

A R v A SPECIAL ADJUDICATOR AND SECRETARY OF  
STATE FOR THE HOME DEPARTMENT EX PARTE B

Queen's Bench Division

Kay J

B 17 December 1997

*Detention – Asylum – Bail – Secretary of State's policy on detention of asylum-seekers – Whether decision to detain asylum-seeker was contrary to Home Office's policy – Obligation on Secretary of State to assess need for continued detention where new material is submitted in support of asylum claim – Damages for unlawful detention*

C The applicant, an Algerian national, arrived in the UK on 30 June 1995, having left  
Algeria in March 1990 and having travelled via Afghanistan, Pakistan, Croatia and  
Bosnia where he had gone to fight for pro-Islamic groups. The appellant claimed  
asylum immediately on arrival and was detained. He was interviewed on 2 July 1995  
but refrained from disclosing his full political history for fear of being thought a  
terrorist and being refused asylum. During the course of the interview the applicant  
D stated that he did not expect the Secretary of State to grant asylum on what he had  
said thus far. On 20 July 1995, soon after he had obtained legal advice, a full  
statement was submitted on his behalf by his solicitors explaining why he had not  
told the whole truth previously. On 2 August 1995 the Secretary of State refused  
asylum. During the course of August and September 1995 the applicant's  
representatives unsuccessfully submitted a number of written representations for  
temporary admission and submitted an Arabic birth certificate in support of his  
E identity. On 10 November 1995 a special adjudicator dismissed the applicant's  
asylum appeal. During December 1995 the applicant's representatives again  
unsuccessfully made further representations, and also submitted a French version of  
the applicant's birth certificate. On 16 January 1996 the Immigration Appeal  
Tribunal allowed the applicant's appeal against the special adjudicator's decision and  
remitted it to the special adjudicator to consider whether the applicant would face  
persecution on his return to Algeria as a failed asylum-seeker. Two applications for  
F bail were made to special adjudicators in March and early April 1996 but these were  
refused despite the applicant having produced two sureties in support of bail. On  
17 April 1996 the applicant submitted further documents, including expert reports  
which supported his account of his movements prior to arrival in the UK. On 8 May  
1996 bail was again refused by a special adjudicator, the Secretary of State's  
objections to bail having been: (a) the applicant had admitted using false identity  
documents on and prior to arrival in the UK, (b) the applicant had stated he had no  
contacts in the UK, (c) the applicant had said in his initial interview that his case was  
G weak, (d) the applicant had been refused asylum and so had little incentive to comply  
with bail terms, (e) the applicant had fought for pro-Islamic groups abroad, and  
(f) the Secretary of State had been unable to verify his identity. The applicant's  
asylum appeal was listed on 6 June 1996 but was adjourned at the request of the  
Secretary of State in order to allow a review of the case. On 13 June 1996 a further  
H bail application was similarly refused by a special adjudicator. The applicant sought  
judicial review of the decision of the special adjudicator to refuse to grant bail on  
13 June 1996 and the Secretary of State's failure to grant temporary admission.  
Leave to move was granted on 27 July 1996 by McCullough J. On 10 July 1996 the  
applicant was released by the Secretary of State and recognised as a refugee the  
following day. At the substantive judicial review hearing the challenge to the special  
adjudicator's decision was not pursued and the argument focused on the Secretary of  
State's failure to apply his detention policy and to release the applicant.

