Neutral Citation Number: [2020] EWHC 3289 (Admin)

Case No: CO/2698/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2020

Before:

MR JUSTICE MOSTYN

- -

Between:

The Queen on the application of
MOHAMMAD SHAHAB MAHBOUBIAN **Claimant**

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

- -
- -

Phil Haywood (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Alan Payne QC (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 26 November 2020

- -

Approved Judgment

Mr Justice Mostyn:

1. Since 30 August 2019 the claimant has been detained at HMP Durham under the authority of the defendant pursuant to Paragraph 2(3) of Schedule 3 to the Immigration Act 1971. The power to detain arises where a deportation order is in force. Such an order was made on 1 October 2018. The defendant accepts that the detention since 12 August 2020 has been unlawful. By virtue of an order made by me at the conclusion of the hearing on 26 November 2020 the defendant is to be released forthwith subject to agreed conditions as to reporting, tagging and curfew.

2. The question I have to decide is whether the detention of the claimant from 30 August 2019 to 12 August 2020 was also unlawful.

3. The defendant has a claim for damages for the period of his unlawful detention. The defendant maintains that any damages should be nominal. This was not pleaded in the defendant's detailed grounds of defence but only arose late in the day in the oral argument on her behalf. I made clear during the hearing that I would not be dealing with the quantification of damages but only with the question of liability. There is no dispute that the defendant is liable in respect of the period beginning on 12 August 2020. As indicated above, the question is whether there is liability for damages for the period from 30 August 2019 to 12 August 2020.

4. Once I have reached my decision on any additional liability I expect the parties to seek to agree the quantum of damages. In anticipation of disagreement they must agree directions for statements to be made as to the damages claim and for the matter to be determined.

Factual background

5. The claimant was born in Teheran, Iran on 20 January 1979. He is therefore aged 41. On 30 June 2010 he attempted to enter this country but was stopped at the border and returned to France. On 20 July 2010 he successfully entered this country clandestinely and claimed asylum. That claim, and a supplemental claim, were refused and his appeals were dismissed. On 21 February 2011 the claimant became appeal rights exhausted in respect of his asylum claims.

6. On 20 March 2013 the claimant applied for discretionary leave to remain in the country. Such leave was granted until 3 March 2016. By that stage the claimant had formed a relationship with a British citizen. From that relationship two sons were born in respectively 2012 and 2013.

7. On 28 November 2015 the claimant was working as a pizza delivery driver. He lured a 15-year-old girl into his vehicle and sexually assaulted her by kissing and fondling her, and by penetrating her with two of his fingers. He was arrested on 30 November 2015. He was sent for trial at the Crown Court at Durham.

8. On 19 February 2016, while awaiting trial, the claimant applied for indefinite leave to remain under the 10-year partner route. His application was refused on 3 October 2018 when he was notified that he would be deported, pursuant to a deportation order signed two days earlier.

9. On the morning of the trial on 10 May 2016 the claimant pleaded guilty to one count of sexual assault without penetration and to one count of sexual assault with penetration.

10. Plainly this was a very serious offence with aggravating features including abduction, prolonged detention, threats of violence and victim vulnerability. This was reflected in the sentence that was awarded of 7 years and 6 months imprisonment. This sentence incorporated a 10% reduction to reflect the very late guilty plea. In addition, an indefinite sexual harm prevention order was made, and the claimant was put on the sex offender register for the remainder of his life.

11. The claimant was taken back to HMP Durham, where he has remained ever since. His automatic release date, after service of half of the sentence, and with credit for time served on remand, was set at 30 August 2019. On that day, subject to immigration detention, he would be released on licence and would remain subject to supervision, and possible recall to prison, until 1 June 2023.

12. On 11 December 2017 the defendant notified the claimant that, unless he could show that one or more of the exceptions under section 33 of the UK Borders Act 2007 applied, she intended to make an automatic deportation order against him as a foreign criminal sentenced to more than 12 months in prison. On 5 March 2018 the defendant served the claimant with a Stage 1 decision to deport. On 23 March 2018 the claimant made submissions resisting his deportation based on his rights under Article 8 of the European Convention on Human Rights. On 1 October 2018 the deportation order was signed and on 3 October 2018 the claimant's submissions resisting deportation were refused. The claimant appealed to the First-Tier Tribunal; his appeal was dismissed on 18 February 2019. On 5 March 2019 the claimant became appeal rights exhausted.

13. On 27 June 2019 the claimant was notified that he would be detained under Paragraph 2(3) of Schedule 3 to the Immigration Act 1971 on his release date of 30 August 2019. He was informed that the reasons for his detention were that it was considered likely that he would abscond and that because his release was not considered conducive to the public good.

