the intervening days were spent arranging accommodation. Otherwise the family would have been thrown onto the street.

3. These proceedings come before the Court in an unusual way. The claim that is technically before the Court was lodged on 4 November 2005. It sought to challenge the decision to reject the Claimant's then recent representations as a fresh claim for asylum. It made no complaint about the earlier detention in August nor the detention continuing at the time the proceedings were issued. By amendment to the original grounds, a claim for false imprisonment and breach of Article 5 ECHR was introduced in respect of the period of detention in November 2005. The fresh claim challenge was maintained. Goldring J refused permission but a renewed application was made before Bean J on 14 August 2006, which he too refused. The detention aspect was dealt with very briefly at the end of a judgment that considered in detail what was then, as it appeared, the main argument. The application was renewed in the Court of Appeal when, for the first time, a complaint was made about the detention in August 2005. Maurice Kay LJ gave permission to apply for judicial review limited to the detention issue. Although the grounds have not been formally amended, the application has proceeded by agreement on the basis that both periods are in issue.

<u>The Issue</u>

4. Mr Walsh, who appeared on behalf of the Claimant, submitted that both periods of detention were unlawful because the decision to detain was in contradiction of the publicly articulated policy of the Secretary of State. That policy, he suggested, provided that detention would be maintained in the sort of circumstances that existed in this case only when removal was 'imminent'. Removal could only be imminent if removal directions were set. When judicial review proceedings were launched, the removal directions were cancelled and thus, submits Mr Walsh,

removal was no longer imminent. He submits that this outcome, which might enable someone liable to removal to secure his release by making an abusive application for judicial review, is dictated by the wording of the policy when seen through the prism of the decisions of (a) the Court of Appeal in *R (on the application of Nadarajah) v Secretary of State for the Home Department* [2003] EWCA Civ 1768; and (b) Beatson J in *R (on the application of WM) v Secretary of State for the Home Department* [2007] EWHC 2562 (Admin).

Background Facts

5. The Claimant is a citizen of Pakistan who was born on 3 June 1973. She entered the United Kingdom illegally on the 5 October 2004 using a passport to which she was not entitled. She has three children. Two were born in Pakistan and brought to the United Kingdom by the claimant. The third was born on 21 December 2004. On 7 October 2004 the claimant made an application for asylum. The essence for her claim was that she had been the victim of domestic violence at the hands of her husband. She suggested that if she returned to Pakistan she would be at real risk of injury from her husband in respect of which the Pakistani state was unable to provide adequate protection.

6. On 3 December 2004 the Secretary of State refused the claimant's application for asylum. She appealed but her appeal was dismissed on 4 March 2005. Undeterred, the claimant sought permission to appeal from the Immigration Appeal Tribunal but this too was refused.

7. On 22 August 2005 removal directions were set for the removal of the claimant to Pakistan on 28 August 2005. On 24 August she and her 3 children were detained with a view to their removal.

8. On 27 August her removal directions were cancelled on notification to the Secretary of State that she had filed a claim for judicial review. On 14 September 2005 the claimant and her family were released on bail, an application having been made to an adjudicator. Two days later, on 16 September 2005, Hodge J considered the application for permission to apply for judicial review. In fact, the claim had not been supported by any grounds whatsoever. Hodge J considered it to be an abuse of process. On 21 October 2005 removal directions were again set with respect to the claimant and her family providing for removal on 29 October 2005. The family was again detained. Those removal directions were cancelled and fresh ones issued on 31 October whereby the family was to be removed on 4 November 2005.

9. On 3 November further representations were submitted to the Secretary of State on behalf of the claimant in the nature of a fresh claim. The Secretary of State rejected these representations in a decision letter the same day. During this period the Claimant had also made representations through her Member of Parliament. On 4 November 2005, the claimant filed a claim for judicial review of this decision. Removal directions were again cancelled. The claim was not served on the Secretary of State until 10 November. On 12 November 2005 a review of detention was conducted. The view taken was that removal remained imminent. That was because it was expected that the Court proceedings would be swiftly concluded. Additionally, it was considered proportionate to continue to detain the family. However, on 18 November 2005, in view of the fact that no time scale was available for the determination of the judicial review proceedings, the Secretary of State decided to release the claimant and her family as soon as appropriate accommodation could be made available.