**Held** – allowing the application – applying the criteria set out in the Secretary of State’s detention policy, it was impossible to say that the Secretary of State’s initial decision to detain was irrational or unlawful. Although the applicant had notified the Secretary of State by 20 July 1995 of the true state of affairs, the position had not so altered as to require the applicant’s release particularly as, first, the application seemed to be progressing with due speed, secondly, there was at that stage no way in which the Secretary of State could have made inquiries into the truth of the applicant’s assertions and, finally, no challenge by way of judicial review had been made to the detention. Accordingly, the applicant’s detention on 20 July 1995 was not unlawful. Similarly, the later submission of the birth certificate did not alter the position significantly. The circumstances changed, however, once the further documents were submitted by the applicant on 17 April 1996. By that stage, there was supporting evidence for the applicant’s account including evidence confirming his identity, there were two persons who were prepared to stand surety for bail and the applicant could view his claim in a far more optimistic light. Having regard to the length of time he had already been detained, it was imperative for the new circumstances to be carefully and urgently considered. Although the Secretary of State was entitled to seek a period to reconsider his refusal of asylum, he should have been able to reach a provisional view on the merits of the new evidence by 8 May 1996 by which time he should have realised that the balance had swung firmly in favour of release. Accordingly, the applicant’s detention between 8 May and 10 July 1996 was unjustified, unlawful and irrational and the applicant was entitled to a declaration with damages to be assessed.

#### Statutory provision considered

Immigration Appeals (Procedure) Rules 1984 (SI 1984/2041), r 33(1)

#### Cases referred to in judgment

*R v Secretary of State for the Home Department ex parte Brezinski and Glowacka* (unreported) 19 July 1996, QBD

*Vilvarajah and Skandarajah v Secretary of State for the Home Department* [1990] Imm AR 457, CA

*Mr M. Henderson* for the applicant

*Miss E. Grey* for the respondent

**KAY J:** The applicant challenges by way of judicial review a decision of the Secretary of State to detain him while his application for asylum was considered. He arrived in this country on 30 June 1995 and immediately made an asylum application. He was detained until 10 July 1996 and, on the following day, he was granted asylum.

His application for leave to move for judicial review was dated 21 June 1996 and challenged a decision of 13 June 1996 by the Secretary of State not to grant bail and a decision of the first respondent, a special adjudicator, who rejected an application for bail. Leave was granted by McCullough J on 27 June 1996 but he rejected an application for bail pending the full hearing. The subsequent grant of bail by the Secretary of State clearly altered the nature of the application and it now comes before the court by agreement to determine the issue whether the failure to grant the application for bail on arrival or at any date before 10 July 1996 was unlawful. If I so find, I am asked to give relief by way of declaration. In the light of my findings, it may be necessary to hear argument on an issue of causation of damage and thereafter any issue of quantum of damages would be adjourned to be

A determined at a later date if agreement was not possible. In such event, it is accepted that transfer from the Crown Office list to the ordinary Queen's Bench list may be appropriate.

B On behalf of the applicant it has been indicated that the applicant, whilst maintaining that the decision of the first respondent was unlawful, is content if the court were in its discretion to decline to consider the challenge to the first respondent. I do so decline and in view of the concession, it is unnecessary to explain in detail the exercise of that discretion.

It is necessary, therefore, to look at the basis on which bail is considered in such circumstances and then to recite the history of the applicant's asylum application and detention.

*Policy in respect of bail*

C In *R v Secretary of State for the Home Department ex parte Brezinski and Glowacka* (unreported) 19 July 1996 to which Mr Henderson on behalf of the appellant has referred me, I set out the policy in this way:

D 'On 14 December 1994, in answer to a parliamentary question concerning the extent to which the arrangements for the detention of asylum-seekers met the requirements of Art 5(4) of the European Convention of Human Rights, the Minister of State for the Home Department told Parliament that:

"Powers of detention under the Immigration Act 1971 are used only where there is no alternative and where there are good grounds for believing that a person will not comply with the conditions of temporary admission.

E Anyone refused asylum may appeal under the Asylum and Immigration Act 1993 and may apply for bail to the independent appellate authorities at any time while an appeal is pending ... These statutory provisions are supplemented by the general power of the court to grant a writ of habeas corpus and to grant bail in any case before them ..."

F Since that date it has been made clear that the policy is to use detention only as a last resort and that it is, in fact, employed in a very small proportion of cases put at about 1.5 per cent. [A] letter written by the Deputy Director (Enforcement), contained the following passage:

G "I should add immediately that it is not in our interests to detain a person for a moment longer than is necessary and our only objective is to effect the removal of those whom we have detained as quickly as possible where this action is appropriate."

