BRIEFING NOTE

***The Queen (Babbage) v SSHD* [2016] EWHC 148 (Admin)**

In a judgment handed down on 1 February 2016 Mr Justice Garnham gave detailed reasons for his decision, announced on 15 December 2015, that the continued detention of a Zimbabwean national who had been administratively detained by the SSHD for more than two years was unlawful.[1] The judgment raises questions about the legality of the practice of detaining Zimbabwean nationals who do not have a current Zimbabwean passport and who are unwilling to return voluntarily. It also raises questions about the practice of pursuing prosecutions of such individuals under s.35 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 ("the 2004 Act") for, essentially, declining to accept voluntary return.

Mr Babbage came to the UK as a child in April 2003 and was granted leave to remain via the rules on UK ancestry. From 2008 to 2011 he "built up a serious criminal record" (§28) culminating in May 2011 with a conviction for robbery, for which he received a 2 ½ year sentence. The Probation Service assessed his risk of harm as "medium". In 2012, after his conditional release date, he was granted immigration bail but shortly after release he breached his bail conditions and the conditions of his licence and was recalled to custody to serve the remainder of his sentence. At the end of his sentence he was held in immigration detention but was again granted immigration bail. Again, he breached his bail conditions. On 6 October 2013 he was arrested for assault but the matter was not pursued by the police. When he was released from police custody he was again held in immigration detention.

As at the date of the hearing on 9 December 2015, Mr Babbage had been held continuously in administrative immigration detention since 7 October 2013. The judge made clear at the outset of his judgment his view that Mr Babbage was "likely, if released, to abscond and to commit further offences" (§1). The key question was whether there was a realistic prospect of removing him to Zimbabwe within a reasonable period of time. The task for the Secretary of State in demonstrating that there was such a realistic prospect was made all the more difficult by a failure to comply with orders for disclosure and a decision not to file witness evidence (see §§5-26).

[1] There was no claim for damages for historic detention before the Court, essentially in order to secure an expedited final hearing and due to inadequate disclosure meaning that it was not possible for adequately particularise such a claim. Mr Babbage repeatedly made clear that such a claim would be pursued separately, and no objection was raised to this course.

For a number of years, it has only been possible for the Home Office to return Zimbabwean nationals where either they have a current passport or they are willing to return voluntarily.[2] The judge accepted that this was unlikely to change, see §95:

> The Zimbabwean authorities' position has been made clear over a prolonged period; they will not accept the return of those who do not hold a current passport other than from those willing to go back. There is nothing to suggest that stance is likely to change in the foreseeable future…

Mr Babbage's Zimbabwean passport had expired. At the hearing, counsel for the SSHD accepted that in order for the Zimbabwean High Commission ("ZHC") to issue an emergency travel document he would need to: (1) sign disclaimer indicating his willingness to return voluntarily and (2) confirm this at a face to face interview with the ZHC.

On a number of occasions, the SSHD had sent Mr Babbage a form IS35 "Request for co-operation with the re-documentation process", specifying that he was required to (a) attend for an interview with the ZHC to answer questions "accurately and completely" and (b) sign the attached voluntary return disclaimer. The documents stated the SSHD's belief that the actions "will or enable a travel document to be obtained" and "possession of a travel document will factilitate your deportation or removal". The documents went on that "[f]ailure to comply with the requirement(s) above, without reasonable excuse, is a criminal offence punishable by up to 2 years imprisonment". A central part of the SSHD's case was that Mr Babbage might change his mind about voluntary return and once it was clear that he would not the SSHD could detain him pending consideration of whether he should be prosecuted under s.35 of the 2004 Act.

At the hearing, counsel for the SSHD was pressed on what the constituent parts of the s.35 offence would be in Mr Babbage's case. The response was confused and included a submission that failing to complete a voluntary return disclaimer when required to do so would be an offence under s.35 whilst completing a voluntary return disclaimer when the individual did not intend to voluntarily return would also.[3]

The judge dealt with two important issues which occur repeatedly in such cases.

Firstly, whereas the SSHD had repeatedly relied upon expeditious consideration of prosecution under s.35 as justifying ongoing detention, the judge held that such consideration of s.35 prosecution was not a lawful basis to maintain immigration detention.

[2] See *The Queen (Mhlanga) v SSHD* [2012] EWHC 1587 (Admin), in particular at §§18-20.
[3] See transcript of 9 December 2015 hearing, pp53-54 and 60-63.

The power could be exercised solely to effect deportation, and not to facilitate prosecution for refusing to return voluntarily. Secondly and in any event, as to s.35 prosecution, the judge concluded that if voluntary return did not reflect the individual's true intention, then he could not properly be required to sign a voluntary disclaimer to facilitate his removal and/or he would have a reasonable excuse for not doing so. The judge stated:

> 74. I cannot see how it can conceivably be said that pursuit of the possibility of prosecution under Section 35 can justify the Claimant's detention. The first principle set out by Lord Dyson in Lumba was that the Secretary of State can only use the power to detain for the purpose of deporting the person concerned. If the true purpose for detaining him was to prosecute him under Section 35, that was not a lawful exercise of the power.
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> 75. In any event, I have the gravest doubt whether a breach of Section 35 could be made out against the Claimant. The Claimant was being asked to sign a document indicating that he intended to leave the United Kingdom. If, in truth, he did not intend to leave the United Kingdom he could not properly be required to sign the voluntary disclaimer; or to put it another way, he would have a reasonable excuse for not doing so.

