EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Communicated on 5 January 2015

FOURTH SECTION

Application no. 33341/13
Arben DRAGA
against the United Kingdom
lodged on 20 May 2013

STATEMENT OF FACTS

The applicant, Mr Arben Draga, is a Kosovan national, who was born in 1984 and lives in West Drayton. He is represented before the Court by Ms J. Savic, Sutovic & Hartigan, a firm of solicitors practising in London.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant is a Kosovan Gorani who was granted refugee status and indefinite leave to remain in the United Kingdom on 6 December 2001. In 2005 he was convicted of criminal damage; possession of a class A drug with intent to supply; and possession of a knife in a public place. He received a fine, a sentence of eighteen months' imprisonment and a sentence of three months' imprisonment respectively.

At the relevant time, section 72(4) of the Nationality, Immigration and Asylum Act 2002 provided that a person would be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if convicted of an offence specified by order of the Secretary of State. A list of those specified offences, in which drugs offences were included, were contained in the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 (the "2004 Order"). The consequence of this was that deportation action could be pursued against the applicant.

The applicant was detained on 2 August 2006, whereupon the Secretary of State served him with a notice of a decision to make a deportation order. On 15 February 2007 his appeal was dismissed by the Asylum and Immigration Tribunal (AIT) and he was released on immigration bail on

29 March 2007. Although reconsideration of his appeal was ordered on 31 May 2007, his case was subsequently dismissed on 10 October 2007 with no error of law having been found in the decision at first instance. No in-time appeal to the Court of Appeal was made. Although the applicant lodged an out of time application for permission to appeal, the Court of Appeal refused to grant an extension of time on 18 February 2008.

The Secretary of State issued a deportation order on 6 November 2007 which was served on the applicant on 30 November 2007. Following service of the order he was re-detained. On 20 March 2008 the applicant submitted fresh representations to the Secretary of State on the basis that the 2004 Order providing for his removal was *ultra vires* and that his removal would breach Articles 2 and 3 of the Convention. The Secretary of State treated these submissions as a request to revoke the deportation order and refused it on 13 June 2008. On 24 June 2008, two days before the applicant's scheduled removal from the United Kingdom, he applied for judicial review of the Secretary of State's decision and was granted injunctive relief. The judicial review was stayed pending the domestic case of *EN (Serbia) v SSHD* [2009] EWCA Civ 360, which also dealt with a challenge to the legality of the 2004 Order.

On 26 June 2009 the Court of Appeal in *EN* found that it was incompatible with the Qualification Directive and the Refugee Convention for domestic legislation to provide that the conviction of certain crimes created a presumption, that could not be rebutted, that an individual had been convicted of a particularly serious crime and that they constituted a danger to society. It declared that the 2004 Order was *ultra vires*.

On 9 October 2009 the Secretary of State reviewed the applicant's case and informed him of an intention to revoke his refugee status under Article 1C(5) of the 1951 Refugee Convention, which provides that an individual will no longer benefit from the provisions of that Convention if "the circumstances in connection with which he has been recognised as a refugee have ceased to exist" and therefore he can no longer "continue to refuse to avail himself of the protection of the country of his nationality".

On 29 October 2009 the applicant submitted written representations to the Secretary of State challenging his decision (a copy of which have not been provided to this Court). On 18 February 2010 the Secretary of State indicated that the deportation order would remain in force owing to the applicant's drugs-related conviction and because his refugee status would cease. The First-tier Tribunal (IAC) allowed the applicant's appeal against deportation on 8 September 2010. It found that the deportation order issued had been unlawful as it had depended upon the *ultra vires* 2004 Order; that the Secretary of State's refusal to revoke that unlawful order could not be upheld; that the cessation of the applicant's refugee status order had simply been a "device" to effect deportation once the 2004 Order could not be relied upon; and that the decision to cease the applicant's refugee status was unlawful. On 17 September 2010 the First-tier Tribunal (IAC) refused the Secretary of State permission to appeal. On 30 September 2010 the applicant was released on immigration bail.

