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Case No: CO/907/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 March 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

SANGER SABIR MOHAMMED	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

ALEX GOODMAN (instructed by **Leigh Day & Co**) for the **claimant**
EMMA DRING (instructed by **GLS**) for the **defendant**

Hearing dates: 31 March 2020
Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

1. This is an application for interim relief in the form of release from immigration detention. It comes before me, following directions given by Mrs Justice Knowles on 11 March 2020. There is a large volume of material before me, including materials filed by the parties in the period subsequent to those directions. The Secretary of State has filed an acknowledgement of service and summary grounds, including grounds resisting interim relief, and has supplied to the claimant and the courts a disclosure bundle of 767 pages. The claimant has provided the court with further materials including a medical report of a psychiatrist Dr Hillen dated 9 March 2020, together with materials relating to the current position on the ground in the context of the pandemic. I have also had the advantage of written and oral submissions by counsel on behalf of both of the parties. I feel well-placed to have evaluated, with their assistance, the position in relation to this application.

Telephone hearing

2. I want to say something about the mode of hearing that was adopted for this matter. The hearing proceeded by way of a telephone hearing, in the context of the coronavirus pandemic and the current arrangements under which everybody is operating, and in the context of the protocol issued in relation to High Court civil proceedings and the new practice direction 51Y. Having been contacted by the court, the parties were for their part able to agree, as did I, the telephone mode for this hearing. So far as the open justice principle is concerned the hearing was published in the usual way in the cause list with a time, at which the press and any others could dial-in. The cause list also gave details which any member of the press or public could use if they wished apply to listen in at this hearing. I ought to mention that I know, from my experience of the previous telephone hearing on the same day, that that facility has proved effective. That previous hearing was indeed joined by a member of the press. This hearing was recorded using the facility available on the BT conference call mode. I conducted the hearing, as did the parties, in exactly the same way that we would have done had we been sitting in court, one floor below where I currently am, at the Royal Courts of Justice. I would like to pay tribute to the parties for the way in which they have cooperated to enable this hearing to be effectively conducted. For my part I am quite satisfied that it was necessary, justified and proportionate to proceed in the manner that we did.

Approach to the application

3. Turning to the application, the approach which I have to take on the application was a matter of common ground. The essential steps in the analysis are twofold. First, the court looks to see whether there is a serious issue to be tried. In this case the Secretary of State creditably accepted that that test was met. The second step involves addressing the balance of convenience, or balance of justice, including the public interest considerations that apply to this as a public law case. Mr Goodman for the claimant cited the case of Adams [2014] EWHC 3506 (Admin) at paragraph 7 as a working example of the approach taken to interim relief in the context of release from immigration detention. I remind myself, as would any court dealing with interim relief at in this context, that the case is concerned with the liberty of the individual.

A close look at the claim

4. In my judgment, applying the balance of convenience, and in the present case, it is appropriate to take a close look at the legal merits and evaluate, to the extent possible, whether this is a weak claim or a strong claim or something in between. The strength of the claim is something I am satisfied is, in principle, capable of being relevant to the consideration of the balance of convenience. In support of that the claimants cited the case of Belize [2003] 1 WLR 2839. If the claim is a weak one that can significantly cut against grant of an interim remedy and of the claim is a strong one that can support it. But there are particular reasons why, in the context of the present case, I considered it appropriate to closely look at the strength or otherwise of the legal claim, on its face. I am not suggesting, as a general principle applicable in other cases, that it will be necessary or appropriate to do so. Each case will turn on its facts and its circumstances. The reasons why I was satisfied that it was appropriate to take their course were as follows.

5. First, because everybody agrees that, on the issue of detention as against release of the claimant, this interim relief stage is likely to be dispositive. There are other issues in the case which the parties envisage would need, unless settled, to go through to a substantive hearing, namely issues as to the claim for damages. But, so far as any detention or release from today onwards is concerned, nobody is envisaging that there would be, in the short-term, a substantive hearing of the claim for judicial review, after which the claimant would stand to be re-detained if the claim then failed. As a matter of principle, where an claim for interim relief is likely to be dispositive of the substantive issue in the proceedings, that can be a reason to take a close look at the legal merits as they appear to the court dealing with interim relief.

