Neutral Citation Number: [2020] EWHC 1243 (Admin)

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

No. CO/1424/2020

Royal Courts of Justice
Strand, London WC2A 2LL

Tuesday, 28 April 2020

Before:

MR JUSTICE SWIFT

B E T W E E N:

THE QUEEN
ON THE APPLICATION OF

"O", Michael Anthony Thomas and "E" — Claimants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT — Defendant

MR C. BUTTLER and MS A. CHRISTIE (instructed by Duncan Lewis) appeared on behalf of the Claimant.

MR D. MANKNELL (instructed by the Government Legal Department) appeared on behalf of the Defendant.

Hearing Date: 28 April 2020

T R A N S C R I P T O F J U D G M E N T

MR JUSTICE SWIFT:

1 On 17 April 2020, the three claimants in this case, each of whom was subject to immigration detention pending removal from the United Kingdom, filed a claim to the effect that their detention was unlawful. They also filed applications for interim relief, seeking orders for immediate release from detention. Those applications for interim relief now come before me.

2 The applications made by the first and second claimants have been overtaken by events. The Secretary of State has agreed to release the first claimant and also the second claimant, those decisions being taken on 22 April and 24 April respectively. For that reason, their applications for interim relief are no longer live and I am not asked to make any orders in respect of those claims. May I just say this in relation to those claims by way of observation. If they are claims that continue in any form, it seems to me that they are most likely to continue as claims for damages for unlawful detention. If they do continue in that form, it seems to me almost inevitable that the appropriate venue for those claims should be the County Court. I understand the parties are seeking to agree directions in relation to those claims and I hope they will be able to do so in short order.

3 The third claimant remains in detention and the application for interim relief is pursued in her case. She has been in detention since 23 January 2020. Yesterday, the defendant undertook a further review of her detention and concluded that it should continue for a further 28 days. Although that decision post-dates the issue of these proceedings and the applications for interim relief, it is agreed by all concerned that it is that decision that should be the focus of attention in this application to determine whether or not an order should be made requiring the release of the third claimant pending determination of her claim.

4 The outcome of this application for interim relief depends on the application of the well-known *American Cyanamid* principles, subject to appropriate modification for the public law context: see the judgment of Cranston J in *Medical Justice, R (on the application of) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin). The claimant must show a real prospect of success at trial, that is to say a real prospect that at trial she will succeed in obtaining an order in the form that is now sought by way of interim relief, an order for release. If such real prospect exists, the order requested as interim relief must be the preferable option on the balance of convenience, that balance of convenience taking account of the public interest in the operation of an effective system of immigration control. It is also the case that since the relief sought in this application may well be, for all practical purposes, a form of final relief, and since the order sought is also in the form of a mandatory order, the claimant must demonstrate a particularly strong case on the merits before the possibility of an interim order arises.

5 The claimant is detained pending deportation from the United Kingdom to Greece. She is 23 years old. She is a Greek national. She came to the United Kingdom in December 2017 and worked as a member of cabin crew on commercial passenger flights. In April 2018, she was kidnapped, held hostage and sexually assaulted. This traumatic experience led to profound changes in her life. She became addicted to drugs. During 2019, she was convicted on five occasions in respect of some 12 criminal offences. On 30 December 2019, she was convicted by magistrates on a charge of possession of a Class A drug; she was sentenced to seven weeks' imprisonment.

6 A deportation order was made on 13 February 2020. Prior to that, on 23 January 2020, the claimant had been detained under Immigration Act powers, pending removal. On 2 April

2020, the Secretary of State gave notice of deportation arrangements for the claimant's return to Greece by plane on 5 May 2020. The claimant remains at Yarl's Wood IRC. There, she occupies a room on her own. She explains in her statement that her room has shower and WC facilities. She further explains that she leaves her room only to collect meals from the canteen. She then returns to her room to eat those meals.

7 The legality of the claimant's detention depends both on the existence of a legal basis for that detention and on whether maintaining detention is consistent with the Secretary of State's policies as to how she will exercise the powers to detain that are available to her. In this application, the claimant does not question the legal basis for her detention. She does not submit that her detention is unlawful on the basis of the well-known *Hardial Singh* principles. Rather, her submission is that her detention is unlawful because it is contrary to the Secretary of State's statements of policy as to when she will exercise her power to detain.