Meanwhile, the applicant had maintained the judicial review proceedings initiated in June 2008, the basis for those proceedings changing, with the applicant ultimately challenging the lawfulness of his detention given the

Court of Appeal's June 2009 decision in *EN*. On 15 July 2011 the High Court found that the entirety of the applicant's detention had been unlawful. It is relevant to note that before the court, the applicant had sought to introduce a new argument based upon a recently promulgated Supreme Court decision of *Lumba (WL) v Secretary of State for the Home Department* [2011] UKSC 12 (23 March 2011). That case dealt with an unpublished policy followed by the Secretary of State between April 2006 and 9 September 2008 and which constituted a "near blanket ban" on the release from detention of foreign nationals. The Supreme Court had held that the mere existence of an unlawful policy was not sufficient to establish that any particular exercise of a statutory discretion was unlawful. However, where the breach of public law breach bore on, and was relevant to the decision to detain, this would be sufficient to give rise to a cause of action in false imprisonment. The High Court in the applicant's case found that to raise a new substantial issue late in proceedings, which had not been hinted at anywhere previously, and which the opposing party had not been able to address, created a risk of unfairness. It did not allow the applicant to argue those grounds.

The Secretary of State appealed and this was upheld in part by the Court of Appeal on 21 June 2012. The court held that the decision to deport was different from the decision to detain; that it was difficult to identify any principled basis for distinguishing between those public law errors which would render the decision to detain unlawful and those which would not; that no challenge had been made to the lawfulness of the Secretary of State's decision that the applicant was liable to deportation; that the Secretary of State had been entitled to rely on the Tribunal's finding on 15 February 2007 that the decision to deport was a lawful one as authority for the applicant's detention from 2 August 2006 to 27 March 2007 and commencing on 30 November 2007; that the applicant had been entitled to rely on the Tribunal's 2010 decision that the Secretary of State's actions to cease his refugee status was a "device" to allow his deportation with the result that the second period of detention was only lawful up to 1 January 2010; and that therefore the applicant had been unlawfully detained during the period between 1 January 2010 and 30 September 2010. Finally with regard to the secret policy issue discussed in *Lumba*, the court found that whilst the policy in question was being operated at the time of the applicant's detention on 2 August 2006, it was not an issue before the court.

The applicant applied to the Supreme Court for permission to appeal, specifically invoking Article 5 for the first time in any of the domestic proceedings. On 27 November 2012 the Supreme Court refused permission.

B. Relevant domestic law and practice

1. United Kingdom Border and Immigration Authority's Enforcement Instructions and Guidance

Chapter 55.1.1 of the United Kingdom Border and Immigration Authority's Enforcement Instructions and Guidance provides that:

> "The power to detain must be retained in the interests of maintaining effective immigration control. However, there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used."

Chapter 55.1.2 goes on to state that:

"In any case in which the criteria for considering deportation action (the "deportation criteria") are met, the risk of re-offending and the particular risk of absconding should be weighed against the presumption in favour of temporary admission or temporary release. Due to the clear imperative to protect the public from harm from a person whose criminal record is sufficiently serious as to satisfy the deportation criteria, and/or because of the likely consequence of such a criminal record for the assessment of the risk that such a person will abscond, in many cases this is likely to result in the conclusion that the person should be detained, provided detention is, and continues to be, lawful. However, any such conclusion can be reached only if the presumption of temporary admission or release is displaced after an assessment of the need to detain in the light of the risk of re-offending and/or the risk of absconding."

Chapter 55.1.3 continues:

"Substantial weight should be given to the risk of further offending or harm to the public indicated by the subject's criminality. Both the likelihood of the person re-offending, and the seriousness of the harm if the person does re-offend, must be considered. Where the offence which has triggered deportation is included in the list here, the weight which should be given to the risk of further offending or harm to the public is particularly substantial when balanced against other factors in favour of release."

Chapter 55.10 provides that:

"Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration accommodation or prisons. Others are unsuitable for immigration detention accommodation because their detention requires particular security, care and control.