6. The second reason why I considered it appropriate, with the assistance of submissions from the parties, to take a close look at the way the nature of the claim stood is this. In the context of immigration detention, as to the value which the law and the public interest puts on individual liberty, and the various other public interests which are engaged, the substantive law applicable in this sort of claim has woven into it all of those competing public interest considerations. So, for example: the question of the risk of absconding or the risk of reoffending and the way in which those matters feature; the question of individual liberty; the onus; the relevant circumstances; the question of mental health and its relevance. All of these would be matters which the courts would wish to consider, in the context of any balance of convenience evaluation, and I intend to take all of them into account in my balance of convenience evaluation in this case. However, it is in my judgment helpful to start by recognising that the law has all of these features well in mind when the relevant principles are articulated and applied.

7. The third reason why I considered it appropriate to take a careful look at this case, and the prima facie nature of the claim, is because of the way in which the parties have helpfully prepared the case. As I have already explained, I have had the benefit of written and oral submissions on the behalf of both parties. I have also had the benefit of a wealth of material filed by them, to which they were able to refer me. I also had the opportunity of pre-reading materials, prior to conducting the hearing. I ought also to add that there was no pressure of time so far as the interim relief hearing was concerned. No other cases were awaiting in my list to be dealt with.

Convincing answers

8. There are a number of points, turning to the substance, with which it is clear to me that the Secretary of State has a convincing and emphatic answer. I take as a first example the reliance placed by the claimant, from the further materials, on an 'internal policy' dated and 17 March 2020 and 20 March 2020 as described in emails of those dates disclosed in other recent proceedings. Mr Goodman relies on the fact that an 'urgent review' is to be undertaken of particular categories of 'priority' case. However, as he candidly accepted, that aspect of the 'internal policy' (if that is what it is) does not of itself assist him, because the process of urgent review does not indicate either way whether detention would or would not be appropriate in the case of any individual. On its face, the email of 17 March 2020 is the more promising for him. It describes the suspension in the context of the coronavirus pandemic of returns to Iraq and then says that Iraqi nationals should 'only be detained if they are high harm FNOs'. On that point, I accept the submissions of Ms Dring. I emphasise that I am not deciding the substantive arguments in this case and no party has asked me to do so. But, on the face of it, she is able to say that this is an 'internal policy' which on its face is referable to "intake", that is to say those who are entering into immigration detention. Moreover, she is able to point to a correspondence between 'harm' characterised as 'high' in this 'internal policy' and 'harm' characterised as 'high' in the most recent, and she would submit in the vast majority, of the detention reviews relating to the claimant. She showed me the March 2020 detention review which specifically records the claimant as being assessed to be a "high" risk of absconding, a "high" risk so far as harm is concerned, and a "high" risk so far as reoffending is concerned. She therefore, convincingly to my mind, submits that those new 'internal policy' documents take the claimant no further forward than he would otherwise be.

9. Linked to that same point I also accept that, at least the purposes of today, Ms Dring is able convincingly to submit that the court ought not to do other than accept the evaluations on their face of those involved in conducting them, so far as risk of absconding and risk of reoffending and risk of harm are concerned. On the face of it, there is no fragility in those assessments and they are worthy of respect, particularly given that this is only an interim hearing.

Removability and reasonable period

10. One of the main legal principles in play in the substantive claim is the Hardial Singh Principle Number 3. That principle is well-known. I was shown the case of Lumba [2011] UKSC 12. In that judgment of the Supreme Court the relevant principle is articulated at paragraph 22(iii). If before the expiry of the reasonable period – the period that is reasonable in all the circumstances for the deportee to be detained – 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. That is the relevant principle.

