

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY THOMAS JOKUBAUSKAS FOR  
JUDICIAL REVIEW

AND

AND IN THE MATTER OF A DECISION BY THE UNITED KINGDOM  
BORDER AGENCY

**TREACY J**

**Introduction**

[1] By this application the Applicant challenges the decision of the United Kingdom Border Agency ("the Respondent") not to deport him to his home territory of Lithuania within a reasonable period of time following the expiry of his custodial sentence on 23 September 2014.

**Relief Sought**

[2] The primary relief sought by the Applicant is a claim for damages arising out of his unlawful detention by the Respondent.

**Background**

[3] The Applicant is a Lithuanian national who was arrested for drugs offences on 23 September 2013 in Belfast. He was remanded into custody and was eventually sentenced at Belfast Crown Court on 4 April 2014 to a determinate custodial sentence comprising 1 year immediate custody and 1 year on licence.

[4] In October 2013, while in custody, the Applicant was served with Form IS91 by the Respondent the purpose of which was to authorise his detention pending removal from the UK. The detention was to take effect following the conclusion of the Applicant's criminal case.

[5] On 23 September 2014 the Applicant's custodial sentence expired. The Applicant was detained in HMP Magilligan until 24 September 2014 and then taken to the Larne Immigration Detention Centre. On 25 September 2014 the Applicant was transferred to Dungavel House Immigration Removal Centre in Scotland, where he remained until his removal. On 7 October 2014 the Applicant was eventually issued with removal directions and his removal from the UK was set for Friday 10 October 2014.

[6] Since his initial arrest in September 2013 the Applicant consistently expressed a desire to return to Lithuania following the expiry of his sentence. The Applicant always accepted that he was in breach of an order banning him from entering the UK and has not sought to challenge any aspect of the deportation process. The Applicant fully anticipated that removal directions would have been issued prior to his release from HMP Magilligan and that his removal would have been immediate. He found his lengthy detention pending removal to be a distressing experience.

[7] The Applicant's lengthy detention pending removal was contributed to because the Applicant was not in possession of the necessary travel documents following his release from custody. It would appear that no checks were made regarding this issue until the Applicant was transferred to Scotland.

[8] It is accepted that the Respondent flagged up this potential problem with the Applicant during a visit to HMP Maghaberry on 23 June 2014 however, no further checks appear to have been made after that date. It appears from the material exhibited by the Respondent that the Applicant's removal was also impeded by the Respondent not having his Home Office file. It is unclear when a full file was available to allow for the Applicant's removal.

## **Legal Framework**

[9] The statutory authority for the making of deportation orders and detention pending deportation is Reg 19(3)(b) of The Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations) and Para 2(3) of Schedule 3 to the Immigration Act 1971 ("the 1971 Act"). Reg 19(3)(b) of the 2006 Regulations states:

"(3) ... a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if-

...

(b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with Regulation 21"

[10] Para 2(3) of Schedule 3 to the 1971 Act provides:

“(3) 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...”

### **Time Limits**

[11] Although there is no express time limit for how long a person can be detained pending removal it is clear that such a detention is subject to limitation as per Woolf J in Ex Parte Hardial Singh [1984] 1 WLR 704 where he said:

“Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time I am quite satisfied that it is subject to limitations. First of all it can only authorise detention if the person is being detained pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out I regard the power of detention as being impliedly limited to a period which is reasonably necessary to that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more if there is a situation where it is apparent to the Secretary of State that he is not able to operate the machinery provided in the act for removing persons who are intended to be deported within a reasonable period it seems to me that it would be wrong for the Secretary of State to exercise his power of detention. In addition I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time.” [p706]

[12] This viewpoint was endorsed in A v Secretary of State for the Home Department [2004] UKHL 56 and by the Supreme Court in Kambadzi v Secretary of State for the Home Department [2011] UKSC 23. See also the decision of this court in Reuter’s (Hans) Application [2012] NIQB 6.

[13] In R (I) v Secretary of State for the Home Department [2002] EWCA Civ 888 Dyson LJ stated that four principles emerge from Hardial Singh, namely:

“(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." [para 46]

## **Applicant's Submissions**

### **Damages**

[14] In respect of damages the Applicant referred the Court to Kambadzi and Lumba v Secretary of State for the Home Department [2011] UKSC 12 which make clear, it says, that where a period of detention cannot be justified, a detainee is entitled to claim for damages arising out of his unlawful detention. In Kambadzi it was held that damages were also recoverable for any breach of a detainee's Art 5 ECHR right to liberty. Reuter's (Hans) also made it clear that an award of damages was an appropriate remedy in cases of this nature.

[15] The Applicant submitted that his extended detention pending removal was unlawful in all of the circumstances given that the Respondent had been aware of his sentence expiry date for a significant period of time and simply failed to act with necessary diligence and expedition to effect his removal to Lithuania within a reasonable period.