In CCD cases [Criminal Casework Directorate – the department responsible for dealing with cases involving the detention of foreign national prisoners], the risk of further offending or harm to the public must be carefully weighed against the reason why the individual may be unsuitable for detention. There may be cases where the risk of harm to the public is such that it outweighs factors that would otherwise normally indicate that a person was unsuitable for detention.

...

In the case of the following individuals, the normal presumption will be that they should remain in, or be transferred to, prison accommodation and they will be transferred to an IRC [Immigration Removal Centre] only in very exceptional circumstances: Enforcement Instructions and Guidance

- National Security – for example, where there is specific, verifiable intelligence that a person is a member of a terrorist group or has been engaged in or planning terrorist activities.
- Criminality – those detainees who have been involved in serious offences involving the importation and/or supply of class A drugs and/or those convicted of sexual offending involving a minor."

2. The Hardial Singh *principles*

Four distinct principles emerge from the guidance given in *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] WLR 704:

"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."

3. R (A) v. Secretary of State for the Home Department *[2007] EWCA Civ 804*

In *R (A)* the Court of Appeal found as follows:

"I accept the submission on behalf of the Home Secretary that where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, and likely often to be decisive factors, in determining the reasonableness of a person's detention, provided that deportation is the genuine purpose of the detention. The risk of absconding is important because it threatens to defeat the purpose for which the deportation order was made. The refusal of voluntary repatriation is important not only as evidence of the risk of absconding, but also because there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss of liberty involved in the individual's continued detention is a product of his own making.

A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring and the potential gravity of the consequences. Mr Drabble submitted that the purpose of the power of detention was not for the protection of public safety. In my view that is over-simplistic. The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom and whose continued presence would not be conducive to the public good. If the reason why his presence would not be conducive to the public good is because of a propensity to commit serious offences, protection of the public from that risk is the purpose of the deportation order and must be a relevant consideration when determining the reasonableness of detaining him pending his removal or departure."

4. R (MH) v Secretary of State for the Home Department *[2010] EWCA Civ 1112*

In *R (MH)* the Court of Appeal found as follows:

"I have found this an anxious case. The period of 38 months' detention held by Sales J to have been lawful is a very long period indeed for administrative detention pending deportation. Detention for that length of time merits the most anxious scrutiny.

...

I do not read the judgment of Mitting J in *R (A and Others) v Secretary of State for the Home Department* as laying down a legal requirement that in order to maintain detention the Secretary of State must be able to identify a finite time by which, or period within which, removal can reasonably be expected to be effected. That would be to add an unwarranted gloss to the established principles. In my view Mitting J was not purporting to do that but was simply asking himself the questions "by when?" and "on what basis?" for the purposes of his own consideration of the case before him. Of course, if a finite time can be identified, it is likely to have an important effect on the balancing exercise: a soundly based expectation that removal can be effected within, say, two weeks will weigh heavily in favour of continued detention pending such removal, whereas an expectation that removal will not occur for, say, a further two years will weigh heavily against continued detention. There can, however, be a realistic prospect of removal without it being possible to specify or predict the date by which, or period within which, removal can reasonably be expected to occur and

> without any certainty that removal will occur at all. Again, the extent of certainty or uncertainty as to whether and when removal can be effected will affect the balancing exercise. There must be a sufficient prospect of removal to warrant continued detention when account is taken of all other relevant factors. Thus in *A (Somalia)* itself there was "some prospect of the Home Secretary being able to carry out enforced removal, although there was no way of predicting with confidence when this might be" (per Toulson LJ at para 58); and that was held to be a sufficient prospect to justify detention for a period of some four years when regard was had to other relevant factors, including in particular the high risk of absconding and of serious re-offending if A were released."

5. Walumba Lumba and Kadian Mighty v. Secretary of State for the Home Department *[2011] UKSC 12*

In the case of *Walumba Lumba and Kadian Mighty v. Secretary of State for the Home Department* [2011] UKSC 12 the Supreme Court briefly considered the *Hardial Singh* principles. In his leading judgment, which was accepted by the majority of the court, Lord Dyson found that in assessing the reasonableness of the length of the period of detention, the risk of re-offending would be a relevant factor. In this regard, he noted that if a person re-offended, there was a risk that he would abscond either to evade arrest or, if he was arrested and prosecuted, that he would receive a custodial sentence. Either way, his re-offending would impede his deportation. He also considered that the pursuit of legal challenges by the foreign national prisoner could be relevant. However, he considered the weight to be given to the time spent on appeals to be fact-sensitive. In this regard, he noted that much more weight should be given to detention during a period when the detained person was pursuing a meritorious appeal than to detention during a period when he was pursuing a hopeless one.

