Neutral Citation Number: [2008] EWHC 1033 (Admin)

Case No: CO/2712/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

13/05/2008

B e f o r e :

THE HONOURABLE MR JUSTICE WYN WILLIAMS

Between:

THE QUEEN ON THE APPLICATION OF FARZAD QADERI **Claimant**

and

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

Mr Simon Canter for the Claimant
Mr Rory Dunlop for the Defendant
Hearing dates: 1 May 2008

HTML VERSION OF JUDGMENT

Mr Justice Wyn Williams:

1. The Claimant is an Iranian national who entered the United Kingdom illegally on 22 April 2005. He was arrested shortly thereafter. In an interview conducted with an immigration officer on 23 April 2005 the Claimant claimed asylum.

2. On 29 April 2005 the Defendant rejected the Claimant's asylum application. There is no indication in the papers before me that the Claimant exercised his right of appeal to the Asylum and Immigration Tribunal and I proceed on the basis that he did not.

3. On a date which is unknown but sometime in 2006 the Claimant applied for asylum again. On this occasion he applied using a false identity. He thereby committed a criminal offence. On 6 June 2006 at the Croydon Crown Court the Claimant was convicted of that offence and he was sentenced to eight month imprisonment. The sentencing Judge recommended that he should be deported after serving his sentence.

4. On 5 October 2006 the Claimant completed his sentence in the sense that by that date he was eligible for release. However the Claimant was not released; he was detained under immigration powers (as to which see below).

5. The Claimant has remained in detention ever since.

6. On 18 March 2008 the Claimant commenced these proceedings. In the Claim Form he specifies that he seeks a judicial review of the Defendant's ongoing decision to detain him since 6 October 2006. He, also claims interim relief; in effect he seeks immediate release.

7. I was the first Judge to consider the claims made by the Claimant. I made directions for an early hearing of whether or not the Claimant should be granted permission to apply for judicial review and whether or not he should be granted interim relief.

8. The hearing took place before Cranston J on 4 April 2008. On that occasion Cranston J ordered that there be a hearing at which all issues, permission, interim relief and the substantive claim should be considered.

9. At the hearing which took place before me on 1 May 2007 there was some debate about whether or not I should deal with the substantive judicial review or whether I should confine myself to the issues of permission and interim relief. In the result I resolved that the interests of justice demanded that I should deal with the substantive judicial review. I should also record that I was urged by Counsel for the Claimant to deal with the case substantively. For the avoidance of doubt I grant permission. I do so without much hesitation.

10. I should record at the outset that the only detailed evidence about the Claimant's detention is a statement made on 30 April 2008 by Ms Hannah Honeyman who is employed as a Senior Executive Officer by the UK Border Agency. The hearing before me proceeded on the basis that her evidence is factually accurate and, in particular, that the chronology which she attaches to her statement is factually accurate.

11. The Claimant was served with a decision to make a Deportation Order on 11 March 2007. That was a little more than 5 months after he was transferred to administrative detention. In her witness statement Ms Honeyman concedes that *"there was not much movement made to effect the removal of the Claimant during this period".* She seeks to explain that apparent inactivity on the basis that there was an outstanding asylum claim referred to in his records. It is to be observed, however, that it was then known or should have been known that the outstanding claim was in another identity and it was this fraudulent claim which had been the subject of criminal proceedings resulting in the sentence of imprisonment passed upon the Claimant. During this period of inactivity, as I understand it, the Claimant was held at Oakington.

12. At some point in time, probably in April 2007, the Claimant was transferred from Oakington to the Dover Immigration Removal Centre. The relevant sequence of events thereafter is as follows.

13. On 23 April 2007 the Claimant made an application for bail and then withdrew it. On 26 April 2007 the Defendant served a monthly progress report upon the Claimant which, no doubt, contained such details as had then been gathered as to the likely progress of his removal. By 21 May 2007 it had become clear that the Claimant was refusing to comply with the process for obtaining emergency travel documentation. On 18 June 2007 a visit was made to the Claimant to ascertain whether he was willing to complete an application for emergency travel documentation. The Claimant again indicated his unwillingness to comply with this process.

14. On 30 June 2007 it was recorded in casework notes that the Claimant was still refusing to comply with the process for obtaining emergency travel documentation because he felt that his life would be at risk if he was deported to Iran.

