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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 3187 (Admin)

No. AC-2023-LON-003383

Royal Courts of Justice

Tuesday, 28 November 2023

Before:

MR JUSTICE CHAMBERLAIN

B E T W E E N :

THE KING
on the application of
ER — Claimant

\- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT — Defendant

____

MS A PATYNA (instructed by Leigh Day) appeared on behalf of the Claimant.

MR M BIGGS (instructed by the Government Legal Department) appeared on behalf of the Defendant.

____

J U D G M E N T

MR JUSTICE CHAMBERLAIN:

1 The claimant, ER, is a national of Trinidad & Tobago. He suffers from schizoaffective disorder. He has been detained under the Mental Health Act 1983 several times. He is an "adult at risk" within the meaning of the Home Secretary's policy.

2 However, ER also has a very large number of criminal convictions. The most recent was in January 2022 when he was convicted on two counts of wounding or inflicting grievous bodily harm, several counts of possession of drugs with intent to supply and possession of a knife in a public place. In May 2022, he was sentenced to three years' imprisonment. On 16 February 2023, he was assessed by the Probation Service as posing a high risk of reoffending and a high risk of causing harm to the public.

3 A deportation decision was served on ER in June 2022. He made representations opposing deportation. A deportation order was signed in April 2023. The custodial element of ER's sentence came to an end on 13 April 2023, whereupon he was detained pending deportation under immigration powers, namely para. 3 of Schedule 2 to the Immigration Act 1971. He was referred to the national referral mechanism as a possible victim of trafficking on 29 May 2023. A positive reasonable grounds decision was made on 14 August 2023.

4 On 17 August 2023, ER applied to the First-tier Tribunal for immigration bail. On 24 August 2023 he was granted bail in principle, subject to appropriate accommodation with electronic monitoring and reporting conditions. To date no suitable accommodation has been found, so ER remains in immigration detention.

5 The relevant sequence of events in outline is as follows. ER's representatives contacted the Salvation Army on the day on which bail in principle was granted (24 August 2023). On 29 August the Salvation Army refused accommodation in a safe house given the risk ER posed to the public. They said that he may be eligible for accommodation under para. 9 of Schedule 10 to the Immigration Act 2016.

6 On 2 September 2023, an application was made for accommodation under para. 9 of Schedule 10. In the absence of any progress, his solicitors made a number of requests by email, telephone and pre-action correspondence for a legal visit with the claimant. These requests were ignored for two weeks until an appointment was offered on 2 November 2023. On that day, there was a bail review hearing before the FTT at which the Home Office representative said that they could not offer a Schedule 10 address because it was possible that the Probation Service might offer accommodation. The First-tier Tribunal judge noted that these delays did not affect the grant of bail in principle and pressed the Home Secretary's representative to find a suitable address for the Probation Service to approve.

7 Having spoken to the charity Detention Action, the claimant saw his lawyers on 3 November 2023. By the time of that visit his mental state had deteriorated. He was in acute distress. He had auditory hallucinations telling him to harm himself, which were becoming overwhelming. His solicitors sent pre-action letters threatening to seek relief requiring the Home Secretary to find suitable accommodation. A pre-action letter had, in fact, been sent prior to the legal visit on 31 October 2023 and on 3 and 8 November further letters were sent. There was no response. Accordingly, this claim was filed on 14 November, together with an application for urgent consideration seeking interim relief in the form of a

mandatory injunction requiring the Home Secretary to release the claimant to a suitable bail address within seven days.

8 On 15 November 2023 the immediates judge, Henshaw J, directed a hearing on notice before a High Court Judge today. That is the hearing which has been before me just now. There was a further hearing before the First-tier Tribunal on 24 November 2023 when bail, in principle, was maintained on terms which are materially identical to those contained in the grant of bail dated 24 August 2023.

9 For the claimant, Ms Agata Patyna submits as follows. First, there is no prospect of removal within a reasonable time because the claimant has a positive reasonable grounds decision which means he cannot be removed before a conclusive decision is made. The Home Secretary's own published data suggests that there are currently delays of 600 days or more in making such decisions. There has been no timescale given for making a decision and, in any event, the requisite travel documentation has not been obtained. These barriers were acknowledged by the First-tier Tribunal when bail was first granted and again, most recently, on 24 November 2023.

10 Second, the claimant is an adult at risk Level 3, or at least Level 2, in terms of the Home Office policy. That policy establishes a strong presumption in favour of liberty in such a case.

11 Third, immigration powers do not authorise preventive detention. Evidence served very recently by the Home Secretary shows that decisions were taken to refuse accommodation under Schedule 10 to the Immigration Act 2016 on 10 and 16 October, but these decisions were never served. In any event, they were based on a material mistake of fact in that they asserted, in the case of the decision of 10 October, that bail had not been granted at all and, in case of the decision of 16 October, that the claimant did not have a bail residence condition. My Patyna submits that both of these assertions were wrong in fact and/or wrong in law in that the absence of a specific address does not preclude the exercise of the power in para. 9 of Schedule 10: see the decision of Johnson J in *Humnyntskyi* [2020] EWHC 1912 (Admin), [2021] 1 WLR 320 at [18]-[19].