10. As is clear from the decisions of Goldring J, Bean J and Maurice Kay LJ there never was any legitimate complaint about the decision made by the Secretary of State on 3 November 2005 to reject the claimant's fresh representations. The application for permission to apply for judicial review intimated on 4 November 2005 was a desperate last throw of the dice by the claimant to seek to remain in the United Kingdom.

The Secretary of State's Policy

11. Chapter 38 of the Operations Enforcement Manual contains the Secretary of State's policy in relation to the detention of immigrants. That policy is revised from time to time. The current version is slightly different from that in place in 2005 which is the relevant time for the purposes of this claim. The material aspects of the policy were identical to those set out in paragraphs 26 and 27 of the judgment of the Court of Appeal given by Lord Philips MR in *Nadarajah.*

> "26. Chapter 38 – Detention/Temporary Release
>
> 38.1 Policy
>
> General
>
> In the White Paper "Fairer, Faster and Firmer – A modern Approach to Immigration and Asylum" published in July 1998 the Government made it clear the power to detain must be retained in the interests of maintaining effective immigration control. However, the White Paper confirmed

that there was a presumption in favour of temporary admission or release and that, wherever possible, we would use alternatives to detention (see 38.19 and chapter 39). The White Paper went on to say that detention would most usually be appropriate:

. to effect removal

. initially to establish a person's identity or basis of claim; or

.where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release

…

Use of Detention

In all cases detention must be used sparingly, and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process once any rights of appeal have been exhausted. However, a person who has an appeal pending or representations outstanding might have more incentive to comply with any restrictions imposed, if released, than one who is removable.

38.3 Factors influencing a decision to detain

1. There is a presumption in favour of temporary admission or temporary release.

2. 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.

3. All reasonable alternatives to detention must be considered before detention is authorised.

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

5. There are no statutory criteria for detention, and each case must be considered on its individual merits.

6. The following factors must be taken into account when considering the need for initial or continued detention.

For detention

. 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?;

. has the subject taken part in a determined attempt to breach the immigration laws? (e.g. entry in breach of a deportation order, attempted or actual clandestine entry);

. is there a previous history of complying with the requirements of immigration control? (e.g. by applying for a visa, further leave, etc);

. what are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? Does the person have a settled address/employment?

. 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?

Against detention;

. Is the subject under 18?

. Has the subject a history of torture?

. Has the subject a history of physical or mental ill health?"

27. At the material time, an Immigration Officer who ordered the detention of an immigrant was required under Chapter 38.5 to fill in a form IS 91 R by ticking all the boxes applicable, in order to inform the immigrant of the reasons for his detention. The material part of the form was as follows;

a. You are likely to abscond if given temporary admission or release.

b. There is insufficient reliable information to decide on whether to grant you temporary admission or release.

c. Your removal from the United Kingdom is imminent.

d. You need to be detained whilst alternative arrangements are made for your care.

e. Your release is not considered conducive to the public good.

This decision has been reached on the basis of the following factors (tick all boxes that apply);

1. You do not have enough close ties (eg. Family or friends) to make it likely that you will stay in once place.

2. You have previously failed to comply with conditions of your stay, temporary admission or release.

3. You have previously absconded or escaped.

4. You have used or attempted to use deception in a way that leads us to consider you may continue to deceive.

5. You have failed to give satisfactory or reliable answers to an Immigration Officer's enquiries.

6. You have not produced satisfactory evidence of your identity, nationality or lawful basis to be in the UK.

7. You have previously failed or refused to leave the UK when required to do so.

8. You are a young person without the care of a parent or guardian.

9. Your health gives serious cause for concern on grounds of your well-being and/or public health or safety.

10. You are excluded from the UK at the personal direction of the Secretary of State.

11. You are detained for reasons of national security, the reasons are/will be set out in another letter.

12. Your unacceptable character, conduct or associations.

13. I consider this reasonably necessary in order to take your fingerprints because you have failed to provide them voluntarily."

12. The overall aim of the policy was to ensure that detention was used as a last resort. The policy covered circumstances in which someone might be waiting for a protracted period to hear the result of an immigration application as well as those who were about to be removed. At the material time, the immigration officer who ordered detention was required to consider the pro-forma criteria which were recorded in the tick box form. When the claimant was detained on 22 August four boxes were ticked:-

> "a) You are likely to abscond if you are given temporary admission or release
>
> c) Your removal from the United Kingdom is imminent
>
> This decision has been reached on the basis of the following factors
>
> 1. you do not have enough close ties (e.g. family or friends) to make it likely that you will stay in one place.
>
> 7. you have not produced satisfactory evidence of your identity, nationality or lawful basis to be in the UK."