11. In considering the apparent merits of the claim, so far as that principle is concerned, Ms Dring for the Secretary of State reminds me of the significance of the risk of absconding, risk of reoffending and, for that matter, the high risk in relation to harm, each of which have been evaluated as I have described. Moreover she points out, by reference to paragraph 121 in the Lumba case, that the risks of absconding and reoffending are "always of paramount importance". I accept her submission that in the present case, for the reasons described in the March 2020 evaluation, under each head - which I will not prolong this judgment by reading out - those are serious and legitimate relevant concerns in the context of the third Hardial Singh Principle.

12. However, in my judgment, notwithstanding those features and their strength, this is a case in which on the face of it there is a strong claim that detention is in breach of the third Hardial Singh Principle. The position is this. Following a consent order (in judicial review proceedings) dated 25 November 2019, and on the face of that order, it was clear that it was going to be several months before any decision would be taken by the Secretary of State on the claimant's putative fresh claim. The submissions and evidence, for which a 3-month period was allowed, were duly provided on 10 February 2020. Even then, the earliest time at which a decision by the Secretary of State was reasonably to be anticipated was in a 3-month period thereafter, even assuming no further extension of the timetable were necessary. In addition to that, as Ms Dring realistically accepted, this is a case given its nature in which the decision by the Secretary of State - if it is adverse to the claimant - stands very likely to be challenged, whether by way of appeal or by way of judicial review, depending on whether the Secretary of State recognises the claim to be a fresh claim. Either of those routes will stand to involve a further period of several months. In addition to that, it is highly relevant to have in mind the pre-existing and detention to which the claimant had already been subjected. This is a matter to which the Lumba case draws attention at paragraph 103 when it describes what period is "reasonable in all the circumstances, having regard in particular to time that the person has already spent in detention". In the present case the claimant's immigration detention goes back to the beginning of May 2019 and so was already a significant period by the time of the order in November. As at today, the claimant has already been in immigration detention for some 11 months. It is worth having in mind, as Mr Goodman reminded me, that the previous criminal conduct of the claimant has attracted two custodial sentences: in each case, those custodial sentences were 6 months.

13. In evaluating whether the 'realistic prospect of removal within a reasonable time' principle is being complied with, I have anxiously looked at the contemporaneous documents disclosed by the Secretary of State. That is because the court can be greatly assisted by the evaluation of those dealing with the matter on the front-line, particularly if a reasoned and convincing basis is given for the assessments which they conduct. This is a point which cuts both ways because, as I have explained, a reasoned evaluation of risk (of absconding and re-offending and harm) is something to which a court will give considerable weight, as indeed I have done. The application of the Hardial Singh Principles is an objective matter for the court dealing with the substantive arguments. Nevertheless, the court will look to see what the evaluation is and how convincing the reasoning is, from the contemporaneous documents.

14. Looking at the contemporaneous documents, I have found it of assistance to me, in taking a close look at this case, that an authorising officer SCO on 9 January 2020, in considering the review undertaken by the reviewing officer, clearly had in mind the prospect of removal and the issue of a reasonable time. That authorising officer was prepared only to authorise a further period of detention to allow full preparation and consideration of a release referral. She specifically recorded that detention was being maintained, in the context of serious convictions and an assessment of posing a high risk of harm, reoffending and absconding, while the case officer investigated the suitability of the proposed release address and subsequent authority to release the claimant from detention. What happened subsequently was that a proposed release address provided in December 2019 was confirmed as being suitable. The recommendation for release however was not actioned because, as is recorded in a subsequent document, it was 'refused at Director level' on 29 January 2020.

15. The next review dated February 2020 had a reviewing officer and authorising officer: a different authorising officer who recorded that for her part "I am satisfied that the case is being progressed and removal within a reasonable timescale remains a realistic prospect". That assessment came in the context of a review which recognised the steps needed following the settlement of the judicial review and the fact that there was currently no timetable for resolution. It is not clear from that assessment what timescale the authorising officer considered was a realistic one for the present case and on the basis of which she was able to conclude that it was reasonable. It is unfortunate, in the consideration of the many hundreds of pages of disclosed materials, that nowhere among them were I or the parties able to find any analysis or reasoning, still less any addressing this principle and 'realistic prospect of removal within a reasonable time', so far as the decision of the Director refusing the January recommendation was concerned.