Lord Dyson further noted that while it was common ground that the refusal to return voluntarily was relevant to the assessment of the reasonableness of the period of detention because a risk of absconding could be inferred from the refusal, he warned against the danger of drawing such an inference in every case. On the contrary, he considered it necessary to distinguish between cases where the return to the country of origin was possible and cases where it was not. Where return was not possible for reasons extraneous to the person detained, the fact that he was not willing to return voluntarily could not be held against him since his refusal had no causal effect. If return was possible, but the detained person was not willing to go, it would be necessary to consider whether or not he had issued proceedings challenging his deportation. If he had done so, it would be entirely reasonable that he should remain in the United Kingdom pending the determination of those proceedings, unless they were an abuse of process, and his refusal to return voluntarily would be irrelevant. If there were no outstanding legal challenges, the refusal to return voluntarily should not be seen as a trump card which enabled the Secretary of State to continue to detain until deportation could be effected, otherwise the refusal would justify as reasonable any period of detention, however long.

6. Immigration Act 1971

Section 3(5)(a) of the 1971 Act provides that :

> "(5) A person who is not a British citizen is liable to deportation from the United Kingdom if—
>
> (a) the Secretary of State deems his deportation to be conducive to the public good;"

Section 5 of the Act continues:

> "5. Procedure for, and further provisions as to, deportation.
>
> (1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force.
>
> ...
>
> (5) The provisions of Schedule 3 to this Act shall have effect with respect to the removal from the United Kingdom of persons against whom deportation orders are in force and with respect to the detention or control of persons in connection with deportation."

The power to detain, once notice of a decision to deport has been given and once a deportation order has been made, is conferred by paragraphs 2(2) and 2(3) of Schedule 3 to the 1971 Act which provide as follows:

> "(2) Where notice has been given to a person in accordance with regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision) of a decision to make a deportation order against him, and he is not detained in pursuance of the sentence or order of a court , he may be detained under the authority of the Secretary of State pending the making of the deportation order.
>
> (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 (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise)."

7. Nationality, Immigration and Asylum Act 2002

Section 72 of the 2002 act states that:

> "72 Serious criminal
>
> (1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).
>
> ...
>
> (4) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if:
>
> (a) he is convicted of an offence specified by order of the Secretary of State, or
>
> (b) he is convicted outside the United Kingdom of an offence and the Secretary of State certifies that in his opinion the offence is similar to an offence specified by order under paragraph (a)."

8. The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004

Specified offences are contained in Schedule 1 to the 2004 Order. Both a large number and wide range of offences are included, such as terrorism offences and related offences concerning material which might be used for terrorist purposes or the security of particular modes of transport. They also include, however, a considerable number of lesser offences, including drugs offences, immigration offences, customs and excise offences, offences against the person including a wide range of sexual offences, and offences against property such as theft and criminal damage.

COMPLAINTS

The applicant complains under Article 5 of the Convention that the deportation order made by the Secretary of State was a nullity as it was based upon secondary legislation found to be *ultra vires*. Therefore it could not be relied upon to justify his detention. Consequently his detention was arbitrary and hence in breach of Article 5.

In addition, the applicant, relying upon the Supreme Court decision in *Lumba*, complains that the domestic authorities relied upon a secret blanket policy to justify his detention in 2006.

QUESTION TO THE PARTIES

Did the domestic legal regime of administrative detention applied to the applicant satisfy the requirements inherent in Article 5 § 1 as to the quality of the national law authorising such detention? In particular, did the lack of any time limits on administrative detention, taken alone or in conjunction with the absence of any automatic judicial oversight of such detention, violate the requirement of "lawful" detention under Article 5 § 1 in this sense?