CO/2650/2005

Neutral Citation Number: [2005] EWHC 2567 (Admin)

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

Royal Courts of Justice
Strand
London WC2

Tuesday, 1st November 2005

B E F O R E:
MR JUSTICE BEAN

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THE QUEEN ON THE APPLICATION OF FAULKNER
(CLAIMANT)

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT
(DEFENDANT)

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MR P NATHAN (instructed by Sutovic & Hartigan) appeared on behalf of the CLAIMANT
MR J P WAITE (instructed by the Treasury Solicitor) appeared on behalf of the DEFENDANT

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J U D G M E N T
(As Approved by the Court)

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1. MR JUSTICE BEAN: The claimant is Jamaican. He arrived in the UK on 25th February 2000 on a six month visitor's visa. On 8th January 2003 he was arrested on a driving charge, was interviewed as an overstayer and claimed asylum. His

claim for asylum was rejected on 11th February 2003 and an appeal to an Adjudicator was dismissed on 27th June 2003. The claim does not appear to have been taken to a further appeal.

2. On 21st July 2004 at the Inner London Crown Court, he was convicted of possession of a prohibited weapon with intent and unlawful possession of ammunition. He received concurrent sentences totalling 30 months' imprisonment. There was no recommendation for deportation.
3. On 8th September 2004 he was given notice of the Secretary of State's intention to make a deportation order. He took the opportunity to make representations which were, essentially, that he had a girlfriend who is a British citizen (though their relationship has, I understand, now ended) and they had a baby child. On 10th January 2005 the Secretary of State gave notification of his intention to make a deportation order. It appears that notice of this was not immediately served on the claimant. Nothing now turns on exactly when notice was given but it was no later than 24th February 2005. On 25th February the claimant appealed against the making of the deportation order, as he is entitled to do under section 82(2)(j) of the Nationality, Immigration and Asylum Act 2002.
4. On 9th March 2005 the prison authorities mistakenly informed the Home Office that the claimant was not appealing. The custodial part of his 30-month sentence was due to expire on 11th March. Accordingly, on 10th March an official in the Home Office authorised his continued detention. The relevant document reads as follows:

   "**Immigration Acts 1971 and 1988**

   Authority for Detention

   To: Ian Faulkner, Jamaica, 18th April 1980.

   Whereas the Secretary of State has decided to make a deportation order under section 5(1) of the Immigration Act 1971 against Ian Faulkner a citizen of Jamaica who is, at present, detained in pursuance of the sentence or order of a court and is due to be released otherwise than on bail on 11th March 2005.

   The Secretary of State hereby, in pursuance of paragraph 2(2) of Schedule 3 to that Act, authorises any constable at any time after notice of the decision has been given to the said Ian Faulkner in accordance with the Immigration Appeals (Notices) Regulations 1984 to cause him to be detained from the date of his release until the deportation order is made or an appeal against the decision under Part II of the Act is finally determined in his favour."

5. It is agreed that the notice should have been accompanied by a form or letter giving the reasons why he was to remain detained. I have been shown specimens of both ways of doing this. The more usual way is the service of form IS91R. This is headed "Notice to Detainee. Reasons for detention and bail rights". The scheme of it is as follows. Paragraph 1 says:

"To [space for name], I am ordering your detention under powers contained in the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002.

(2) Detention is only used when there is no reasonable alternative available. It has been decided that you should remain in detention because . . . "

The form then contains six reasons why the decision is as the individual should remain in detention, one of which is:

> "(a) you are likely to abscond if given temporary admission or release."

Paragraph 2 then goes on:

> "This decision has been reached on the basis of the following factors."

Then 14 factors are given with boxes which can be ticked where applicable. At the bottom of page 1 it says:

> "Your case will be regularly reviewed. You will be informed in writing to the outcome of the review."