Although as stated the issue of past detention was not before the Court, the judge held that there had been no realistic prospect of returning Mr Babbage to Zimbabwe since "at least, August 2015" (§2).

The judgment also gives important guidance as to the SSHD's duty of disclosure/ candour. In this case, the Judge criticised the failure of the SSHD and her advisers to provide documents of their own volition, when then prompted to do so by solicitors, and when the Mr Babbage subsequently obtained an order from the Court that she disclose "all documents relevant to the reasons for the Claimant's detention". The SSHD failed in response to disclose all such documents, and disclosed others in redacted form which was explained on the basis that GLD took the view that they were not relevant to the areas of dispute or were sufficiently covered by other documents that had been disclosed. The Judge said that:

> 19. ... It is wholly unacceptable for those acting for the Secretary of State to ignore or disregard the orders of the Court. Furthermore, once a Judge of this Court has identified specific documents which are required to be disclosed, there is no basis for the exercise of any discretion by the Secretary of State's advisers. If the document falls within the class covered by the Order, it must be disclosed.
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> 20. In particular, it is not open to the Secretary of State, or her advisers, to decide that some of the documents falling within the category made subject to the Order ought to be redacted to protect some interest of the Home Office or because they do not appear, to the Secretary of State, to be relevant to the issues in the case. The Order of the Court determines relevance and disclosability.
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> 21. If it is thought that there are grounds on which material covered by the Court Order should be redacted before it is disclosed to the other party (or, conceivably,

even to the Court) then a proper application should be made for the Order to be varied to accommodate that concern. What must never happen is that those acting for the Secretary of State (or any other party) decide, off their own bat, not to disclose material subject to an order of the court because they judge it irrelevant.

22. This case concerned allegations of unlawful detention. In such cases, an especially careful approach is necessary, by those acting for the Secretary of State, to issues of disclosure. It is plain there was no such approach here.

23. It strikes me as astonishing that more than 20 years after the decision of the House of Lords in M v The Home Office [1994] 1 A.C. 377, it should be necessary to set out what are, in truth, elementary principles of constitutional law…

25. Since the hearing in this case, I have received a letter from the head of the division of GLD responsible for this case, providing a fulsome apology to the Court, confirming that training in duties of disclosure was provided to those responsible for cases such as this, and indicating that "*a review of disclosure in all claims where detention within [the relevant] team which challenge use of the power of detention*" had been initiated.

That letter referred to at para 25 said that "This matter has been considered at the highest levels in GLD" and that "your Lordship will of course be aware of our published guidance, "Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings" ("the Hogg guidance")". Natalie Lieven QC, acting for GLD at the hearing on 15 December 2015, confirmed to the Court that GLD continues to comply with the Guidance (which is published at [2010] JR 177) and has no internal policy or practice departing from it (transcript, p. 8B-C).

The judgment is likely to be of use in other cases as follows:

1. In challenges to immigration detention: unless a Zimbabwean national has a current passport, the SSHD will only be able to enforce removal where he/she is willing to accept voluntary return. Once it is apparent that a detainee is unwilling to voluntarily return, the detainee should be released, even where there are significant risks of absconding and re-offending/harm. As the judge said "Those risks go to, and may have a very significant effect upon, what is to be regarded as a reasonable period of detention prior to the proposed removal. But the acid test is always whether there is a realistic prospect of effecting a return." (para 90)

2. In all immigration detention challenges, detention cannot be justified by reference to expeditious steps to prosecute the claimant under s.35 because he continues to decline voluntary return (or to prosecute on any other ground). The power of detention can be exercised only for the purpose of effecting deportation, where there remains a

realistic prospect of doing so. This applies regardless of the strength of the prosecution case.

3. Someone should not in any event be referred for prosecution under s.35 of the 2004 (or threatened with prosecution) for declining to complete a voluntary return disclaimer or state an intention to return, or for declining to say at a travel document interview with their national authorities that they are willing to return voluntarily if that does not correspond to their true intention.[4] The judgment means that it is exceptionally unlikely that someone could be convicted on this basis.

4. The guidance on candour and disclosure is useful in the numerous cases where there are failings by the SSHD/GLD in this regard, together with highlighting the importance of an order for specific disclosure in such cases, and establishing the steps that the SSHD must take should she wish to redact or withhold a document covered by such an order. The judgment also confirms that the consequences of such failings and of the failure to lead witness evidence is that adverse inferences should be drawn against the SSHD where the position in the documents before the Court is unclear.

Mr Babbage was represented by Mark Henderson of Doughty Street Chambers and Jed Pennington and Rachel Etheridge of Bhatt Murphy.

[4] NB a flat refusal to attend an interview is one of the matters in s.35(2) for which an individual may be prosecuted.