14. On 9 July 2019 a bio-data form was completed in respect of the claimant and sent to the Iranian Consulate for the purposes of the issue of an emergency travel document to enable the removal of the claimant to Iran.

15. On 30 August 2019 the claimant's criminal detention ended and his immigration detention began.

Legal principles

16. I now set out the relevant legal principles to be applied in determining whether in the period 30 August 2019 – 12 August 2020 the claimant was unlawfully detained.

17. Paragraph 2(3) of Schedule 3 to the Immigration Act 1971 provides, so far as is relevant to this case:

> "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

> … unless he is released on immigration bail under Schedule 10 to the Immigration Act 2016."

18. Under Schedule 10 to the Immigration Act 2016 either the Secretary of State or the First-Tier Tribunal may grant bail to a person detained under Paragraph 2(3) of Schedule 3 to the Immigration Act 1971. A grant of bail must be made subject to one or more conditions relating to things such as reporting, working, residence and tagging. Tagging is almost compulsory. In deciding whether to grant bail the Secretary of State or the First-Tier Tribunal must have regard, among other things, to the likelihood of the person failing to comply with a bail condition; whether the person has been convicted of an offence; the likelihood of a person committing an offence while on immigration bail; the likelihood of the person's presence in the United Kingdom, while on immigration bail, causing a danger to public health or being a threat to the maintenance of public order; and whether the person's detention is necessary in that person's interests or for the protection of any other person.

19. Although it is not explicitly stated in Schedule 10 it is clear that when a First-Tier Tribunal judge considers whether or not to grant bail he or she is not deciding whether continued detention is lawful or not. Para 6 of the Guidance on Immigration Bail for Judges of the First-tier Tribunal (Immigration and Asylum Chamber) (15 January 2018) rightly expresses this important principle.

20. Paragraph 9 of Schedule 10 to the 2016 Act addresses the situation where a person has been granted immigration bail subject to a condition requiring him or her to reside at a specified address and that person would not be able to support himself or herself at that address without assistance. In such a case the Secretary of State may arrange to provide accommodation provided that she thinks there are exceptional circumstances justifying the exercise of the power.

21. Under section 4 of the Immigration and Asylum Act 1999 the Secretary of State may arrange for the provision of accommodation for a person released on bail from detention under any provision of the Immigration Acts or for an asylum seeker whose claim has been rejected.

22. Although the language of Paragraph 2(3) of Schedule 3 to the Immigration Act 1971 is wide and unfettered the courts have significantly circumscribed the scope of the power to detain and have laid down clear principles. These are known as the *Hardial Singh* principles. They were conveniently summarised by Dyson LJ in *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888 at [46]:

> (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 that 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.

The principles are no doubt thus framed in order to ensure that the power is exercised consistently with Article 5(1)(f) of the European Convention on Human Rights which authorises the lawful detention of a person against whom action is being taken with a view to deportation.

23. What amounts to a reasonable period is, needless to say, highly fact specific. Its length will take account of the obstacles which might prevent a deportation. Some countries simply will not accept a return of their nationals who have committed crimes in this country. If that is proved then continued detention cannot be justified. Equally, the diligence of the Secretary of State in trying to secure emergency travel documentation from the relevant Consulate will be relevant in determining what is a reasonable period. The matters that a First-Tier Tribunal judge must consider when deciding to award immigration bail are plainly relevant to what amounts to a reasonable period. Therefore, the risk that the detainee will abscond or commit offences if released will be highly material.

24. If the detainee refuses to cooperate with the process to enable his deportation then such resistance can properly be taken into account as demonstrating a heightened risk of absconding justifying a prolongation, perhaps for years, of the reasonable period of detention. Of course, throughout that extended period it remains incumbent on the Secretary of State to act with reasonable diligence to try to implement the removal. Provided that she does so, then a lengthy extension of the detention of a recalcitrant detainee may well be justified.

25. The third principle acts to bring the reasonable period to a halt if the end of the road is reached in trying to get the agreement of the foreign country to accept the return of its national. However, when considering this principle, the court must be alive to the delicate and nuanced nature of diplomatic negotiations and that in that sphere things are rarely black-and-white or cut and dried.

26. The lawfulness of any period of detention must therefore be judged by reference to these principles. As will be seen, in this case there were three grants of immigration bail by the First-Tier Tribunal, in each instance subject to a condition of suitable accommodation, which was not implemented by the defendant with the result that the claimant remained detained in Durham prison.

