Bhatt Murphy Solicitors

Briefing note on *R (AM) v SSHD*

In a judgment handed down on 13 March 2012 by Her Honour Judge Guggenheim QC, sitting at Central London County Court, the Home Secretary was found to have unlawfully detained a Zimbabwean national between 30 November 2007 and 14 January 2009.

The Claimant was represented by Jed Pennington of Bhatt Murphy Solicitors and Graham Denholm of 1 Pump Court Chambers.

Background

The Claimant, whose identity is protected by an anonymity order and who is known only as "AM", is a Zimbabwean national who arrived in the UK on a visitor's visa in September 2001. He was subsequently granted leave to remain as a student but that expired in March 2006 and he remained in the UK unlawfully. In May 2007 he was convicted on his own guilty plea of robbery and sentenced to 16 months' imprisonment. In a pre-sentence report a probation officer assessed that he posed a low risk of serious harm and a low risk of re-offending.

AM was entitled to release from his sentence on 30 November 2007. However, the Home Secretary authorised his detention and he remained detained until he was granted bail by the Asylum and Immigration Tribunal on 14 January 2009.

AM issued proceedings against the Home Secretary on 23 December 2009. The case was heard at Central London County Court over four days on 31 October, 1-2 November and 5 December 2011.

Application of the unlawful blanket detention policy

In her Defence, the Home Secretary admitted that she had falsely imprisoned AM between 30 November 2007 and 8 September 2008 because he had been detained pursuant to the blanket policy of detention operated at that time, which was found to be unlawful by the Supreme Court in *Lumba* [2012] 1 AC 245.

Mr Graham Chapman, an Inspector (Senior Executive Officer grade), and Mr Kieran Kennedy (Higher Executive Officer grade), gave extensive oral evidence for the Home Secretary at the hearing. They had been responsible for conducting some of the reviews of AM's detention. Their evidence was that they attempted to conduct meaningful reviews of detention but were fully aware that if they recommended individuals for release senior managers would overrule them. The Judge rejected Mr Chapman's evidence that the detention reviews were "meaningful" and referred to

his evidence that the artificiality of the exercise they were asked to conduct "made many officials uncomfortable"[1].

Evidence relied on by the Home Secretary on enforced removals to Zimbabwe
The Home Secretary relied on the evidence of Mr John McGirr (Senior Executive Officer grade in the Agency's Specialist Appeals Team) with regard to the issue of enforced removals to Zimbabwe.

It was Mr McGirr's evidence that enforced removals to Zimbabwe were suspended in September 2006 as a result of an undertaking given to the High Court[2]. He said that the reason for the suspension remaining in place thereafter until a date subsequent to the decision in *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083[3] was "solely related to and tied to resolution of the outstanding [country guidance] litigation". Thereafter, it was said by Mr McGirr that "it was decided to extend the suspension of enforced returns for foreign policy reasons, and in particular HM Government's wish not to destabilise progress on [the] implementation of the Global Political Agreement in Zimbabwe". On 14 October 2010 Damian Green announced to Parliament the Government's intention to resume enforced returns to Zimbabwe, thereby ostensibly bringing an end to the suspension.

It was Mr McGirr's evidence that it was the Home Secretary's reasonable expectation, at all times up until *RN* was promulgated, that the outstanding litigation would be resolved and enforced returns would resume. It was accordingly the Home Secretary's case that at all times during the Claimant's detention there was sufficient prospect of the Claimant being removed to justify continued detention.

In his witness statement, Mr McGirr stated that there were "no public statements made by Ministers or officials about the enforced removal of failed asylum seekers to Zimbabwe" during the dates of AM's detention. A search of Hansard revealed a number of statements by Government Ministers, including:

- On 7 May 2008 Lord Malloch-Brown, Minister of State at the Foreign and Commonwealth Office, told the House of Lords that "the British Government would not want to return people to a country where conditions like [that in Zimbabwe] prevail",
- On 30 June 2008 Lord Bach, Foreign and Commonwealth spokesman, told the House of Lords "I make it clear that [the British Government] have no current plans to enforce removals to Zimbabwe and will not do so until the current political situation is resolved".
- On 10 July 2008 Gordon Brown, the Prime Minister, told the House of Commons that "no one is being forced to return to Zimbabwe from the United Kingdom at this time – no one".