[16] The Applicant submitted that this was a straightforward deportation case and there was no justification for the delay in issuing the Applicant with the necessary removal directions. Removal directions were issued 14 days after the Applicant's custodial sentence had expired and it was a further 3 days before the Applicant was eventually returned to Lithuania.

[17] The Applicant did not accept that his detention for such a period could be justified by simply stating that he ought to have recovered his ID from the police and submitted that the onus was on the Respondent to carry out such checks and that it should be at the forefront of their minds when a detainee becomes eligible for deportation.

[18] The Applicant submitted that there was no evidence to suggest that the Respondent had made any enquiries regarding the relevant travel document further to the conversation with the Applicant on 23 June 2014. No efforts were made to raise this issue with the Applicant's solicitor and no attempts appear to have been made to liaise with police about the location of the travel documents.

[19] The Applicant argued that it was clear from the Respondent's affidavit that his removal was also delayed because his Home Office file was not in the possession of the appropriate immigration officials and this was a secondary cause for the delay in removing him.

[20] Given that the Applicant has never sought to delay his removal and had always expressed a clear desire to return to his native country the Applicant submitted that the delay in this case was quite clearly unreasonable in all of the circumstances and argued that he is entitled to damages arising out of his unlawful detention and the breach of his Art 5 ECHR right to liberty.

## **Respondent's Submissions**

### **Damages**

[21] The Respondent submitted that in Lumba only nominal damages were awarded as the Applicants would have been detained had the proper, lawful policy been applied. In Kambadzi the court held similarly, that causation was relevant to the question of recoverability of damages and the amount of damages appropriate in each case depends upon the circumstances of the case.

[22] The Respondent submitted that s8 of the HRA provides that a court is to make an award of damages where it is satisfied that the award is necessary to afford '*just satisfaction*' to the person in whose favour the award is made. Further, it submitted, that in determining what is necessary the court must take into account all the circumstances of the case including other remedies granted. The Respondent contended that so far as damages and breaches of the HRA are concerned that R (Greenfield) v Home Secretary [2005] UKHL 14 is the leading authority on the issue of damages and that a restrictive approach should be used when considering any award beyond a declaration or other non-pecuniary relief. (See Anthony Judicial review in Northern Ireland 8.44 & 8.45).

[23] The Respondent submitted that the intention to deport must be the operative reason for the detention and that if it becomes clear to the Respondent that this cannot be effected within a reasonable time then the detainee should be released. In this case the Applicant had twice been convicted of serious drugs offences for which he received custody, he had been made the subject of a deportation order and had entered the UK in breach of that order.

[24] Referring to the four principles above the Respondent submitted that the period that is reasonable in each case is influenced by the circumstances of the case itself and in this case, the Applicant's antecedents made it reasonable that he be detained whilst his removal was organised. The detention of the Applicant was reviewed on 7 October, on the same day that removal directions were set, and the Respondent concluded that detention should be maintained.

[25] Further, the Respondent submitted that it is directed to act with '*reasonable diligence and expedition to effect removal*' and argued that in so doing it is not a requirement that the removal is effected as soon as possible. The Respondent submitted there is no defined time limit for detention pending removal.

[26] The Respondent referred the Court to Reuter which involved detention of less than a period of several months where the Respondent relied upon the 72 hour notice provision in the Enforcement Instructions Guidance. The court further found default with the expedition with which the Respondent reacted when the original removal attempt failed. Here the Respondent sought the required information to generate a travel document on 26 September and these were received in the post on 6 October. From that the travel document was generated and removal directions set on 7 October for 10 October. The case was passed to the removals team on 24 September 2014 but the file was not available and the Respondent sought the required information and identity documents to allow removal directions to be set. Therefore, the Respondent submitted, it acted with the appropriate and required diligence and expedition to effect the removal.

## **Conclusion**

[27] In this case the Applicant was detained for a period of approximately two and a half weeks from the end of his custodial sentence until the date of his return to Lithuania. I agree with the Respondent that the obligation to act with "reasonable diligence and expedition to effect removal" is not a requirement to remove persons as soon as possible and that the time limits involved are somewhat more flexible than the latter standard would imply. However, I am satisfied in the circumstances of this case, that a period of 17 days extra deprivation of liberty cannot in its entirety be regarded as consistent with the requirement to act with reasonable diligence and expedition. Detention is impliedly limited to a period which is reasonably necessary for the purpose of lawful removal. The period which is reasonable depends on the facts and circumstances of the particular case. Further, as Hardial Singh recognises, it is implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time. The Applicant in this case was detained for longer than he ought to have been due to the lack of due expedition on the part of the Respondent. Removal directions were issued 14 days after the Applicant's custodial sentence expired and it was a further period of 3 days before he was eventually returned to Lithuania. Given the delay in setting the removal directions I do not consider the further delay in returning him to Lithuania can be regarded as

consistent with the Hardial Singh principles. By way of just satisfaction, and bearing in mind the restrictive approach to an award of damages in the Greenfield case, I award the Applicant £1,500.