The period 30 August 2019 – 12 August 2020: the facts

27. As already explained, on 30 August 2019 the custodial element of the claimant's sentence came to an end and he was eligible for release on license. The claimant's situation did not change however because he was detained under the Immigration Act 1971.

28. In advance of the end of the custodial sentence, preparations had begun by July 2019 to obtain an emergency travel document from the Iranian authorities to facilitate the claimant's return to Iran. The claimant was uncooperative in this regard, having refused to give his fingerprints on several occasions.

29. Since 30 August 2019 there had been monthly Detention and Case Progression Reviews by the Case Progression Panel ("CPP"). Most of these reviews assessed the claimant as posing a high risk of absconding and/or re-offending and/or inflicting harm, and the continued detention of the claimant was recommended, save as set out below. The claimant was assessed as needing MAPPA ("Multi-Agency Public Protection Arrangements") level 1 management in the light of the serious nature of his offending.

30. From October 2019 onwards the defendant sent the claimant monthly progress reports. Each report records that the obstacle to removing him from the UK was the absence of the emergency travel document. They also cited the asylum representations made by the claimant in the periods when this has been relevant (principally in November 2019 and June 2020).

31. In October 2019 the Iranian authorities signified that the process for enforced returns could restart, it having been paused for approximately five months. There were meetings in August, October and November 2019 between the defendant's officials and the Iranian consular officials about the return of several individuals, including the claimant.

32. On 23 October 2019 the claimant made an application for bail but subsequently withdrew it at a hearing.

33. On 30 October 2019 the Probation Service assessed the claimant as posing a low risk of re-offending and a high risk of serious harm to children. However, this appraisal was revised to designate the claimant as being high risk of re-offending.

34. In the meanwhile, the claimant submitted several private addresses to which he could be released, but the Probation Service refused approval of them. In more recent times the claimant has not proposed any private addresses of family or friends.

35. On 15 November and 22 November 2019, the claimant made submissions to the defendant expressing his fear of returning to Iran and citing his family life here in the UK. These were rejected on 29 November 2019 with no right of appeal.

36. On 13 January 2020 the Iranian Consulate accepted that the claimant was an Iranian national and agreed in principle to provide him with an emergency travel document.

37. On 30 January 2020 the First-Tier Tribunal considered a second application by the claimant for bail. Bail was granted on the condition that suitable accommodation be found. In the event that suitable accommodation was not provided by 14 February 2020, the grant would lapse. A request for accommodation was made by the defendant to her suppliers on 3 February 2020, but, unsurprisingly, none could be identified.

38. On 10 February 2020 the CPP recommended the claimant's release on bail, considering that there was no reasonable timeframe for the claimant's deportation to Iran. What the CPP did not know was that the Iranian authorities had recently agreed in principle to issue the claimant with an emergency travel document. The recommendation of the CPP was not accepted by the Strategic Director with whom the ultimate decision rested in cases of foreign national offenders.

39. In late February 2020 there was a change of Iranian Consul and his assistant. The Iranian authorities requested that the new consul be given a period of time to be briefed on these and other matters.

40. On 28 February 2020 a grant of support under Schedule 10 of the 2016 Act was approved although this was not made known to the claimant at the time.

41. On 4 March 2020 the First-Tier Tribunal allowed an appeal by the claimant against the defendant's decision to refuse to provide support pursuant to section 4(2) of the 1999 Act. Consequently, the defendant wrote to the claimant on 12 March 2020 confirming that she would provide accommodation and subsistence support under that provision. A request for accommodation was made on the same day.

42. The duplication of the authorisation of the provision of accommodation is of no consequence as the accommodation, whether provided under section 4(2) or Schedule 10, is sourced from the same pool.

43. In March 2020 the defendant chased her accommodation providers. However, the grant of bail had already lapsed by then as no suitable accommodation had yet been found.

44. It is well known that towards the end of March 2020 the UK went into an unprecedented lockdown brought about by the Covid-19 global pandemic. This had an almost immediate paralysing effect on much of the public and private sectors. One consequence was to pause the requirement on people who had failed in their claim for asylum to move from their accommodation. This naturally caused a major strain in the system with the number of people requiring accommodation increasing. Conversely, available accommodation has not expanded rapidly enough to keep pace with the increased demand. Much of the accommodation recently acquired to deal with the issue was in hotels, which was not suitable for this claimant due to the nature of his offending.

45. On 6 April 2020 a third bail application by the claimant was considered and provisionally granted. At a contested hearing on 8 April 2020 the grant of bail was refused. The First-Tier Tribunal judge stated that had it not been for the absence of appropriate accommodation he would have granted bail.