*Detention criteria*

H (4) I mentioned that in December 1991 we issued instructions to the Immigration Service covering all aspects of detention. These confirmed a continuation of the previous policy to grant temporary admission/release whenever possible and to authorise detention only where there is no alternative. The aim is to free detention space for all those who have shown a real disregard to the immigration laws and whom we expect to remove within a realistic timescale. Among the factors to be taken into account are the following:

- (a) Is there any evidence of previous absconding from detention? A
- (b) Is there any evidence of previous failure to comply with conditions of temporary admission/release or bail?
- (c) Has the subject shown a blatant disregard for the immigration laws?
- (d) Has the subject attempted to gain entry by presenting falsified documentation? B
- (e) What are the person's ties with the UK? Does he/she have a settled address/employment? Are there close relatives (including dependants) here?

(5) In particular, where a person claims asylum, the Immigration Service will immediately contact B3 Division (the Asylum Division) to confirm that they are prepared to accept the case for "targeting". If B3 Division are able to target the case then they will give priority to it and try to resolve the application as soon as possible. If B3 Division confirm they are unable to target a case this will generally mean that we should not be able to effect a removal within a reasonable timescale and this would be an almost decisive argument against detaining in that particular case.' C

The Immigration Service instructions to staff on detention state the policy in broadly similar terms. In the course of referring to the policy the document says: D

'Broadly, however, the overriding consideration is whether the person is likely to comply voluntarily with any restrictions imposed upon him including any arrangements for removal.' E

Then later, 'Criteria for Detention' are specifically set out:

'Decisions to detain are to be made on the basis of the criteria set out below. These are not in any order of priority and neither detention nor temporary admission/release will necessarily be warranted on the grounds of only one of the criteria in isolation - all factors must be taken into consideration: F

- (a) Is there any evidence of previous absconding from detention?
- (b) Is there any evidence of previous failure to comply with conditions of temporary admission/release or bail?
- (c) Has the subject shown a blatant disregard for the immigration laws (eg entry in breach of a deportation order, attempted or actual clandestine entry)? G
- (d) Has the subject attempted to gain entry by presenting falsified documents ...?
- (e) Is there a previous history of complying with the requirements of the immigration control - eg by applying for a visa, further leave etc?
- (f) What is the likelihood of the person being removed (especially in asylum cases) and if so after what timescale? [I interpose there that that matter is underlined in the instructions.] H
- (g) What are the person's ties with the UK? Does he/she have a settled address/employment? Are there close relatives (including dependants) here?

- A (h) What are the individual's expectations about the outcome of the case? Are there factors, eg an outstanding application for judicial review, representations or an appeal, which afford an incentive for him/her to keep in touch with the Department.'

In relation to review of a decision to detain, further guidance is given in IS Instruction dated 20 September 1994 which provides:

- B 'It is not sufficient, on review, simply to conclude that the factors which led to detention remain unchanged and thus that continued detention should be authorised. Rather, the longer a person has been detained, particularly if it is as a result of a failure on the part of the Home Office to resolve the case, the greater is the onus on the part of the Home Office to justify continuation of detention.'

C *The history of the applicant's detention*

- The applicant is an Algerian national. He left Algeria in March 1990 intending to go to fight for the Muslim cause in Afghanistan. He went to Pakistan as a staging post for his ultimate destination and spent 7 days there. He was then actively involved with the Mujahadeen in Afghanistan until early 1994. He then returned to Pakistan where he remained until September 1994. By that stage he was aware that the Pakistan Government were coming under pressure to hand over to Arab countries their nationals who had fought for the Mujahadeen. He, therefore, left Pakistan and went to the Yemen staying there for 5 months before making a decision to go and fight for the Muslims in Bosnia. He flew to Croatia and 3 days later moved on to Bosnia. On 28 June 1995 he left Bosnia and travelled via Zagreb to London in order to seek asylum.