6. On the second page, the document has a detailed section headed "Bail Rights", advising the detainee of five different procedures for application for bail depending on the classification of the case, and goes on in paragraph 4 to give telephone contact numbers for the Immigration Advisory Service and the Refugee Legal Centre, either of whom may be able to assist. Finally, there is a section headed "Contents of this notice have been explained to you in English by me", with provision for a signature by the appropriate official and/or interpreter.
7. The Immigration and Nationality Directorate Operations Enforcement Manual chapter 38, section 38.6.3, dealing with form IS91R, "Reasons for Detention", says:

"This form is in three parts and must be served on every detained person at the time of their initial detention. The IO must complete all three sections of the form. The IO must specify the power under which the person has been detained, the reasons for detention and the basis on which the decision to detain was made. The detainee must also be informed of his bail rights and the IO must sign both at the bottom of the form overleaf to confirm the notice has been explained to the detainee (using an interpreter where necessary) and that he has been informed of his bail rights. It should be noted that the reasons for detention given could be subject to judicial review. It is therefore important to ensure they are always justified and correctly stated."

The paragraph goes on to enumerate the six possible reasons for detention and to say that the IO must tick all the reasons that apply to the particular case. It then goes on to list the 14 factors which may form the basis of the reasons for the

decision to detain, and again instructs the Immigration Officer to tick all those which apply to the particular case.

8. Returning to the chronology, on 21st April the Home Office, in the belief that the claimant had not appealed, set removal directions. The claimant's solicitors, when informed of this, quite rightly protested and the removal directions were cancelled. In early May 2005 the claimant's solicitors notified the defendant of an application for bail. On 9th May, the day before the bail application was due to come before a Designated Immigration Judge, the defendant gave reasons for opposing them. On 10th May a Designated Immigration Judge refused bail. On 21st June, however, another Designated Immigration Judge granted bail. The appeal against the deportation order remains outstanding.
9. Meanwhile, at an oral hearing in this court on 26th May, Ouseley J had given permission to apply for judicial review on the issue of the lawfulness of the claimant's detention between 11th March, the date on which the custodial portion of his prison sentence expired, and 9th May, the date on which he was given reasons why the Secretary of State opposed bail.
10. The statutory basis of the claimant's detention after 11th March is paragraph 2(2) of Schedule 3 to the Immigration Act 1971 which states:

    "Where notice has been given to a person in accordance with regulations under section 18 of this Act of a decision to make a deportation order against him, and he is neither detained in pursuance of the sentence or order of a court nor for the time being released on bail by a court having power so to release him, he may be detained under the authority of the Secretary of State pending the making of the deportation order."

    There is no dispute that that statutory power was applicable in this case, but it does not defeat the claimant's claim. As Moses J held in **R (on the application of Sedrati) v Secretary of State for the Home Department** [2001] EWHC Admin 418, the terms of paragraph 2(2) of Schedule 3 do not create a presumption in favour of detention upon completion of a sentence of imprisonment of someone liable to deportation; particularly not, I would add, when, as in this case, the Crown Court has made no recommendation for deportation.

11. Since there is no presumption in favour of detention, it follows in my view that there is a duty to inform a detainee of the grounds of his continued detention. The basic proposition is not in doubt: as Sedley LJ put it in **Taylor v Chief Constable of Thames Valley Police** [2004] 1 WLR 315 at paragraph 58:

    "If the State is taking away your liberty, you are entitled to know why."

12. The celebrated case of **Christie v Leachinsky** [1947] AC 573 was an action for false imprisonment following each of two allegedly wrongful arrests of the plaintiff. In what was described by Clarke LJ in **Taylor's** case as a classic passage, Viscount Simon said:

"(1) If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words a citizen is entitled to know on what charge or on suspicion of what crime he is seized. (2) If the citizen is not so informed but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment. (3) The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained. (4) The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed. (5) The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, eg, by immediate counter-attack or by running away. There may well be other exceptions to the general rule in addition to those I have indicated, and the above propositions are not intended to constitute a formal or complete code, but to indicate the general principles of our law on a very important matter."

Clarke LJ, having cited this in **Taylor**, continued:

> "(23) The relevant principles remain those set out in **Christie v Leachinsky** [1947] AC 573. It seems to me that the best statement of those principles as articulated in more recent times is not to be found in an English case at all but in para 40 of the decision of the European Court of Human Rights in **Fox, Campbell and Hartley v United Kingdom** (1990) 13 EHRR 157, 170. The court was there of course considering, not section 28(3) of PACE, but Article 5(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides: 'Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him'.

(24) The court said, at p170, para 40:

> 'Paragraph (2) of Article 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This protection is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph (2) any person arrested must be told in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to

a court to challenge its lawfulness in accordance with paragraph (4). Whilst this information must be conveyed 'promptly' (in French: 'dans le plus court delai'), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.'.

