CO/3012/2011

Neutral Citation Number: [2011] EWHC 3358 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 25th November 2011

B e f o r e:

MR JUSTICE MITTING

Between:
THE QUEEN ON THE APPLICATION OF YEGOROV
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Mr G Denholm (instructed by Wilson Solicitors LLP) appeared on behalf of the **Claimant**
Mr S Singh (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

1. MR JUSTICE MITTING: This is yet another claim by a foreign national prisoner that he has been unlawfully detained pending his removal.

2. On 20th January 2005 the claimant's application for a work permit to work in the United Kingdom was granted, his permission lasted until 20th January 2006. He arrived on an unknown date in the United Kingdom and disappeared from view. On 10th November 2008 he was convicted at Knightsbridge Crown Court of the possession and use of a false instrument, a forged Lithuanian passport with which he had attempted to obtain a national insurance number, he says so that he could play a more legitimate part in the white economy and earn himself entitlement to ordinary benefits such as pension rights.

3. On 8th December 2008 he was sentenced to 15 months' imprisonment. On 2nd January 2009, a notice was served upon him, notifying him that he was liable to automatic deportation and inviting him to respond to an accompanying questionnaire. He refused to complete the questionnaire.

4. On 9th April 2009 the custodial element of his criminal sentence expired. Thereafter he was detained under immigration powers. On 22nd April 2009 he was served with a deportation order.

5. Attempts were then made to interview him for the purpose of applying to the Russian consulate for an emergency travel document. On 14th May 2009 he said that he did not wish to answer questions until he had spoken to his legal representatives. On 23rd June 2009 and again on 20th July 2009 interviews were booked and the claimant refused to co-operate with them. On the second occasion he stated that he was not cooperating. That was significant, for reasons which I will explain in due course. The next possible step open to the Secretary of State was to threaten proceedings under section 35 of the Asylum and Immigration Treatment of Claimants Act 2004, under which it is a criminal offence to decline to provide certain information to the Secretary of State.

6. There was however, and perhaps was recognised to have been a problem with taking action under section 35 in this case. The Russian authorities have, at least since 2008, taken the public stance that they will not accept the return of their nationals if they do not attend a consulate and signify their willingness to return to Russia.

7. A refusal to signify willingness is not one of the matters expressly mentioned in section 35 and it is likely that any prosecution for refusing to indicate willingness would be problematic and likely to fail. Accordingly section 35, while a useful tool for the Secretary of State, as a bluff, might not have produced a successful prosecution on the facts of this case. But in any event, it was attempted.

8. On 8th October 2009 a letter was sent to the claimant notifying him of his obligation to comply with section 35. He was transferred on 12th October 2009 to Dover for a section 35 interview to take place and, if it was considered appropriate, for a prosecution to be set in train.

9. Nothing then happened beyond his transfer to Dover. He simply continued to be detained. By then junior staff at UKBA had already concluded that if he was going to continue to refuse to co-operate, then there would be little alternative but to release him with a tag. There followed a period of relative inactivity during which nothing active, still less anything effective, was done to attempt to secure the claimant's co-operation or to facilitate his removal without it.

10. Deborah Bradley, now the Chief Immigration Officer of the Returns Liaison Unit at the UK Border Agency took up that position in April 2010. She immediately set about seeing what could be done about the small number of Russian nationals, some of them at least detained, who refused to indicate their willingness to return to Russia. She ascertained, correctly, that in 2007 the United Kingdom and the Russian Federation had signed an agreement between EU Member States and the Russian Federation on readmission.

11. That agreement provides for mutual acceptance of the return of nationals by Member States and Russian Federation and provides quite short time scales for the States parties to take the prescribed steps. However, the United Kingdom and the Russian federation have not yet signed a bilateral implementation protocol without which the agreement has no effect between them. Accordingly, and promptly, on 29th April 2010, Ms Bradley sought the assistance of the Foreign Office. She was advised that the Returns Liaison Unit had conducted a meeting with the Russian authorities on 2nd June 2009 and it was understood, as a result of that meeting, that the Russian Federation was prepared to accept and consider re-admission applications even though the negotiations for a bilateral implementation protocol had not yet been concluded. She says that she was advised that there was a further meeting between the Russian authorities and Foreign and Commonwealth Officials and the Prison Service on 18th November 2009 about the early release of Russian national prisoners under the Facilitated Return Scheme, and how best to establish their identity and nationality.