16. It seems to me at first sight, and for the purposes simply of interim relief, that the January evaluation is a convincing one and those pointing the other way are not. It is, in my judgment, revealing that the more senior officer involved in the January review recognised the difficulty and implications for release of the problems so far as removeability and likely timeframe were concerned. Significantly, in my judgment, the matter was reconsidered more recently in a March 2020 review. On that occasion another senior authorising officer had to consider the present circumstances of the present case and did so in the context of the assessment of the "high" risks so far as the claimant is concerned. That authorising officer's comments on 5 March 2020 were as follows: "as it has not been possible to progress the decision ordered by the court due to ongoing litigation the timescale of removal is now been extended. In light of this a further release referral should be submitted and Police Scotland engaged to ensure a plans in place to allow effective management of the claimant in the community. I authorise detention for a period of 28 days to enable these actions to be progressed."

17. That is where matters stand, so far as any contemporaneous evaluation on the ground is concerned. The 28 days expire on Thursday of the present week. The recommendation is now as it was in January 2020 review: release. The release has not been actioned because that recommendation needs to be considered, as it was in January. That has not happened. I entirely understand that there will be sound practical reasons why it is difficult for the Secretary of State to have been able to do so before this matter came before me. Nevertheless it is relevant, in my judgment that I do not have, even in relation to the January decision, any reasoned evaluation, still less a convincing one. I do have two evaluations, including the most recent extant one, which to my mind are a convincing answer when applying the parameters of the third Hardial Singh Principle to the present circumstances, including the weight that was being put on the relevant risks that have been assessed. In my judgment, those contemporaneous materials just as the contemporaneous assessment in relation risk are relevant and helpful to the court in considering what ought to be done in the present case, although ultimately the judgment it is one for me to form applying the balance of convenience.

18. I repeat, I am not deciding even provisionally the substantive merits of the present case. I am however taking a close look at the position in order to see whether the review can be formed of the strength of the claim. I am quite satisfied that there is, as things stand, and on the basis of the materials which a court would have for a substantive evaluation, a strong claim under the Third Hardial Singh Principle. I have in mind that it is always for the state to justify detention of the individual. I also have in mind the anxious scrutiny

that is applicable to cases of executive detention. I have in mind that, for good reasons of principle, the Hardial Singh principles, including their 'reasonableness' parameters, are objective questions for evaluation by a court.

Mental health

19. The case does not stop there. There is also, in my judgment, a further dimension to the present case which reinforces the strength of the claim, and reinforces why the balance of convenience is in favour of the grant of interim relief. Indeed, it also serves to support a freestanding head on which the claim is brought. That additional aspect concerns the medical evidence of Dr Hillen and the claimant's mental health conditions. It will suffice for me to say that Dr Hillen's recent report assesses that the claimant fulfils the diagnostic criteria for severe depression and post-traumatic stress disorder. Dr Hillen records the view that these mental health disorders had not been present during the months prior to the current period of immigration detention, and the assessment that on the balance of probability the current immigration detention has materially contributed to their development. It is also of relevance that Dr Hillen's report comments on a matter on which the Secretary of State and Ms Dring have placed reliance, namely the disruptive behaviour including verbal aggression and damaging property of which the claimant has been responsible during his immigration detention. It is clear from Dr Hillen's report that that is regarded as being linked to 'the acute deterioration in the claimant's mental health following his reception into immigration detention in May of last year'.

20. Ms Dring pointed out, quite rightly, that the triggers for the mental health deterioration can, if one traces them back, be identified as matters which were consequential on the claimant's prior conduct: he had previously been on bail and in this country; he absconded to Germany; on return here he was detained and has repeatedly been refused bail. Nevertheless, the evidence is that there is a significant mental health condition, indeed two; and that they are causally linked to the immigration detention.

21. Ms Dring also pointed out the measured and qualified nature of Dr Hillen's description of the prognosis: the fact that he qualifies his description of the extent to which there will be a recovery even if the claimant is released; and the various factors on which that will depend. She also reminds me that there are passages in the Report which link to aspects of detention, reported by the claimant but hotly disputed in these proceedings by the Secretary of State. One example of that is the allegations concerning rat infestation in the immigration detention room in which he was detained before being moved.