(25) The wording of Article 5(2) and of section 28(3) of PACE are not of course the same. Nor are the words used by the European Court of Human Rights the same either as those of Viscount Simon quoted at para 21 above or as those used in any of the other cases I have mentioned, but to my mind the principles expressed are essentially the same . . .

(26) In the light of all the authorities I would hold that the modern approach to the application of section 28(3) is that set out in para 40 of the judgment in **Fox, Campbell and Hartley v United Kingdom** 13 EHRR 157, 170. The question is thus whether, having regard to all the circumstances of the particular case, the person arrested was told in simple, non-technical language that he could understand, the essential legal and factual grounds for his arrest. In the light of the case law as it has developed I doubt whether it will in the future be necessary or desirable to consider the cases in any detail, or perhaps at all. It seems to me that in the vast majority of cases it will be sufficient to ask the question posed by the European Court of Human Rights."

13. It is instructive to consider the facts of **Taylor's** case and the case of **Fox, Campbell and Hartley**. In **Taylor's** case the arresting officer had said to the 10-year old claimant:

"I am arresting you on suspicion of violent disorder on 18th April 1998 at Hillgrove Farm."

The county court judge rather surprisingly held that this was insufficiently particularised. The Court of Appeal reversed him on this point. In **Fox, Campbell and Hartley v UK**, according to paragraph 41 of the judgment of the European Court of Human Rights:

"On being taken into custody Mr Fox, Miss Campbell and Mr Hartley were simply told by the arresting officer that they were being arrested under section 11(1) of the 1978 Act on suspicion of being terrorists. This bare indication of the legal basis of the arrest, taken on its own, is insufficient for the purposes of Article 5(2) as the government conceded. However, following their arrest all of the applicants were interrogated by the police about their suspected involvement in specific criminal acts and their suspected membership of proscribed organisations. There is no ground to suppose that these interrogations were not such as to enable the

applicants to understand why they had been arrested. The reasons why they were suspected of being terrorists were thereby brought to their attention during their interrogation."

14. Mr Waite for the Secretary of State relied on the facts of the second arrest in **Christie v Leachinsky**. Every law student knows that the case is an authority for the proposition that an arrest without warrant can be justified only if it is an arrest on a charge made known to the person arrested, per Lord Simonds at page 591:

"Blind, unquestioning obedience is the law of tyrants and slaves. It does not yet flourish on English soil."

15. Some also know that Leachinsky's first arrest on 31st August was on a charge of unlawful possession (under the Liverpool Corporation Act 1921) which, as the arresting officer well knew, gave no power of arrest without warrant. But few remember the second part of the case. Leachinsky, having been remanded by the Stipendiary Magistrate in custody on 1st September and on bail on 8th September, was brought before the Magistrates' Court for a third time on 15th September on the charge of unlawful possession. This, with the magistrate's consent, was then withdrawn on the ground that the police had decided to prosecute the respondent for larceny. The respondent was accordingly discharged; but instead of coming from the dock into the body of the court, he was directed by one of the appellant officers to descend the steps into the cells and was detained until the arrival some hours later of a Leicester policeman who charged him with larceny and took him into custody.
16. The House of Lords, reversing the Court of Appeal, held that this imprisonment was justified since the respondent then knew for what alleged felony he was being detained. Mr Waite relies on the fact that it was apparently sufficient in that case for Leachinsky to be told merely that he was being charged with larceny. I think, however, that it is unwise to place too much reliance on this. It is apparent from the speech of Lord du Parcq at page 603 that Detective Constable Christie had given unchallenged evidence at the trial that on 15th September he had almost immediately told Leachinsky the true ground of his detention. There appears to have been no argument that it was insufficiently particularised.
17. In my judgment, the present state of the law is accurately set out in two passages from the judgment of Clarke LJ in **Taylor's** case. At paragraph 35 he said:

"Each case depends upon its own facts. It has never been the law that the arrested person must be given detailed particulars of the case against him. He must be told why he is being arrested. In some cases it will be necessary for the officer to give more facts than in others."

In paragraph 27 he had said:

"It is important to note that the arrested person must be told both the essential legal and the essential factual grounds for the arrest. The words

spoken must therefore include some statement of the factual, as well as some statement of the legal, basis of the arrest [emphasis added]."