12 Fourth, Ms Patyna submits the balance of convenience favours the grant of interim relief in the form of an order that the claimant be released no later than 6 December 2023.

13 For the Home Secretary, Mr Michael Biggs submits as follows. The time taken to secure accommodation for the claimant has been influenced by the fact that he has an appalling criminal record and presents a high risk of reoffending and a high risk of harm to the public. He also has mental health problems which are potentially relevant. It is apparent that steps have been taken to arrange accommodation following the grant of bail in principle on 24 August 2023. As Mr Biggs explained in oral argument, the steps referred to here consist of the referral to the Salvation Army, which explained, on 29 August 2023, that they could not provide safe house accommodation.

14 The claimant's Schedule 10 application was refused on 16 October 2023. In his skeleton argument, Mr Biggs submitted it did not appear that there was a fresh application and that a fresh application could now be made in the light of the grant of bail, again conditional, dated 24 November 2023. In oral argument, Mr Biggs accepted, however, that he could not maintain that there was not at least a serious issue to be tried that the refusals of 10 and 16 October were unlawful.

15 As to the complaint that the claimant is being unlawfully detained, Mr Biggs pointed in his skeleton argument to s.12 of the Illegal Migration Act 2023, which was commenced on 28 September and, he submits, "on any view must apply to the claimant's continued detention." That provision confers authority to detain the claimant for a period the Home Secretary considers reasonable both to facilitate his removal or deportation and "to enable such arrangements to be made for the claimant's release as the Secretary of State considers to be appropriate": see the newly inserted para. 17A(5) of Schedule 2 to the 1971 Act.

16 Mr Biggs submits that so far as the balance of convenience is concerned, ordering release to be obtained within seven or 14 days would be unwarranted "particularly as the claimant has been detained for a considerable period altogether" and, in his original skeleton, submitted that "it remains open to the claimant to make a further Schedule 10 application" on the basis of the FTT's decision of 24 November 2023. The suggestion in the original skeleton was that, if that application were unsuccessful, further judicial review proceedings could be brought. As I understand his submissions made orally today, he no longer maintains that latter submission.

17 In my judgment, the present case has five very concerning features. First, the claimant's solicitors, Leigh Day, first emailed the relevant address seeking a legal visit to visit their client on 17 October 2023. They wrote again on 18 October. On 19 October they telephoned and were put through to the booking line, but the phone went dead. They tried again and the same happened. On the third try they were told the only way to book a visit was by email. So, they emailed on 20 October and again on 24 October, saying that the claimant was a "highly vulnerable victim of trafficking that appears to be unlawfully detained" who required access to lawyers as a matter of urgency. They also called the reception number at Harmondsworth Immigration Removal Centre and left their details. They were told that the person in charge of legal visits would call back. No one did call back. So, they called the General Helpline on 27 October to complain. They were given a different email address and sent an email to that address. They then sent a letter before claim challenging the Home Secretary's failure to facilitate a legal visit.

18 It is wholly unacceptable that the Home Office does not appear to have an adequate system in place to respond promptly to requests for legal visits from solicitors complaining about the unlawful detention of their clients and wholly unacceptable that no visit was facilitated until after the claimant's solicitors had sent a 13-page letter before claim.

19 Second, the first substantive letter before claim challenging the lawfulness of the claimant's continuing detention was sent on 31 October 2023 seeking a response within seven days. A further letter was sent on 3 November 2023, following the legal visit. There was no response within the timescale requested. A yet further letter was sent on 9 November 2023, enclosing an urgent medical letter from two medical practitioners working for the charity Medical Justice and seeking a response by 13 November 2023. Again, there was no response. This too was offhand and unacceptable. A detailed letter from a solicitor claiming that a client is being unlawfully detained requires a prompt response, not a shrug of the shoulders. The response need not be long, but it must set out why, contrary to the solicitor's claim, the detention is believed by the Home Secretary, or his officials, to be lawful.

20 Third, the present claim was issued on 14 November 2023 with an application for urgent consideration. On 15 November 2023, Henshaw J directed the present hearing and ordered the Home Secretary to file and serve any evidence in response by 4pm on 21 November. At 4.10pm the Home Secretary filed an application for an extension of time until 4pm on 23 November. That evidence, directed to be produced by 21 November 2023, was eventually provided at 4.21pm on 23 November 2023, which was last Thursday. It was not

accompanied by any statement of the Home Secretary's position on interim relief. So, over a month after they had received the first communication from the claimant's solicitor that their client was, in their view, being unlawfully detained, and more than three weeks after they had received a detailed letter before claim, there had been no substantive response at all to Leigh Day's contention that the claimant was being unlawfully detained.