22. This, however, in my judgment is highly material evidence on the face of it. Again, I do not have the benefit of an assessment by the Secretary of State which takes into account. That is not a criticism because Dr Hillen's report is very recent. But it is rightly not suggested by Ms Dring that I should do other than take it into account. I do so and do so on the basis of what it says on its face. The mental health evidence would be relevance both to Hardial Singh reasonable time principles, but also to the balance of convenience as it was in the Adams case: see paragraph 9.

23. It is also relevant so far as immigration detention is concerned in another way. That is because the Home Office, for obviously good reason, has a published policy guidance document entitled 'Adults at Risk in Immigration Detention'. The most recent version of that policy guidance was published on 6 March 2019. That is a policy which emphasises mental health conditions and other features that serve to inform the balancing exercise

which the Secretary of State performs in deciding whether to detain. It is also a document which emphasises the significance of estimating 'the likely duration of detention required to effect removal'. In that regard there is a link to Hardial Singh principle number 3, to which I do not propose to return. In the policy document there are various 'levels' of mental health condition for the purpose of an 'evidence assessment'. This is relevant because, as Ms Dring points out in her summary grounds of resistance, the so-called 'rule 35 reports' in relation to the claimant had been characterised by the Secretary of State as constituting 'level 2' evidence. The claimant submits that Dr Hillen's report is new evidence which strongly supports the proposition that the claimant is in fact, on this evidence, a 'level 3' case. 'Level 3' is described as a case where 'on the basis of professional and/or official documentary evidence detention is likely to lead to a risk of harm to the individual if detained for the period identified as necessary to effect removal'. In a 'level 3' case the policy, expressed as being 'a guide rather than a prospective prescriptive template', is that detention should be considered only if one of the following two limbs apply. The first is that removal has been set for a date in the immediate future are and there are no barriers to removal. The second is that the individual presents as a 'significant public protection concern' or has been subject to a 4 year plus custodial sentence or there is a 'serious relevant national security issue' or presents a 'current public protection concern'.

24. I emphasise, once again, I am not deciding any substantive issue in this case. However, it is clear to me that this part of the case is highly material both in considering the strength on its face of the claim but also because these are very much the public interest considerations that should in any event be informing any balance of convenience evaluation. As it seems to me, the evidence of Dr Helen on the face of it would tend to support the conclusion that this is now a 'level 3' case. Moreover, as it seems to me on the face of it, it would be difficult for the Secretary of State to sustain the assessment that this is a 'significant public protection concern' or 'current public protection concern' case, when those concepts are read in their context and by reference to the seriousness of the matters to which they relate. All of that would have course be a matter which the Secretary of State could and would evaluate. I have to do the best, on the basis of the materials that I have, to see what to make of the mental health evidence, assisted by the Secretary of State's own published policy.

25. As it seems to me, on this second feature of the case, the claimant's position is reinforced, both as to the strength on the face of it claimant is made but also as to the balance of convenience and public interest considerations and their reconciliation that arise.

Balance of justice

26. It is already obvious from what I have said, but I will emphasise it again: the sorts of considerations which I have considered above, in the light of the contemporaneous documents before the court, are all features which I would have taken into account in informing the balance of convenience, even if I were leaving to one side questions of substantive legal principle such as Hardial Singh 3 and the Lumba duty of adherence (absent a good reason) to a published policy. I have explained however that, in my judgment, it is helpful not simply to see them as balance of convenience considerations but also to consider them in the context of the legal principles that apply in claims such as the present.