- E The applicant arrived at 30 June 1995 at Heathrow travelling on a Saudi passport in a false name. He immediately indicated his true identity and claimed asylum. His explanation for his false passport was that he had purchased it in Zagreb. He had left Algeria on his own passport but had lost it in Pakistan. He had then travelled for some time on a false Algerian passport until he reached Bosnia. He had then abandoned this false passport because it gave a residence in Pakistan and contained stamps from Pakistani and Yemeni authorities. He had acquired the Saudi passport to make the journey to London.

- F The applicant was detained on arrival. He was interviewed on 2 July 1995. He did not, however, at that stage tell the whole story and omitted reference to his having fought with the Mujahadeen. As a result, the basis of his claim for asylum was clearly weakened. The applicant recognised that the claim, as he put it forward, did not make out a very compelling case for asylum. He told the interviewing office at one point: 'I am aware that what I have said is not enough to convince the Home Office to give me asylum but it is the truth'.

- G The applicant was not represented at that stage but, not long after, his present solicitors started to advise him. On 20 July 1995 a detailed asylum statement was made which gave the full account of the applicant's claim. It explained that he had not told the full story on arrival for fear of being thought a terrorist and refused asylum on that basis.

H On 2 August 1995 the Secretary of State refused the asylum application. On 14 August 1995 the applicant's solicitor made detailed and forceful

written representations for a grant of temporary admission and indicated that the applicant would appeal the decision refusing him asylum. These were followed by further representations on 16 August 1995. In the second letter, the solicitor referred to the applicant's having expressed doubts about the strength of his case but asserted that having been given legal advice, the applicant now believed he had a good chance of winning his appeal.

A reply was received from an immigration officer dated 17 August 1997. It included:

'Your client as you have stated, produced a forged document on arrival, when he claimed asylum. Since then no evidence of his true identity has been produced to verify his statements. In addition, your client has no relatives nor friends in the UK who could act as sponsor for him. These factors form the basis of our decision to detain.'

The letter invited the submission of further documentary evidence relating to his nationality and identity, which would be considered.

On 6 September 1995 the applicant appealed against the decision of the Secretary of State. On 24 September 1995 the solicitor responded to the letter of 17 August 1995. Included with the letter was an Arabic birth certificate, put forward in response to the request for documentary evidence.

A response was received dated 2 October 1995. It indicated that since the birth certificate remained unverified the reasons for detention already given stood and in any event such verification would only be one factor in considering whether the applicant was likely to comply with the terms of any temporary admission. The letter promised to consider any further information and reminded that the applicant could apply to an adjudicator for bail.

On 25 October 1995 the applicant's asylum appeal was heard. An application for bail was refused because the special adjudicator said he had no jurisdiction to grant bail. His decision dismissing the appeal was dated 10 November 1995. A subsequent application for leave to appeal to the Immigration Appeal Tribunal was granted.

Further representations were made enclosing a French version of the birth certificate and a copy of the determination granting leave to appeal. This was responded to by letter dated 13 December 1995 which included:

'Your client arrived in the UK on 30 June 1995 using a passport to which he was not entitled. It also transpired that your client left Algeria in March 1990 since when he has travelled extensively using more than one identity. You have now produced a late birth certificate issued in Algeria but I regret to say that this particular piece of evidence does not outweigh the fact that your client has shown a complete disregard for the immigration rules and regulations of several other countries in order to evade detection. Given this unsatisfactory history and the lack of a suitable sponsor in the UK, I cannot consider temporary admission as being appropriate in this case.'

On 16 January 1996 the Tribunal allowed the applicant's appeal and remitted the case to the special adjudicator.

On 15 March 1996 an application for bail was refused by a special adjudicator. A further application was heard on 9 April 1996. It is clear that

A by this stage the applicant was able to suggest two names of persons who would act as sureties, one in the sum of £2500.