18. Mr Waite further relied on the **R (on the application of) Saadi) v Secretary of State for the Home Department** [2002] 1 WLR 3131. That case concerned the lawfulness of the Home Office policy introduced in March 2000 of detaining asylum seekers on arrival in the United Kingdom for up to 10 days in order to facilitate the expeditious determination of their claims to asylum. The claimants submitted that such detention was unlawful in the absence of a stated and reasonable belief that the individuals concerned would seek to evade immigration control. Again, as in this case, there was a failure to serve properly completed forms IS91R. In the case of Dr Saadi himself, the IS91R was missing. In the case of the other claimant a form had been served that had not been properly filled in. Collins J, at first instance, [2001] EWHC Admin 670 at paragraph 15 said:

    "The use of inappropriate forms and the giving of reasons for detention on those forms which may not have been wholly accurate do not effect the lawfulness of the detention. The real reason was the new Oakington process. If that was lawful, the disgraceful failure to prepare proper forms cannot render it unlawful. In any event, it may be that in the cases of illegal entrants the immigration officers could properly rely on at least the absence of identification and a clandestine entry as factors justifying detention even if, had Oakington not been used, temporary admission would have been granted. I do not need to go into the matter further since Mr Scannell has not sought to argue that the muddle about reasons renders the detentions unlawful."

19. Collins J's conclusion that the claimants succeeded was reversed by the Court of Appeal and a further appeal to the House of Lords was dismissed. Lord Slynn of Hadley at paragraph 48 of his speech said:

    "It is agreed that the forms served on the claimants here were inappropriate. It was, to say the least, unfortunate but without going as far as Collins J in his criticism of the Immigration Service, I agree with him that even on his approach the failure to give the right reason for detention and the giving of no or wrong reasons did not in the end affect the legality of the detention."

20. In the **Saadi** case counsel were not arguing that the failure to give reasons was critical. This is not surprising. The evidence of Mr Ian Martin of the Home Office (see paragraph 18 of the report in the House of Lords) was that detention at Oakington was not based on fear of absconding but on the desirability of reaching an expeditious determination of the cases. I do not consider that this case detracts from the principles set out in the judgment of Clarke LJ in **Taylor**, nor their applicability to cases of detention of an unlawful entrant at the conclusion of a custodial sentence in the United Kingdom.
21. Mr Waite, indeed, did not dispute that **Taylor** is applicable to the present case, but he submitted that its requirements were satisfied by the fact that the claimant

either was told or knew that (1) he was an illegal entrant, (2) he had committed firearms offences and had been sentenced to 30 months' imprisonment for those offences, (3) the custodial part of his prison sentence had ended, (4) the Secretary of State intended to deport him; therefore, Mr Waite submits, it must have been obvious that (5) the reason why he was being detained was because he presented a risk of absconding to avoid deportation, or a risk to the public, or both.

22. I accept that the claimant knew items (1) to (4) of this list but it does not follow, in my judgment, that he must have known item (5). One might as well say Leachinsky, on his first arrest on 31st August, knew perfectly well that he was suspected of having a stolen a bale of cloth and did not need to be told what the basis of his arrest was.
23. Mr Waite finally argues that judicial review is different from an action of false imprisonment in that the claimant must show that he has been prejudiced. I accept that distinction. It is easy to conceive of cases where a failure to give reasons for continued detention is immaterial. Suppose a case where an illegal entrant to the United Kingdom with no family or ties here is convicted of conspiracy to supply class A drugs, sentenced to 14 years imprisonment and recommended for deportation. Shortly before the end of the custodial period of his sentence, he is served with a deportation order against which he appeals. No court would contemplate the grant of bail in those circumstances and the reasons for detention are obvious. Here, by contrast, the claimant was sentenced to 30 months' imprisonment, was not recommended for deportation, has a partner and child in the United Kingdom and, as we now know, although his application for bail was refused at the first time of asking on 10th May, it was granted on the second occasion on 21st June. It cannot, in those circumstances, be said that the failure to inform him in March of the reasons for his detention and the procedure for applying for bail was immaterial. Mr Waite relies on the claimant's failure to instruct solicitors for a month after 11th March but this point, in my view, is circular.
24. I therefore conclude that the claimant succeeds. This makes it unnecessary to consider the interesting but conceptually difficult submission of Mr Nathan for the claimant that the decision of Woolf J (as he then was) in **Gransden v Secretary of State for the Environment** [1985] 54 P&CR 86 concerning justifications for departure from a published policy applies to a case where the relevant policy is one giving reasons for a substantive decision. I grant a declaration that the claimant's detention between 11th March and 9th May 2005 was unlawful because of the defendant's failure to give him the reasons for that detention.
25. MR NATHAN: My Lord, just one point. Reference was made to the partner and child. I should add that further facts came to light during the course of the appeal hearing and statements have been taken for that. I understand the claimant has a partner and he also has a child but, for the sake of completeness, he is no longer with the partner with whom he had the child. He has moved on from that relationship.
26. MR JUSTICE BEAN: Is that to a new partner or is he on his own?