46. In April 2020 the defendant chased her accommodation providers at least twice.

47. On 1 May 2020 a review was undertaken to consider whether the claimant was unduly impacted by Covid-19 in light of his continued detention. The review found that the claimant was not unduly impacted.

48. On 22 May 2020 an internal update within the Home Office recorded that an emergency travel document had been agreed in principle and that commercial direct flights to Iran continued. However, at that stage Iran was only willing to issue emergency travel documents for individuals who were voluntarily returning to Iran, which was not the position of the claimant.

49. On 29 May 2020 a fourth bail application by the claimant was considered. The defendant was directed to explain why suitable accommodation had not been obtained and to clarify the position regarding the claimant's return to Iran. Again, the

commencement of the grant of bail was made conditional on the provision of suitable accommodation for the claimant.

50. In May 2020 the defendant chased her accommodation providers at least twice.

51. In June 2020, the defendant chased her accommodation providers up to eleven times.

52. A number of responses received from providers stated that due to the nature of the claimant's offending, they were unable to provide accommodation because, for example, of the presence of lone females and/or children. This has been a complicating feature in the search for accommodation and has inevitably made it harder and therefore longer.

53. In early June 2020 the Iranian authorities confirmed its intention to encourage Iranians illegally present in the UK to return to Iran and indicated that they wished to resume talks about the enforced return process.

54. On 2 June 2020 the claimant submitted a new application for asylum on the basis of his recent purported conversion to Christianity. This was refused but the claimant is exercising his right of appeal.

55. The claimant, through his solicitors, sent a pre-action protocol letter on 12 June 2020 in anticipation of this judicial review.

56. On 18 June 2020 a fifth and final bail application by the claimant was considered. Again, a grant of bail was made conditional on the provision of suitable accommodation for the claimant. On 22 June 2020 it was recommended that the search for suitable accommodation be escalated to a senior manager for urgent resolution.

57. On 17 July 2020 it was ordered by the First-Tier Tribunal's own motion that the grant of bail had lapsed, no suitable accommodation having been found.

58. On 20 July 2020 the Iranian Consul indicated at a meeting that Iran would be keen to resume enforced returns once the Covid-19 restricted lifted.

59. In July 2020 the defendant chased her accommodation providers up to eight times.

60. Between 1 and 5 August 2020 defendant chased her accommodation providers three times. On 3 August 2020 the matter was escalated to the Service Delivery Manager. On 6 August 2020 the CPP recommended the release of the claimant. An address was proposed and sent to the Probation Service for approval. In the end it was not approved because of the presence of a female maintenance officer.

61. As stated above, the defendant accepts that the claimant's detention became unlawful on 12 August 2020.

Was the detention in the period 30 August 2019 – 12 August 2020 lawful?

62. Mr Payne QC has suggested that I should look at the claimant's immigration detention in two phases. First, I should look at the phase before the first grant of immigration bail. That phase should be analysed by reference to the classic *Hardial Singh* principles. Next, I should look at the phase following the first grant of bail on 30 January 2020.

For that phase, I should ask first whether the defendant has diligently and in good faith sought to give effect to the condition of suitable accommodation. If the answer to that is yes, but unfortunately it was not possible to do so with the result of continued detention, then the resultant continued detention must be subjected to *Hardial Singh* analysis. I agree with this approach. Mr Haywood did not suggest otherwise.

63. I consider first the phase 30 August 2019 to 30 January 2020. As explained above, it was on the latter date that the claimant was first granted bail.

64. I am satisfied that in this phase the *Hardial Singh* principles were satisfied and the detention was therefore lawful. I note in particular:

i) the claimant's case was regularly and carefully scrutinised and he was judged on almost each occasion to represent a risk of committing further offences or absconding;

ii) the defendant had actively engaged with the Iranian Consulate which had agreed in principle by 13 January 2020 to issue an emergency travel document for him;

iii) the claimant was actively resisting deportation by making submissions (a) asserting that he would be placed in jeopardy should he be returned to Iran and (b) relying on his right to family life in this country. Further, the claimant had refused to give his fingerprints for the purposes of obtaining an emergency travel document; and

iv) in the absence of suitable accommodation having been identified by the claimant to the probation service he would have been at serious risk of being recalled to prison under the terms of his licence had he been released.