27. I am going to grant interim relief in this case. I do so, having regard to the strength of the claim. I do so, having regard to the apparent strength of the claim on the face of it, by reference to principles which combine relevant public interest considerations and which in any event inform the balance of convenience. I do so, even leaving aside strength of the claim, taking into account those various public interest considerations and the direction in which each of them faces. I do so, having regard to the context as being concerned with the liberty of the individual. I do so, having regard to the mental health position, as it is evidenced before the court. Finally, I do so, having regard to the Secretary of State's own position in the assessment documents the contemporaneous documents and the published guidance. I am quite satisfied that the balance of justice is in favour of release. I am satisfied that that outweighs the risk of injustice, and the risk to the public interest, were it to be concluded (even hypothetically) that the detention at this current stage and ongoing was lawful, and yet the claimant had been released pursuant to the order which I will be making. In my judgment, the considerations in favour of release at outweigh the various public interest considerations, including the legitimate concerns to which I have referred relating to offending conduct and absconding.

28. I have had well in mind, in that evaluation, the fact that the previous criminal conduct of the claimant in this case has included conduct which related to his previous partner, the mother of the child with which he wishes to have future contact, and conduct in the context of orders and restrictions that were imposed and which he breached. Those are matters of our anxious concern to the Secretary of State and to me. They, together with other features, such as the fact that he is recorded last month as having been past drugs from a visitor in the detention centre, are all matters that inform informed the evaluation of the "high" risk categories in the most recent detention review documents, to which I have referred. I add one further point so far as the former partner is concerned. I am told that there is an extant restriction order which serves to operate against the claimant and restricts what he can and cannot do so far as his former partner is concerned. I am aware, as no doubt he will be aware, that his previous offending leading to custodial terms for breach of such restrictions. That is a matter of concern, as I have explained, that I take into account. On the other hand, the existence of that restriction order does have this consequence: were there to be any breach of any such condition, there would in those circumstances be a clear basis for further incarceration of the claimant for having breached that condition.

Appropriate order

29. Finally, so far as the appropriate order is concerned, both parties were agreed about two things. The first is that, in principle, there are two things a Court allowing a claim for interim relief in a case such as the present could do. One is to make an order for bail in which the court itself identifies with the parties appropriate conditions, as appears to be what happened in the Adams case. The other is that the court makes an order for release of the claimant by way of interim relief, but that it is then for the Secretary of State to release the individual using the bail powers in schedule 10 of the 2016 Act, and in those circumstances the Secretary of State would be able to identify appropriate conditions. That is the first thing on which the parties were agreed. The second thing on which they were agreed was that in the present case if the court were granting interim relief in the present case, the second of those alternatives should be adopted.

30. I asked the parties about the knotty question regarding whether the Secretary of State can lawfully use bail conditions, or for that matter the court can impose bail conditions,

where the case relates to issues of legality of detention: I had in mind that there may be limitations on whether conditions can be imposed at all if the logic of the position is that the detention is unlawful. I am satisfied that the answer given by Mr Goodman, from which Ms Dring did not dissent, is the right one. The answer is that I am not declaring that claimant's detention to be unlawful. I am not determining substantive issues as to the lawfulness of that detention. I am ordering interim relief, on the balance of convenience, directing that the claimant should be released but without making any such determination. All of those knotty problems, should they be relevant at all, will be left for another day. Mr Goodman confirmed that it was not his position before me that it would be unlawful for the Secretary of State to impose bail conditions as a response to any interim relief order today from this court. He envisages that that is what will occur.

31. That leaves two points to mention. The first is that in the Secretary of State's detention assessment documents, including March 2020, an address is given whose suitability had specifically been confirmed. It is at Forge St, G21. As it was explained to me that the claimant's position that address is still available in the short term and available notwithstanding the coronavirus pandemic restrictions, but that there will in the longer term be a need for section 4 accommodation to be identified by the Secretary of State. Ms Dring raised a question to which it may or may not be necessary to return about the timing so far as that address is concerned. The second and final matter is transfer of the damages claim to the Queen's Bench Division, on which the parties are agreed. I will now deal with any consequential matters.

Addendum: Ms Dring told the Court that the Secretary of State would need 21 days for any section 4 action. Mr Goodman told the Court that the Forge Street address would be available for at least 21 days. I directed release of the appellant by noon 2 April 2020 (conditions being a matter for the Secretary of State), transfer of the damages claim to the QBD, costs reserved to that court.

Approved by Fordham J for release to the parties

1.4.20