21 The papers disclosed did, however, contain two documents, said in the index to be dated 10 and 16 October 2023, which were letters refusing accommodation under Schedule 10 to the Immigration Act 2016, neither of which had previously been supplied to the claimant's solicitors. The claimant's solicitor's evidence is that they were not even supplied to the claimant himself. In the absence of any explanation at all by the Home Secretary, it is unclear why these letters were not supplied earlier.

22 Fourth, the Home Secretary's response to the interim relief application eventually came in the form of a skeleton argument dated 24 November 2023 from Mr Biggs, which said that it was "open to the claimant to make a further Schedule 10 application" and which suggested bringing further proceedings for judicial review if that were unsuccessful. It was not said in that skeleton argument how such an application could in practice have been made given that the refusals of 10 and 16 October had not been sent to the claimant's solicitors until late on the afternoon of 23 November 2023. What was said is that it would be "unwarranted" to grant interim relief in the form sought by the claimant "particularly as the claimant has been detained for a considerable period already." The implication appeared to be that unlawful detention matters less if the person being detained has previously been detained lawfully for a substantial period. That is, to say the least, a surprising suggestion.

23 Fifth, it appears to be at least strongly arguable that the refusal of accommodation under Schedule 10 on 10 and 16 October was unlawful for one or other of three reasons advanced today by Ms Patyna. On 10 October, Schedule 10 accommodation was refused because "our records show that you have not been granted bail". This was straightforwardly false. On 16 October, Schedule 10 accommodation was refused because "you do not have a residence condition attached to your grant of immigration bail." It is difficult to understand this. The original grant of bail on 24 August was subject to the condition that "the applicant will reside at an address that has been approved by Probation". This is materially the same as the wording used on 24 November 2023. If the first was not good enough to trigger the power in para. 9 of Schedule 10, why would the second be?

24 In any event, as Ms Patyna has pointed out, Johnson J in the *Humnyntskyi* case at paras 18-19, pointed out that grants of bail in these terms do trigger the power to provide accommodation under Schedule 10. His decision to that effect was based on a document dated 26 March 2018 from the Home Office, which indicated that a "specified address" can be either an address that is already specified or one that is to be specified. These passages appear to show an acceptance on the part of the Home Office, dating back as long ago as 2018, that the lack of a specified address at the time of a conditional grant of bail is no bar to the provision of accommodation under para.9 of Schedule 10.

25 These features, taken together, seem to me to provide not only a seriously arguable case but what, at this interlocutory stage, appears to be a very compelling case that the Home Secretary has to date acted unlawfully in refusing accommodation under Schedule 10 following the grant of conditional bail on 24 August. That is so even if, as the Home Secretary contends, the new provisions inserted by the 2023 Act have the effect that the underlying power to detain remains even if detention no longer complies with the *Hardial Singh* principles. I will say a little more once I have completed this interim relief judgment about that contention.

26 As to the balance of convenience, Mr Biggs says that an order requiring the Home Secretary to provide accommodation will cause real difficulties given the claimant's extensive criminal history and the high risk he poses to the public. But Henshaw J, on 15 November 2023, gave the Home Secretary time to file evidence which could have addressed these alleged difficulties. The Home Secretary has chosen to file no evidence whatsoever attesting to them, let alone suggesting that they are insuperable. Nearly a month after the first letter before claim and two weeks after Henshaw J's order, there is no evidence before the court to suggest that there is no suitable accommodation. More than three months after the grant of bail, there has apparently been no attempt whatsoever, save the initial referral to the Salvation Army, which received a negative response on 29 August, to locate such accommodation. Instead, the request for it has been refused on a basis which it is strongly arguable is unlawful.

27 The suggestion that the claimant could simply make another application for Schedule 10 accommodation and then bring fresh proceedings for judicial review was not pursued in oral argument by Mr Biggs. Rightly so, in my judgment. In the first place, the Home Secretary's policy is that persons in the claimant's position do not need to make an application for Schedule 10 accommodation. The duty to secure that accommodation arises by virtue of the grant of conditional bail. Second, given that the grant of bail on 24 November 2023 is framed in terms that are materially similar to that of 24 August 2023, there is no reason to suppose that the result of any further application would be any different. In any event, and thirdly, the suggestion that the claimant should have to wait for a new decision ignores the series of unacceptable delays to date on the part of the Home Secretary.

28 In short, the history of this case supplies no reason to believe that there is any prospect of a lawful decision within a reasonable time without an order of the court. I shall therefore make a mandatory order that within seven days of today the Home Secretary, in consultation with the Probation Service, must identify accommodation under Schedule 10, and within three days thereafter the claimant must be released to that accommodation. I do not encourage any application by the Home Secretary to vary or discharge that order on the basis that it has not been possible to identify such accommodation. If, however, such an application is made, it is to be referred immediately to a High Court Judge who will consider whether a further hearing is required.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.