15. On 13 August 2007 a Deportation Order was made against the Claimant. On 24 August 2007 a request for a further interview was made so as to establish whether the Claimant was willing to co-operate with the process of obtaining travel documentation. The records indicate that the Claimant made no response to that request.

16. In September, October and November the Claimant was provided with monthly progress reports by the Defendant. He made an application for bail on 19 October 2007 but that was refused by the Asylum and Immigration Tribunal.

17. The first sign of co-operation on the part of the Claimant in the process of his removal came on 5 December 2007. On that date he applied for the assisted voluntary removal programme. However, by that date, this programme was not open to him since a Deportation Order had been made against him. However, to repeat, that was a sign that the Claimant wished to co-operate in his removal to Iran.

18. On 30 December 2007 the Claimant was advised that in order to reduce his time in detention he would need to produce supporting evidence of his identity from Iran. On 18 January 2008 the Claimant signed a disclaimer in which he stated he wish to leave the United Kingdom.

19. On 1 February 2008 the Claimant sent two letters, one to the Iranian Embassy and the second to his sister although I should say that he did not know whether or not his sister would receive the letter sent. In the letter to his sister the Claimant asked her to send him any personal or family identification document or any proof of his identity. There is no information before me to suggest that the sister has acted upon this letter assuming she has received it. The Claimant's letter to the Iranian Embassy sought an interview with the Iranian authorities with a view to preparing any required documentation and obtaining guidance as to how he could best return to Iran.

20. On 5 February 2008 the Claimant wrote to one of the organisations for which the Defendant is responsible stating that he wished to return home but that he had no way of obtaining documentation from family in Iran as to his identity as his parents had died. Miss Honeyman says that a reply was sent on 12 March 2008 advising the Claimant that he should contact the Iranian Embassy. In the letter the Claimant was told that the Iranian Embassy would be able to liaise with the authorities in Teheran who might be able to obtain documentation which proved the Claimant's identity. Miss Honeyman does not explain why approximately six weeks went by between the Claimant's letter of 5 February 2008 and the response on 12 March 2008. As I have said the Claimant commenced these proceedings on 18 March 2008.

21. On 14 April 2008 the Claimant's Solicitors wrote to the Iranian Embassy, in effect, asking the Embassy to assist in the Claimant's removal. On 24 April 2008 an Immigration Officer visited the Claimant to advise him upon his options in relation to obtaining documentation.

22. As at the date of the hearing before me, however, no application had been made by the Defendant for emergency travel documentation. The Defendant maintains that no purpose would be served by such an application in the absence of evidence of identity.

23. In paragraph 9 of her witness statement Miss Honeyman says that the Iranian Embassy has recently indicated that if an individual is generally willing to return to Iran they will do whatever they can to assist. Indeed, according to Miss Honeyman,

the Embassy has recently interviewed a person notwithstanding the fact that he has no proof of identity so as to seek to facilitate his return to Iran. As of the date of the hearing the relevant personnel within the Border Agency were considering whether to make a similar approach in the case of the Claimant.

24. The relevant statutory provisions relating to detention are as follows. Paragraph 2(1) of Schedule 3 Immigration Act 1971 provides that where a recommendation for deportation made by a Court is in force in respect of any person he shall (unless the Court by which the recommendation is made otherwise directs) be detained pending the making of a deportation order in pursuance of the recommendation unless the Secretary of State directs him to be released. Paragraph 2 (2) of the same Schedule provides that where a notice has been given to a person of a decision to make a deportation order against him he may be detained under the authority of the Secretary of State pending the making of the deportation order. Sub-paragraph 3 provides that where a deportation order is in force against any person he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom.

25. In detaining the Claimant since October 5 2006, therefore, the Defendant has purported to act in accordance with powers conferred upon her by statute.