8 The Secretary of State's policy on use of immigration detention powers starts with Chapter 55 of the Enforcement Instructions and Guidance. Chapter 55 refers to a general approach of a presumption in favour of bail rather than detention unless detention is required to effect removal or there are reasons to believe that the person concerned would not comply with bail conditions. Chapter 55 also refers to various special cases. One such is that of persons falling within the Secretary of State's "Adults at Risk" Policy. Adults at Risk are persons assessed by the Secretary of State to be particularly vulnerable to harm if in detention. The Secretary of State's policy is that for this class of person the usual presumption against detention is strengthened. The Adults at Risk Policy lists classes of person who may be particularly vulnerable to harm if detained. For present purposes, these include persons who are potential victims of modern slavery, persons who may, in the past, have suffered torture and persons suffering from serious illness or health conditions. Further guidance on the scope of this particular category has been given in the specific context of the present COVID-19 pandemic so as to capture those who would be at increased risk of serious harm were they to contract COVID-19. This includes persons with chronic heart disease.

9 Is there a real prospect that the claimant will succeed at trial on her submission that her detention is unlawful as in breach of any material part of the Secretary of State's policies?

10 First, the claimant's position as a potential victim of modern slavery. In 2018, the claimant made a claim to the National Referral Mechanism ("NRM") that she had been a victim of modern slavery by reason of what had happened to her in 2018. She received a positive reasonable grounds decision from the NRM but then absented herself from the process, resulting in a negative conclusive grounds decision by the NRM on 8 August 2018. On 6 April 2020, the solicitors now acting for the claimant wrote to the NRM requesting reconsideration of that decision. It is agreed by the parties that a message from the NRM dated 15 April 2020 does mean that the NRM has agreed to reconsider its negative conclusive grounds decision and that that reconsideration is now in progress. The claimant submits that this means she should be treated as if she is a person in receipt of a positive reasonable grounds decision, a submission that seems to me to be consistent with para.14.229 of the Modern Slavery Act 2015 Statutory Guidance.

11 The Adults at Risk Policy states that whether persons who are the subject of a positive reasonable grounds decision should be detained should be decided on the basis of guidance given in the statutory guidance on the Modern Slavery Act. That guidance, however, is largely silent on the matter of detention. The only reference seems to be at para.15.249 of Annexe F to the Guidance, where it is said that there is no requirement to release from detention if there are reasons of public order not to do so. The reference to public order picks up language used in Article 13 of the Council of Europe Convention on Action Against Trafficking in Human

Beings, although that Article deals not with detention but rather with the circumstances in which states may remove a person from its territory notwithstanding that it is believed that they may be a victim of modern slavery. It is unfortunate that the present Statutory Guidance in relation to the Modern Slavery Act deals with detention only in such an oblique way.

12 I have been shown the judgment of the Court of Appeal in *TT (Vietnam) v Secretary of State for the Home Department* [2019] EWCA Civ 248, where the court considered an earlier version of the Statutory Guidance which set out the position on detention in more detail and in the main body of the guidance, rather than an annexe. I cannot help but suspect that this specific policy "ball" was dropped somewhere between the EIG and the Modern Slavery Act Statutory Guidance. Be that as it may, and focusing on the 27 April 2020 detention review document, I am satisfied that, on the facts of this case, there is a real prospect at trial that the claimant will demonstrate that her detention is contrary to this part of the Secretary of State's policy and therefore unlawful.

13 Mr Manknell, counsel for the Secretary of State, has taken me to the judgment of the Court of Appeal in *TT* and, in particular, to para.46, para.54 and para.58 to 60. Based on those passages, I accept that matters such as a risk of absconding or a risk of reoffending are matters that can make good an argument that the public order criterion for maintaining detention is made out. In this case, those matters have been formally assessed in the most recent detention review as "medium" and "high" respectively. This is by reference to the boxes that are ticked on that form. I recognise that on the facts in *TT*, where similar rankings were in issue, the court concluded that the public order basis for detention was present. But in doing so, it is apparent that the court looked at the substance of the position, not simply looking to which boxes had been ticked on the pro-forma document. Looking at the substance in this case, the risk of absconding does not recognise that if released the claimant would, as a person with the benefit of a positive reasonable grounds decision under the NRM, have the benefit of accommodation and financial support until such time as the reconsideration process is complete. As to the risk of reoffending, the offences that the claimant did commit, as I have said, 5 convictions for 12 offences in the course of 2019, were the consequence of her drug addiction, itself a consequence of being out of accommodation. The claimant has now completed a programme of Methadone treatment and if released her status in the NRM would mean that accommodation would be available to her.