27. MR NATHAN: No, to a new partner. He has a separate partner to the partner with whom he had the child, but he still has contact with the child.
28. MR JUSTICE BEAN: Thank you very much. That had not been made clear to me during the hearing. It does not affect the decision I have reached but I will make the necessary corrections to the narrative in correcting the transcript.
29. MR NATHAN: My Lord, there then follows the implications of your Lordship's judgment. I do not know if my learned friend disagrees, but my understanding is that the matter is ought now to be sent -- we are in the Queen's Bench Division strictly already, but reference to this is made in Collins J's judgment in **Saadi**. I understand the general procedure is for the matter to be sent to the Queen's Bench list for further listing for the assessment of damages.
30. MR JUSTICE BEAN: There was also a discussion of this in Brooke LJ's judgment in **ID**. It may be that the matter is settled in the near future, I do not know. Mr Waite, what directions should I give?
31. MR WAITE: My Lord, the Home Office's preferences is for it to be kept in the Administrative Court for the reason that the Administrative Court heard the case and the Administrative Court judges are likely to have particular specialist expertise in this area. My Lord, that is the application I would make.
32. MR NATHAN: I certainly have no objection. That seems eminently sensible, my Lord.
33. MR JUSTICE BEAN: It can be retained in the Administrative Court. Mr Nathan, perhaps at the conclusion of, say, 28 days your solicitors would inform the court whether the assessment of damages remains contentious and, if so, apply for a hearing.
34. MR NATHAN: May I ask for 56 days in that regard?
35. MR JUSTICE BEAN: Yes, certainly.
36. MR NATHAN: There is an issue relating to aggravating features in the claimant's statement regarding an assault upon him while in detention which may or may not need to be considered on further hearing. My instructing solicitors have been seeking a DVD from the detention centre which unfortunately seems to have passed into many hands, but in the course of the last six months my instructing solicitors have still yet to see the DVD. That would be material. 56 days will hopefully them to obtain a copy. It is a DVD of the CCTV of the assault.
37. My Lord, the only other issue that I seek to draw to your Lordship's attention is that of costs. I would be grateful if your Lordship would make an order for costs against the Secretary of State on the basis that we have succeeded with our claim. Moreover, I think it would be standard for a detailed assessment of those publicly funded costs to be ordered in case agreement cannot be reached.
38. MR JUSTICE BEAN: Yes. Mr Waite?
39. MR WAITE: No objection to that, my Lord.
40. MR JUSTICE BEAN: As to liberty to apply for further directions, I think that should be for either party because in this type of case the defendant may be more keen to get on with it than the claimant.
41. MR NATHAN: Yes.
42. MR JUSTICE BEAN: Liberty to either party to apply within 56 days, but not necessarily to wait until the 56th day. Anything else to be dealt with?

43. MR WAITE: My Lord, I have a short application for permission to appeal. The short point is this. It is in the words of the House of Lords in **Saadi** that the giving of no or wrong reasons does not affect the legality of the detention. The fact that that was endorsed, seemingly, in **ID v Secretary of State**, my Lord, that is, in my submission, an important issue which needs to be clarified by the Court of Appeal. The impact of the underlying reason for detention which, of course, was lawful in this case. My Lord, that is the point of law which, in my submission, justifies the grant of permission to appeal.
44. MR JUSTICE BEAN: Yes. I take your point, Mr Waite. I make no pretensions to infallibility but I think this case is, to some extent, fact specific. I will refuse permission and leave it to the Court of Appeal to decide whether they want to take the case. Thank you both very much.