[1] Judgment, paragraphs 31 and 32.
[2] The undertaking was to defer all enforced removals to Zimbabwe pending the outcome of the Home Secretary's appeal in *AA (Risk for involuntary returnees) Zimbabwe CG* [2006] UKAIT 00061.
[3] The decision in which was promulgated on 19 November 2008.

Mr McGirr accepted in cross examination that it was "deeply regrettable" that the contents of his statement to the court were inaccurate. He agreed that the only reasonable conclusion as at 30 June 2008 was that the suspension of enforced removals would remain in place for a very long time indeed.

The Judge's decision

The Judge found that the statements to Parliament showed that removals to Zimbabwe were suspended following the March 2008 elections due to "a broader humanitarian concern" not to return failed asylum seekers to the conditions prevailing in Zimbabwe at that time[4]. She was "satisfied that a careful examination of the situation, as the situation deteriorated after the March 2008 elections, ought to have brought into focus the fact that the timescale for resuming enforced removals to Zimbabwe was no longer necessarily tied to the timetable for the resolution of the country guidance litigation" and "it ought to have been clear to senior officials and the Secretary of State, soon after the elections in March 2008, that the timetable for resumption of removals was now at large and depended on the inherently unpredictable process of Zimbabwe achieving some political solution"[5].

Weighing this and all other relevant factors in the balance (which included her findings that (i) AM was a moderate abscond risk; (ii) there was a low risk of serious harm and re-offending; (iii) AM had done nothing to positively obstruct the removal process; and (iv) AM had indicated a firm and settled intention not to return voluntarily) the Judge concluded that it should have been apparent to the Home Secretary by 14 May 2008 that AM could not be removed within a reasonable period[6] of time and accordingly he was entitled to substantial damages for false imprisonment from that date until he was released[7].

The Judge made an order that AM should be paid nominal damages of £1 for the period he was unlawfully detained between 30 November 2007 and 13 May 2008 and substantial damages, to be assessed by her if the parties are unable to reach agreement as to the amount, for the period 14 May 2008 to 14 January 2009. The Judge refused the Home Secretary's application for permission to appeal at a further hearing on 26 April 2012. On 3 May 2012 the Home Secretary indicated that she did not intend to renew her application for permission to the Court of Appeal which means the judgment is final.

Comment

Zimbabwean nationals with a similar risk profile to AM who were detained at around this time are likely to have good claims that their detention was unlawful. However, as the Judge made clear at paragraph 67 of her judgment, the "reasonable period" for the purposes of the second and third Hardial Singh principles will be different in each case, and may be longer if the risks of absconding, harm and re-offending are shown to be higher.

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[4] Judgment, paragraph 61.
[5] Judgment, paragraph 62.
[6] In breach of the 3rd Hardial Singh principle identified by Dyson LJ in *R (I) v SSHD* [2003] INLR 196.
[7] Judgment, paragraphs 63-66.

In this case, the Defendant's failure to provide full disclosure led to adverse findings being made against her. There may be a significant volume of evidence relating to the Government's policy not to return individuals to Zimbabwe in the wake of the March 2008 elections which was not placed before the court in this case. It is understood that in other cases, applications for specific disclosure of this material are being pursued.

The case also serves to illustrate the hypocrisy of the Government when it comes to human rights issues: it was official Government policy not to enforce returns to Zimbabwe in the wake of the violence and unfolding humanitarian crisis following the March 2008 elections, strongly condemning the Mugabe regime. Meanwhile, at the Home Office, where the policy imperative continued to be to appear "tough" on immigration, asylum and, particularly, the removal of foreign national offenders, the Home Secretary continued to insist to Zimbabweans in detention that they should go voluntarily and refused asylum support to destitute Zimbabweans without permission to work on the basis that they were not making enough effort to leave.