14 I also take account of the time likely now to pass before the reconsideration decision is made. I am told that the NRM has not yet allocated the case to a case worker and will not do so until some point next week. Thereafter, that person will need to decide what steps need to be taken and how to take them. In present circumstances, that is to say the severe restrictions on movement and so on that have been put in place in order to combat transmission of COVID-19, it does not seem to me that any of those matters that the NRM will need to address are likely to happen quickly.

15 The Secretary of State suggests that a "wait and see" approach on this point is appropriate. The decision taken in the most recent detention review document is a decision to maintain detention for a further 28 days. If, as time passes, it becomes apparent that the reconsideration process will require an extended period, then, says the Secretary of State, either she would be able to review the matter again or the matter could be brought before the court again, either by way of a further application for interim relief or a bail application. While I can see some force in that submission, I am satisfied that on the facts of the present case it is tolerably clear now that the NRM process is likely to take some time. It is then a matter that feeds into the assessment of the claimant's likely prospects of success. I have taken this into account as Mr Manknell accepted that as a matter of policy this would be a relevant consideration for the Secretary of State.

16 I mentioned earlier the lack of any clear statement of policy relating to the approach to the detention of persons who are the subject of positive reasonable grounds decision. The point accepted by Mr Manknell, entirely correctly as it seems to me, about the relevance of the likely duration of detention, is not a matter that is addressed anywhere on the face of any policy relating to the exercise of the power of detention when it comes to person who are the subject of positive reasonable grounds decision. This seems to me to be simply an example of why it would be beneficial for the Secretary of State to set out her policy on this aspect of the use of her detention powers in one place in a way that is comprehensive in the same way as she has already done when it comes to the remainder of the classes of persons falling within the Adults at Risk Policy.

17 The second matter is the claimant's submission by reference to her contention that she is a victim of historic torture. The Adults at Risk Policy is to the effect that in the circumstances of this case, where there is objective information in the form of scarring to support the claimant's claim to have been tortured, this brings her into what is described as Evidence Level 2 under the Adults at Risk Policy. The policy provides that in such instances a person should be considered for detention only if removal would take place within a reasonable timescale or that there were public protection concerns or that there is evidence of past non-compliance with immigration control or other relevant court orders. As I see it, the first of those possible matters is relevant here.

18 Had this basis of challenge stood alone and had the basis of challenge based on the claimant's position within the NRM not existed, I would not have concluded that this ground of challenge gave rise to a real prospect that the claimant would, at trial, make good a submission that her detention was unlawful for this reason. In support of this part of her submission the claimant points to the fact that the detention review refers to a proposed removal date to Greece of 5 May, when the evidence is that for now, there are no direct commercial flights between the United Kingdom and Greece, and it is unlikely that there will be any before 15 May 2020 at the earliest. Thus, says the claimant, the information on the detention review document is in error.

19 I do not consider that this matter is sufficient to make out a case to the required standard. Whether such a case exists must depend on the likelihood that the substantive decision to maintain detention will be found to be unlawful, even though removal will not take place on 5 May. Removal would, but for the matters I have already mentioned relating to the NRM reconsideration process, have taken place within a reasonable timescale, or at least that was still likely to be the position. The effects of the COVID-19 pandemic have been severe in many European countries. The date for the claimant's removal certainly could not be stated with certainty. However, I accept that when those circumstances change the Secretary of State would remove the claimant from the UK, again now subject to the conclusion of the NRM process. That event would, no doubt, be more distant than originally envisaged. It would certainly not take place on 5 May 2020. But nevertheless, it remains an event that would take place within a reasonably proximate period of time. Although there are restrictions on international travel presently in force, there is no suggestion for now that those restrictions will be in force indefinitely. Again, then, for that reason I would not conclude that the claimant's present detention was likely to be found unlawful on the basis that her detention was at odds with her contention to be within the Adults at Risk Policy on the basis that she is a victim of torture.