12. That led her to discuss the way forward with Foreign Office officials from April to August 2010. Meanwhile, perhaps as a result of her prompting, further steps were taken to try to secure the co-operation of the claimant. They were unsuccessful. He twice refused to co-operate on 5th May 2010 and 28th June 2010. At a final interview on 27th July 2010 he claimed, without any foundation whatever, that he was himself British and had the name David David. He acknowledges in his witness statement, for the purpose of these proceedings and in observations that he has made to psychiatrists who interviewed him, that he knows perfectly well that he is not British and is a Russian national born in Tomsk of Russian parents. But he expresses a close affinity with this country and a determination not to be returned to Russia, to the point of stating that he prefers prison to deportation. He is a man determined, sometimes by unorthodox means, to get his way. Whilst in immigration detention he has engaged in a dirty protest, a hunger strike, the deliberate targeting of prison officers who happen to be female for threats and abuse and fighting with other detainees, all he says to ensure, in various respects, fulfilment, his wishes as regards his accommodation within the immigration detention estate.

13. The two psychiatrists who have examined him have commented that it is possible that he suffers from Asperger's Syndrome. Both of them believe that his behaviour in detention is unlikely to be a reliable guide to his behaviour at liberty and there is no suggestion and no evidence that he has ever behaved in a threatening or violent manner, when at liberty. A final attempt was made to interview him on 19th August 2010. Again he did not co-operate.

14. This led Ms Bradley to an alternative approach, to see, by two different channels, whether the Russian authorities would, despite his unwillingness to indicate to them that he was willing to return to Russia, have him back.

15. On 26th August 2010 Ms Bradley attend a video conference with the UKBA's Returns Group Documentation Unit, Criminal Casework Directorate, the Foreign and Commonwealth Office and the British Embassy in Moscow. The topic of discussion was a potential internal process, to be followed, to obtain documentation for non compliant Russian nationals. The decision was made to apply for emergency travel documents, from the British Embassy in Moscow, direct to the Ministry of Foreign Affairs or Federal Migration Service.

16. Simultaneously she also decided to attempt an alternative approach to the Russian Embassy in London. She prepared a note, dated 15th September 2010, in which she canvassed these possibilities: it acknowledged the risk that the Russians might not co-operate unless the British government indicated a willingness to start negotiations on a bilateral implementing protocol, negotiations which would prove difficult because, for reasons entirely unconnected with these cases, the British government would not be willing to waive visa requirements for Russian nationals - consideration which might lead Russian negotiators to refuse to entertain the British request to deal with their own non- compliant nationals.

17. On 29th September 2010 she attended the Russian Embassy in London and met a third secretary, Mr Nyuppa, to discuss individual cases.

18. Mr Nyuppa was to prove to be an unfruitful interlocutor. On this occasion, he said that it was the Russian view that the United Kingdom was not a signatory to the European Russian Agreement of 2007 (something of an overstatement), but an indication of the lack of practical effect in the default of a bilateral implementation protocol.

19. Mr Nyuppa confirmed his view on 4th October 2010 by email. Ms Bradley then conducted an email exchange with Mr Nyuppa which culminated in an application on 6th December 2010, submitted on 13th December 2010, to the Russian Embassy for an emergency travel document for the claimant. Ms Bradley had decided to treat his case as something of a test case in attempting to deal with the problem of non- compliant Russian nationals. The application contained copies of all identity documentation held by the UKBA including his visa application form. She says that "it was anticipated", but she does not say by whom, that the Russian authorities may agree to issue an emergency travel document, on this occasion to the claimant, on an exceptional basis, because his identity was clearly verified. That did not prompt a response until 18th February. The response was that the Russian Embassy would not commence the

procedure for issuing emergency travel documents because of the claimant's refusal to indicate his willingness to return to Russia.

20. On 4th March 2011 Ms Bradley attended a video conference with the Foreign and Commonwealth Office in London and the British Embassy in Moscow. The British Embassy advised that it was feasible to attempt to facilitate the emergency travel document application, directly to the Ministry of Foreign Affairs in Moscow and it was decided that a note verbale should be sent. Ms Bradley drafted it promptly. It was sent on 23rd March 2011. It recorded a proposal by the United Kingdom that it submits readmission applications to the Federal Migration Service via the Ministry of Foreign Affairs, under the terms of the EU Russian Federation Agreement of 2007, and sought confirmation from the Russian Federation that the Ministry of Foreign Affairs would accept such applications under that agreement. No reply has yet been made to that note verbale.