On 21 October 2005, when the second detention was authorised, only c) and 7) of the above were ticked.

13. It can thus be seen that one of the factors that might substantially inform a decision to detain is that removal is imminent. That makes obvious sense because it would be easy to frustrate removal by a given flight on a given date if it were left in the hands of the immigrant to arrive at the correct time at the airport. The other aspect of the Secretary of State's policy of importance for this case is set out in paragraph 28 of the judgment in *Nadarajah:*

> "where proceedings have been initiated which challenge the right to remove an immigrant it is not the policy of the

> Secretary of State to detain an immigrant on the ground that his removal in imminent. Normally, in such circumstances he will be granted temporary remission pending the result of those proceedings"

Discussion

14. The policy did not suggest that the phrases "your removal from the United Kingdom is imminent" and "removal directions have been set" were synonymous. A removal might properly be described as "imminent" even when removal directions have not been set if the intention is, and efforts are being made, to effect removal in the very near future. I am unable to accept Mr Walsh's submission that the cancellation of removal directions brought with it, as night follows day, a conclusion that removal was no longer imminent.

15. Furthermore and in any event, the policy as recorded in paragraph 28 of the judgment in *Nadarajah* makes it clear that the initiation of proceedings is not sufficient necessarily to result in temporary admission. It is unsurprising that removal directions will ordinarily be cancelled once judicial review proceedings are lodged. Yet it is only "normally" that temporary admission will be granted. That means there will be circumstances when it will not be granted. The importance of that qualification was recognised by Stanley Burnton J at first instance at *Nadarajah* (see paragraph 66 of his judgment as set out in paragraph 34 of that of the Court of Appeal). It was also recognised by Beatson J in *WM* where he said:

> "the policy, however, was not invariably to grant temporary admission pending the result of the judicial review proceedings but to do so 'normally'. In this case (unlike *Nadarajah*) the defendant has had regard to that policy. She is entitled to apply it flexibly in accordance with the circumstances of the particular case under consideration." [58]

The First Period

16. It is clear in this case that the Secretary of State, through her officer, took a conscious decision to maintain detention after the application for judicial review was lodged on 27 August 2005. There is a record of the detention review that took place on 31 August 2005. It noted that a request for expedition of the claim had been made. The decision to maintain detention was confirmed on 7 September 2005 but, as I have indicated, the decision was reversed when bail was granted a few days later. As it turns out the Claimant was released only two days before Hodge J determined that her application was an abuse. It is no surprise that he did so. The Secretary of State cannot be criticised, in my judgement, for having treated the unparticularised claim that was lodged in August 2005 with the greatest degree of scepticism. It is abundantly clear that the Secretary of State neither ignored nor misapplied her own policy. The detention in August 2005 of which complaint is made was in my judgement lawful.

The Second Period

17. There was a material difference between the reasons for detention given in August 2005 and those given on 21 October 2005. The first identified a risk of absconding; the second did not. That, to my mind, demonstrates the care with which those making these decisions approached their task. After her release in September, the Claimant had complied with conditions of temporary admission. It is thus no surprise that the risk of her absconding in a general sense was not relied upon to support the detention decision. It is apparent that the Secretary of State, through her officer, made an informed decision to keep the Claimant in detention after 4 November 2005. That decision was reviewed but the evidence suggests that there was an expectation that the application for permission to apply for judicial review would be considered within a week. On 12 November 2005 the view remained that the matter would be considered expeditiously. When, on 18 November, the Secretary of State came to consider the matter again and no timetable for the court's consideration was available immediate steps were taken to release the Claimant.

18. I am quite satisfied that the Secretary of State neither misunderstood nor misapplied her policy. The background to the consideration of detention in November was an abusive claim (so labelled by a High Court Judge) made as recently as September. Once again, there was deep scepticism about the very late, fresh application and then the challenge to the Secretary of State's refusal to treat it as a fresh claim for asylum. That scepticism was magnified by the Claimant's activation of her local Member of Parliament to make representations in parallel, many of which proceeded upon a mistaken basis.

Conclusion

19. The detention of the Claimant and her family during the two periods complained of was lawful. It was consistent with the Secretary of State's policy. The circumstances of the Claimant's desperate attempts to avoid removal by abusing the legal process provided ample justification for the Secretary of State to maintain detention for those short periods rather than immediately releasing her on temporary admission.

20. For these reasons this claim for judicial review is dismissed.