26. There is no express temporal limit in the statute but, as has been acknowledged since **R v Durham Prison Governor exparte Hardial Singh [1984] 1 WLR 704,** the power to detain is subject to limits. In **Hardial Singh,** itself, Woolf J (as he then was) expressed himself in this way: -

> *"First of all, it [the 1971 Act] can only authorise detention if the individual is being detained in one case pending the making of a deportation order, in the other, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of the deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise its powers of detention.*
>
> *In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary for the removal of the individual within a reasonable period of time."*

In **R (On the Application of I) v The Secretary of State [2002] EWCA Civ 888** Dyson LJ at paragraph 48 said: -

> *"It is not possible or desirable to produce an exhaustive list of all circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of Schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences "*

27. In **R(A) v The Secretary of State for the Home Department [2007] EWCA Civ 804** the Court of Appeal gave specific consideration to whether, and to what extent, a risk of an individual absconding and a risk of him re-offending might be taken into account in considering what was a reasonable time for him to be detained pending his removal or departure. The Court also considered the significance, if any, of a failure by a detained person to co-operate with the process of removal to the issue of the reasonableness of the length of detention. In paragraph 45 of his judgment Toulson LJ said: -

> *"The way I would put it is that there must be a sufficient prospect of the Home Secretary being able to achieve that purpose [i.e. effecting removal or departure] to warrant the detention or the continued detention of the individual, having regard to all the circumstances including the risk of absconding and the risk of danger to the public if he were at liberty".*

Later in his judgment (paragraph 54) Toulson LJ said: -

> *"I accept the submission on behalf of the Home Secretary that where there is a risk of absconding and refusal to accept voluntary repatriation, those are bound to be very important factors, and likely often to be decisive factors, in determining the reasonableness of a person's detention, provided that deportation is the genuine purpose of the detention. The risk of absconding is important because it threatens to defeat the purpose for which the deportation order was made. The refusal of voluntary repatriation is important not only as evidence of a risk of absconding, but also because there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss of liberty involved in the individual's continued detention is the product of his own making. "*

He went on in paragraph 55: -

> *"A risk of offending if the person is not detained is an additional relevant factor, the strength of which will depend on the magnitude of the risk, by which I include both the likelihood of its occurring and the potential gravity of the consequences* "

28. Longmore LJ expressly agreed with the judgment of Toulson LJ and Keene LJ delivered a judgment in which he expressed very similar sentiments to those set out above.

29. I turn to the application of these principles to the instant case.

30. The Claimant has been detained, almost exactly, for 19 months. When he commenced these proceedings an important part of his case was the assertion that the Defendant had no intention of removing the Claimant expediently and that the detention had become unlawful due to excessive length. (See paragraph 13 of the grounds for judicial review) It was also important to the Claimant's case that he was asserting that the removal of undocumented Iranians is extremely difficult (paragraph 23 of the grounds). In making that submission he relied upon a document entitled **"Dossier on Difficulties in Removal of Undocumented Iranian Nationals"** which was produced by a registered charity known as the London Detainee Support Group and which was published on 11 July 2007. That document begins with the following assertion:-

> *"Our evidence suggests that the removals of Iranian nationals without a passport or birth certificate are not possible. We are concerned at the effects*

on these detainees of long-term detention with no apparent prospect of removal."

The remainder of the publication provides the material upon which that conclusion is based.

31. To a substantial extent, at least, the proposition that it is not possible to remove Iranians who lack appropriate identity documents is contradicted by the evidence of Miss Honeyman. Her evidence is that the Iranian authorities have advised that evidence of identity can be obtained by either the individual in question or by friends or family on their behalf. Apparently the Claimant can nominate anyone to assist in the re-documentation process. The Claimant is likely to receive greater assistance if he makes contact with the Iranian Embassy himself and expresses a wish to return home - a step he has already taken. More recently, apparently, officials at the Iranian Embassy have been prepared to interview an individual with a view to ascertaining the best way of providing evidence of his identity. Active consideration is now being given, as I understand it, to an attempt to arrange such an interview on behalf of the Claimant.

32. All that said, it remains the position that no emergency travel document will be supplied to the Claimant by the Iranian authorities until they are satisfied about his identity. Accordingly, there is bound to be some further delay before his removal.

33. The Claimant first indicated to the Defendant a willingness to return to Iran in December 2007. I am quite satisfied, on the evidence, that until that date, at least so far as the Defendant was aware, the Defendant was not. willing to co-operate in the process of his return to Iran. Approximately five months has gone by since the Claimant's change of heart and both the Claimant and the Defendant have taken steps since that time so as facilitate the Claimant's return to Iran.

34. Counsel for the Claimant complains that the Defendant has not done enough. In particular he complains that no attempt has been made, as yet, to seek to arrange an interview between the Claimant and a member of staff at the Iranian Embassy. He submits that this failure amounts to a lack of due diligence on the part of the Defendant.