21. Meanwhile, on 20th April 2011, Ms Bradley attempted again to secure the co-operation of the Consulate in London. She asked Mr Nyuppa to confirm that the claimant's earlier passport, submitted in support of his entry clearance application, was genuine. Mr Nyuppa replied that he could not confirm the issue of the passport because it had expired in 2007 but said it looked "okay" from the photocopy but he could not even run a check on the claimant's nationality without his consent. On 4th May 2011 the Foreign and Commonwealth Office advised that they could not, through the Moscow Embassy, seek to verify the authenticity of the claimant's passport.

22. Efforts through diplomatic channels came to an conclusive end on 13th July 2011, when Russian negotiators told Foreign Office counterparts that a bilateral implementation protocol would be required before returns could be accepted under the EU Russian Agreement of 2007. The Foreign and Commonwealth Office advised UKBA that, in their view, that meant that the diplomatic route to secure the return of non compliant Russian nationals was, at least for the foreseeable future, closed. The claimant has remained in detention since.

23. The first issue I have to decide is whether or not his continued detention, from the present time onwards could be lawful in the circumstances which I have described, assuming no change.

24. The principles are by now well established. They are those set out by Dyson LJ in I v Secretary of State Home Department [2002] EWCA Civ 888, approved by him and the majority of the Supreme Court in Lumba v Secretary of State for the Home Department [2011] UKSC 12, in particular at paragraph 22:

> "(i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
>
> (ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
>
> (iii) If, before the expiry of the reasonable period, it becomes apparent

that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;

(iv) The Secretary of State should act with reasonable diligence and expedition to effect removal."

25. In the circumstances which I have described, culminating in the refusal, for all practical purposes, of the Russian authorities to accept the return of someone in the position of the claimant, who refuses to signify his willingness to return, his removal cannot be effected within a reasonable period. Accordingly, as of today, the third Hardial Singh principle, as summarised by Dyson LJ, requires a finding that continued detention would be unlawful.

26. The claim however is not only concerned with current detention but with past detention. The claimant seeks a declaration that his detention for at least part of the period to date has been unlawful and seeks damages in respect of that period.

27. Mr Denholm accepts that the Secretary of State has established that she intends to deport the claimant and has used the power of detention to that end. The first Hardial Singh principle accordingly is satisfied. He submits however that the third principle is not; that well before today it has become apparent that the Secretary of State would not be able to effect deportation within a reasonable period.

28. I do not accept that submission. As to the first part of the claimant's detention, the Secretary of State was entitled, for a reasonable period, to see whether or not he would signify his willingness to the Russian authorities to return to Russia. She was entitled to deploy all of the means available to her to secure his compliance, including interviewing him, threatening him with prosecution under section 35 and was not obliged to take the first "no" for an answer. She was entitled to wait until satisfied that it was his settled view that he would not willingly return. That is only one element in the equation. The second is the prospect of persuading the Russian authorities to accept the return of someone who is undoubtedly a Russian national, even though he does not comply with their insistence that he indicates his willingness to return. The steps that I have described have proved unfruitful but they were not, viewed in advance or objectively, hopeless from the start. I can envisage in the future when, if there is further legislation following upon the Green Paper entitled "Justice and Security", a judge in my position, with the aid of special advocates might be required to conduct the careful examination of internal confidential Foreign and Commonwealth Office documents, to make a judgment on the state of play in negotiations between the United Kingdom and foreign states. But under the current procedural regime I am required, unless the opposite is clear, to accept what a senior official says in a witness statement prepared for these proceedings.