20 The third basis on which the claimant contends that her detention is contrary to the Secretary of State's policy is on the basis of serious ill-health. Various claims have been made about the claimant's health. The one that is pursued before me is contained in a letter dated 6 April

2020 from her solicitors, which states that the claimant suffers from mitral valve prolapse, a condition that affects the proper functioning of her heart. The letter stated that, while living in Greece and for some time while she was living in the United Kingdom, the claimant was prescribed medication for this condition which appears to result in episodes of hypertension. The detention review document refers to the fact that the claimant mentioned no such condition either while in prison or on arrival in detention. It appears that the claimant's blood pressure and pulse were measured on her arrival at Yarl's Wood and were found to be normal.

21 The claimant's submission is that the Secretary of State has failed to take sufficient steps to look into the heart condition the claimant claims to suffer from. For example, no steps to undertake regular measurement of the claimant's blood pressure or pulse, and no steps to undertake any other suitable medical examination that might assist in identifying whether the claimant falls within a class of persons at increased risk of serious harm in the event that they were to contract COVID-19.

22 It is apparent that since 6 April 2020 the claimant has visited the health centre on a number of occasions. There is no record of any examination or test to determine whether the claimant has the heart condition claimed or symptoms of it. The response to the 6 April letter I am told is in the form of a note on the claimant's medical file made on 14 April which reads as follows:

> "No entry in YW or prison records during any health screening with doctor or nurse of any heart condition/mitral valve prolapse. Has informed healthcare re history of lymph node swelling in past. Investigated in Greece one year ago. Advised to monitor. Pulse and BP checked on arrival. No indication/reason to have rechecked since then. Has been seen in healthcare last month for mental health review and substance misuse clinics and sexual health nurse."

23 The Secretary of State has provided no further evidence to explain why further steps or, it would appear, any steps need to be taken to investigate the presence or not of a condition which, if it exists, seems to be common ground would be a condition giving rise to an increased risk of harm were the claimant to contract COVID-19. It seems to me that further steps could and should have been taken and perhaps now those steps should be taken to investigate whether the claimant does suffer from mitral valve prolapse. That is something I consider the Secretary of State should do. But I do not consider that the Secretary of State's failure to take those steps so far is a matter that goes to the legality of the claimant's detention or gives rise to a real prospect of success that on this ground she would succeed at trial in demonstrating that her detention is now unlawful.

24 If the claimant does suffer from the heart condition she has described, it is highly likely, given the terms of the Adults at Risk guidance, as supplemented to take account of the potential effects of COVID-19, that the claimant would be released because her case would fall within the Evidence Level 3 category in that policy. If she does not have that condition, her circumstances would fall within Evidence Level 2 and the situation in respect of this argument would be materially the same as the situation I have described on the basis of the grounds that the claimant is within the category of victims of torture.

25 All this being so, I consider the Secretary of State should take reasonable steps as soon as possible to determine whether the claimant falls within either evidence level 2 or evidence level 3 of the Adults at Risk Policy for this reason. This is not, however, a matter that I consider goes to the legality of her detention.

26 Balance of convenience. My conclusion on the balance of convenience is heavily influenced by the fact that the claimant only seeks an order for release if and to the extent that the

Salvation Army, in performance of its obligations as part of the NRM machinery, will provide accommodation for her pending reconsideration of the negative conclusive grounds decision. That condition, together with such reporting conditions as the Secretary of State may think appropriate, in my view mitigate the risks arising from release, that is to say the risk of absconding and the possible risk of reoffending. It was the claimant's chaotic life without accommodation, as it seems to me, that drew her into offending. If released, it will be with the benefit of the accommodation and support provided to those with favourable positive reasonable grounds decisions within the NRM process.

27 I therefore consider that the balance of convenience favours an order requiring the claimant's release from detention subject to regular ordinary reporting conditions and subject also to a condition that she is not released until such time as accommodation from the Salvation Army is available for her occupation.