35. In my judgment, there are indications in this case of a lack of due diligence on the part of those responsible for effecting the Claimant's deportation. Miss Honeyman concedes, in effect, in her witness statement that there was a lack of due diligence in progressing his deportation in the period immediately after the Claimant's transfer to administrative detention. There is some force, in my judgment, in the submission that the Defendant has not acted as speedily as is reasonable since the Claimant has indicated his willingness to return to Iran in December 2007 although it is also to be observed that it is not clear on the evidence when it was that the Defendant could reasonably have known that the Iranian authorities might be prepared to interview the Claimant even without his having documents proving his identity.

36. These are factors which militate against a finding that the period of detention of 19 months is reasonable.

37. On the other hand there are significant factors which point the opposite way. It seems clear to me that until December 2007 the Claimant was stubbornly refusing to take any step which would assist his return. I appreciate that in the early months between October 2006 and March 2007 the Claimant's co-operation was not sought but there is no reason to suppose, in my judgment, that his attitude would have been any different in that period to the attitude which he displayed between March 2007 and December 2007. Had the Claimant been co-operative from the outset there would always have been some period of time during which the Claimant's identity was being

verified. However, there is good reason to infer that a removal or departure would have taken place long before now. In my judgment on the basis of Miss Honeyman's statement a process would have been put in place which would have solved that problem of the Claimant's identity had the Claimant co-operated from the outset.

38. In my judgment, too, there is a very real risk that the Claimant would have absconded if he was at liberty. The nature of the criminal offence which he committed and which led to his imprisonment is a clear indicator that the Claimant would go to significant lengths to avoid his deportation to Iran and seek to remain in this country.

39. In my judgment the detention of the Claimant has always been authorised for the legitimate purpose of effecting his removal from this country. There is no basis to conclude other than that the power of detention in this case has been exercised only for the purpose for which it exists. That said, the question becomes whether a period of 19 months, in all the circumstances, is unreasonable. While there are indications that the Defendant has not acted as expeditiously as she should have done I have reached the conclusion that the evidence as a whole demonstrates that it is not yet proper to say that the period of detention has been unreasonable. In making that finding, of course, I am confining myself for the moment to the period of detention between 5 October 2006 and the present time.

40. I have considered whether it is appropriate to conclude that periods of detention within the 19 month total were unlawful. I do not think the initial period of about 5 months was unlawful despite the failure of the Defendant to take any effective step towards removing the Claimant in that period. I say that because I am completely satisfied that had she taken the steps which she did take in and after March 2007 earlier she would have been met with the same response from the Claimant as he offered for many months after March 2007. Further in my judgment there was during this period a very significant chance that had the Claimant been at liberty during this period he would have absconded. The other potential period when detention was unlawful is from sometime after December 2007 to the present. In my judgment, the evidence as to a lack of due diligence on the part of the Defendants is much less cogent. It boils down to the assertion that she should have acted much more expeditiously in arranging an interview for the Claimant with the Iranian Authorities. I do not consider it is yet the case that this allegation is made out. Now that the clear possibility of such an interview taking place has been identified, however, it seems to me that the Defendant is under an obligation to do what she reasonably can to arrange it within a short a time scale as is reasonably possible.

41. It is obviously incumbent upon me to consider whether the Claimant's detention currently and into the immediate future is lawful. As things stand the Claimant is being detained for a legitimate purpose and there is no reason to believe that his removal cannot be achieved. The time scale of such a removal is still, on the evidence, in some doubt. I am satisfied however, that the time has not yet arrived when it is permissible to categorise the Claimant's detention as unlawful and it will not become unlawful in the immediate future.

42. It does not seem to me to be fruitful to specify in advance when, if at all, detention might become unlawful. I say that for the obvious reason that much will depend upon the circumstances which unfold. However, any future period of detention will, no doubt, be closely monitored by the Claimant's advisers and in the event that they consider that the period of detention is becoming unduly long and/or that the Defendant is failing to take such steps as are reasonable to effect the Claimant's removal timeously it will be open to them to mount a further challenge. Such further challenge will have the benefit of my finding that aspects of the history, to date, reveal that there has been one period in which there has been a degree of unnecessary delay on the part of the Defendant and a further period where that is arguably so.

43. For the reasons I have given, however, I am not persuaded that the detention of the Claimant to date has been unlawful in any respect or that it will become unlawful in the immediate future. Accordingly this claim is dismissed.