29. Mr Denholm does not suggest otherwise but he does call into question the authority of Ms Bradley to make judgments about the possibility that negotiations with the Russian State would produce fruitful results. I do not accept that. She is a senior official. She has acted throughout with the assistance and the advice of the Foreign and Commonwealth Office. She had, soon after appointment, every reason to believe that

the discussions that had occurred on 2nd June 2009, to which I have referred, might signify a willingness on the part of the Russian authorities to move away from their hitherto inflexible stance. She tried diligently through diplomatic channels both in London and Moscow to secure a change of attitude on their part. The fact that it has proved unsuccessful does not mean that there was not a realistic prospect at the time that the approaches would succeed. Accordingly I reject Mr Denholm's submission that detention was unlawful from the moment that it became clear that the claimant would not co-operate, on the third Hardial Singh principle.

30. That does not however provide a complete answer to this claim. The second and fourth principles are in play. A deportee may only be detained for a period that is reasonable in all the circumstances and the Secretary of State should act with reasonable diligence and expedition to effect removal. The two principles are closely linked. If the Secretary of State does not act with reasonable diligence and expedition then it is likely, perhaps inevitable, that the period of detention will become unreasonable. A claimant such as this claimant who, by his own unreasonable act, frustrates lawful removal cannot legitimately complain if in consequence it takes the Secretary of State far longer than would otherwise be the case to secure his removal. To take a typical Algerian case, the Algerian authorities do not, as far as I know, create difficulties in the removal of properly documented Algerians, those who have Algerian passports and identity documents. But it is notorious that in the case of those who do not, they take many months to process an application for emergency travel document. An Algerian who throws away his identity card and passport cannot complain if the processing of his application for emergency travel documents takes far longer than would have been the case had he not done so.

31. Likewise, in a case in which settled agreements are not in place between the United Kingdom and the State of which the claimant is a national, so that his return creates diplomatic difficulties, then he has to live with the consequences of those difficulties. Negotiation between States and diplomacy takes time. Someone who deliberately causes such negotiations to be required because of his own refusal has to put up with the consequences, provided of course there are other good reasons to detain him, of which, from the familiar list, the risk of absconding and of committing serious offences to the jeopardy of the British public are the most important. This claimant posed a significant risk of absconding. He disappeared from view after entering the United Kingdom, he made no attempt to regularise his status, he obtained and used a false document in an attempt to secure a national insurance number. His conduct in prison, while partly explicable as a protest against the conditions of his detention nevertheless indicate a clear determination not to be removed from the United Kingdom. Accordingly if released, even on strict bail conditions and with a tag, he poses and has throughout posed a significant risk of absconding. If he absconds he will, at least for the time during which he is at large, frustrate the Secretary of State's efforts to remove him.

32. Accordingly, in my judgment, on the facts of this case, that part of his detention which is attributable to his own refusal to co-operate and to negotiations with Russian authorities in an attempt to secure his removal nevertheless was not unlawful, save to

the extent that the total period has become unreasonable and that the Secretary of State has not acted with reasonable diligence and expedition to effect removal.

33. There are such periods on the facts. From the moment that the attempt to invoke section 35 was made in October 2009, until Ms Bradley set in motion steps to overcome his refusal to co-operate, in the spring of 2010 and to initiate negotiations with the Russian authorities, nothing happened. Some 6 months went by, from November to the end of April, during which no approach was made to the claimant, to try to persuade him to co-operate, or to see if his refusal was adamant as subsequently it proved to be. No negotiation was initiated with the Russian authorities. More recently, from the moment that the Foreign and Commonwealth Office advice in July that negotiations was unlikely to bear fruit, nothing has happened. The two periods in total amount to about 10 months. In my judgment, the Secretary of State did not act with reasonable diligence and expedition during that period of 10 months and in consequence the claimant's detention for the whole of the 2 years and 7 months since he entered immigration detention cannot be held reasonable. He is entitled to damages in respect of his detention during that period. I direct that those damages are to be assessed by Master, if not agreed.

Is there anything else?

34. MR SINGH: Just in relation to the last paragraph of the judgment. You say that the detention for 10 months is unlawful not detention for 2 years and 7 months?

35. MR JUSTICE MITTING: No, no, the period of unlawful detention within the total period of 2 years and 7 months is 10 months.

36. MR SINGH: I see, I just wanted to clarify. I think you said "in consequence the claimant's detention for the whole of 2 years and 7 months", I think what you actually meant was the detention could not be said to be unlawful for the whole of that period.