65. I consider now the phase 30 January 2020 to 12 August 2020. In this phase, as explained above, the claimant was granted immigration bail, subject to a condition of suitable accommodation, on 30 January 2020, 29 May 2020 and 18 June 2020. Although decisions had been taken to afford the claimant accommodation pursuant to Schedule 10 of the 2016 Act and section 4 of the 1999 Act, none had been provided. And so, the grant of bail in each instance was frustrated and the claimant remained detained. It is fair to say that the reasoning of each First-Tier Tribunal judge reveals increasing exasperation at the failure to provide suitable accommodation. Such exasperation is also reflected in the terms of the grant of permission to seek judicial review by Johnson J on 24 August 2020 where he said:

> "The operative cause of the Claimant's continued detention is the fact that accommodation has not been provided. The Secretary of State appears to have accepted an obligation to provide accommodation and must therefore secure such accommodation within a reasonable time. The assessment of what is a reasonable period of time is fact sensitive. Here, the relevant context includes the fact that the Claimant poses a clear public protection concern and that the approval of the Probation Service is required. These factors are constraints on the accommodation that would be suitable and may justify a longer period of time than would otherwise be the case.

> I do not consider it is obviously sufficient for the Defendant to show (as she apparently has done) that she has repeatedly chased her accommodation providers. Faced with a continued failure by her accommodation providers to source accommodation, there arguably comes a point when the Defendant must either take matters into her own hands and directly source accommodation, or must demonstrate that it is simply not possible to source appropriate accommodation."

66. Although criticisms can reasonably be made I do not think they sufficiently reflect the difficulty faced by the defendant in the light of the eruption of the Covid-19 pandemic in mid-March 2020. This led to a pause of all asylum decisions until September 2020 rendering it virtually impossible in this and similar cases to source suitable accommodation. I do not accept that the defendant was merely going through the motions, firing emails into the ether, as Mr Haywood put it, and not seriously trying to comply with the spirit of each grant of bail. Identification of accommodation was always going to be difficult in this case given the nature of the original offences and the fact that for a lengthy period the claimant was going to be on licence supervised by the probation service which had an important say in the accommodation to be allocated to the claimant. In my judgment the eruption of the Covid 19 pandemic made this task virtually impossible.

67. I am not prepared to find, therefore, that the defendant did not conscientiously and in good faith seek to source appropriate accommodation so that the grant of bail could take effect. On the contrary, I find that reasonable efforts were made but that events conspired against her.

68. I now apply the *Hardial Singh* principles to the continued detention that resulted from the failure to provide accommodation. In my judgment, the period of continued detention had not become unreasonable. As stated above, the claimant had taken yet further steps to seek to frustrate the deportation. Mr Payne QC told me that a purported conversion to Christianity is a well-recognised ploy by deportees seeking to avoid removal to Iran. In the absence of suitable accommodation being identified he plainly represented an unacceptable risk of absconding and/or of committing further offences.

69. It is true that the discussions with the Iranian consular authorities had been progressing intermittently and slowly. A hiatus had arisen when there was a change of consul. The eruption of Covid-19 completely disrupted the progress that had been made to the resumption of forced returns to Iran. However, on 5 June 2020 the Iranian authorities had indicated that they wish to resume conversations about the enforced return process. That became a much more solid prospect on 20 July 2020 when the Iranian authorities signified that they were keen to resume the enforced returns process. In such circumstances it is my judgment that the end of the road had not been reached. Put another way, at no point in this second phase could it be said that the defendant should have reached the conclusion that she would not be able to implement a forced return within a reasonable time, thus bringing to an end her lawful power to detain the claimant.

70. I therefore find that for the phase 30 January 2020 to 12 August 2020 the detention of the claimant was lawful.

71. The defendant now accepts that with effect from 12 August 2020 the claimant has been detained unlawfully. I asked Mr Payne QC to state in pithy terms precisely why that decision was reached. His written response was as follows:

> "The decision taken on 12 August 2020 (but recorded on 14 August 2020) was to maintain the Claimant's detention (the 'Decision'). The Decision was made in the context of the Claimant having been granted bail. The Decision did not refer to or identify a material change in the circumstances, since the grant of bail by the First Tier Tribunal, which were said to justify the decision to further detain the Claimant. For this reason, it is accepted that the Claimant's subsequent detention pursuant to the 12 August decision was unlawful."

72. As stated above, pursuant to an order made by me on 27 November 2020, the claimant is in the process of being released subject to conditions, agreed on his behalf, relating to reporting, tagging and curfew.

73. The claimant is entitled to damages for false imprisonment for 3½ months. The defendant intends to argue that the damages should be only nominal. I shall not set out in this judgment the arguments of Mr Payne QC in this regard. Suffice to say that procedural fairness requires that these are clearly stated in writing and that the claimant is given the opportunity to respond to them. As stated above, I expect counsel to agree the necessary directions if the quantum of such damages cannot be agreed. If there is a dispute as to the directions then I will rule on it.

74. That is my judgment.