37. MR JUSTICE MITTING: Precisely. Is there anything else?

38. MR DENHOLM: My Lord I am grateful, we seek our costs of our claim.

39. MR JUSTICE MITTING: Mr Singh? There is an application for costs.

40. MR DENHOLM: We wish to seek our costs of the claim.

41. MR SINGH: Okay. The only thing I say about that, my Lord, is that the claimant has been successful in challenge and is continuing that challenge. Of course this was also a challenge to all past detentions since (in my learned friend's skeleton argument July 2009 but in the grounds of claims it is April 2009) that is a claim for the majority of that that period. So I say the claimant should not be entitled to 100% of his costs. May I just take instructions on the costs? (Pause).

42. My Lord of course it is up to you, you have a wide discretion. In my submission the claimant should be entitled to 50% to reflect his success.

43. MR DENHOLM: With great respect we say that we sought three (inaudible) in this case. We sought an order (inaudible), sought, we sought a declaration in relation to (inaudible) and damages and we have succeeded in obtaining those. Plainly your Lordship did not accept the periods for which I was arguing for. But the reality is one cannot form the view in this type of case without conducting a full analysis of the entire period as your Lordship has done. Even with 100% hindsight, be able to predict precisely the view which your Lordship arrived at, with people we have succeeded ... no unnecessary work occurred as a result of the information and that (inaudible).

44. MR JUSTICE MITTING: The claimant has substantially succeeded in this claim. I accept Mr Denholme's submission that no additional work has been caused other than perhaps half-an-hour's worth of analysis of the facts in the course of this hearing by his attempt to secure a declaration in respect of a period greater than 10 months. Accordingly the defendant must pay the claimant's costs to be subject of a detailed assessment if not agreed.

45. MR DENHOLM: My Lord, I am grateful, I also seek the usual public funding.

46. MR JUSTICE MITTING: Public funding assessment of the claimant's cost.

47. MR DENHOLM: As matters stand my instructing solicitors made note of the application of the bail address. There is no address to which he should be released. I think I suggest that my learned friend and myself try to agree between us terms for release once that address has been made available which should be the next few days.

48. MR JUSTICE MITTING: The order as regards the release that I propose is that he is released as soon as reasonably practicable on such terms as the Secretary of State sets for bail.

49. MR DENHOLM: I would be grateful. There may be nothing between us but I would grateful if you entertain the submissions on the conditions. (Pause)

50. MR SINGH: My Lord, can I just ask one thing whilst my learned is looking at the submissions. You may have noted from Ouseley J's order, which is page 55 of the bundle, that he made an order that certain documents which have been disclosed were to effectively to remain confidential under CPR 31.22.

51. MR JUSTICE MITTING: They should remain confidential.

52. MR SINGH: My instructing solicitor has just asked me to flag up: in your judgment, you referred to the substance of some of those documents. From my point of view I am not sure anything can be done like that because I have looked at the rule and it does not cover judgments, it just covers material that is produced to the court, but I thought I should mention that my Lord in case you think there is any--

53. MR JUSTICE MITTING: I have to explain my reasoning in the judgment and I am afraid I had not expressly referred to any of the documents contained there, I have referred to the witness statement which itself refers to them. I am afraid there is simply no means of avoiding reference to that in the judgment.

54. MR SINGH: Okay. Thank you.

55. MR DENHOLM: My learned friend has shown me the conditions that the Secretary of State would seek, which are conditions as to residence, weekly reporting and electronic tagging which she sees fit. We have no difficulty with any of those, we are content ... Draw up an order to that effect.

56. MR JUSTICE MITTING: Thank you very much.

57. MR SINGH: My Lord, can the claimant be released in 48 hours' time, to enable the tagging to...

58. MR JUSTICE MITTING: Yes, it takes a little time to set that up I know. I suggest that he is released in ... it would be Sunday or Monday?

59. MR SINGH: I am not sure if my learned friend would object if he is released on Monday.

60. MR DENHOLM: We are not going to press for any date at all until we have a bail address secured in any event, but I think, in the circumstances we cannot realistically oppose an extra 48 hours if the address becomes available for set up for tagging. We can construct an order to reflect that.

61. MR JUSTICE MITTING: Well, my intention is that he should be released as soon as proper arrangements are made, to try to ensure that he complies with conditions of temporary admission of. That is what is granted.

62. Can I leave you to draw up an order to that effect rather than deal with minutia myself. Thank you very much, thank you for your submissions.