B The special adjudicator who had until that time been dealing with the matter, arranged to be released from the case under r 33(1) of the Immigration Appeals (Procedure) Rules 1984 and a new hearing date was set for hearing in May 1996 before a different adjudicator. On 17 April 1996 the applicant's solicitor submitted fresh documentation for the appeal. It included an expert report from a Dr Joffe of the School of Oriental and African Studies and a statement from a Mr Benaissa, who provided support for the applicant's account of his movements in Pakistan and Afghanistan.

C The Secretary of State indicated that he would require at least 6 weeks to respond to this material. (In counsel's chronology a figure of 5 weeks is given but the applicant's solicitor's letter of 17 April 1996 records that the period suggested was 'at least 6 weeks'.) The hearing was accordingly fixed for 6 June 1996.

D On 8 May 1996 a further bail application was made. A bail summary is included with the papers and it is suggested in the applicant's counsel's submissions that this relates to this hearing. I doubt whether that is right from the content of the document, which makes no reference to events after 1 January 1996. It bears a date at the foot of 7 March 1996 and it seems to me that it is much more likely to relate to that date. The applicant's solicitor's affidavit producing the document is silent on the date and in the index to the exhibits it is described as having a date 7 May 1996, which was not a date on which there was a hearing of a bail application.

The reasons for refusal were expressed as:

- E (a) The passenger had presented a forged document in a false identity on arrival. He had admitted having used other forged documents previously to travel between countries, which denotes a high propensity by him towards complete disregard for rules and regulations and adherence to law.
- F (b) Since his arrival until now he had stated that he had no relatives, friends or contacts in the UK. [Further supporting the view that the document was for the March 1996 hearing when sureties were first indicated.]
- G (c) In his own admission, he had stated during PA interview that his case was unsubstantial and therefore weak.
- (d) His position has now passed PA refusal stage. He has little incentive to comply with temporary admission. Considering his repeated use of forged documentation to travel about extensively and in the light of the above observations, we cannot be satisfied that this passenger would comply with any bail terms imposed on him.
- (e) Furthermore he claims to have fought with the Mujahadeen in Afghanistan and to have travelled to Bosnia with similar intentions.
- H (f) We have also been unable to verify his claimed identity as shown on the birth certificate.'

It does not matter greatly whether this document arose on the earlier occasion or for the May 1996 hearing since the basis of the objection was undoubtedly in essentially similar terms on each occasion. The result, in any event, was that bail was refused.

At the hearing of the appeal on 6 June 1996 the Secretary of State applied for an adjournment because the material submitted had not yet been considered. That application was not opposed and the case was adjourned to 7 August 1996.

A further bail application was made on 13 June 1996. A further bail summary was lodged which stated the reasons for refusal in broadly the same terms as those quoted already. Again bail was refused. This prompted the application for leave to move for judicial review granted by McCullough J on 27 June 1996.

As already indicated on 10 July 1996 the applicant was released from detention and was recognised as a refugee the following day.

#### *The challenge*

Mr Henderson for the applicant argues that since the Secretary of State's policy is to only detain as a last resort and since no more than 1.5% of applicants are detained, there is nothing so exceptional about this case that should cause it to be placed in that small minority of cases.

That is, however, in my judgment, to consider the case from the wrong standpoint. The Secretary of State's stated position is that cases are considered against the policy already set out above and that leads to conclusions requiring less than 1.5% to be detained, thereby demonstrating that the policy is genuinely one of last resort. It is, therefore, necessary to see whether the policy has been applied to this case. If it has, and if it is properly applied in all cases, it will have the consequence that only a small minority are detained. I find it unhelpful though to look at an individual case and ask whether it is a case that should come within the 1.5% referred to.

The challenge has, therefore, either to be on the basis that the policy has not been applied or that the resulting decision is unreasonable on a *Wednesbury* basis.

An attempt was made to introduce by way of amendment an argument that the decision did not comply with Art 5 of the European Convention on Human Rights. That argument, which in any event I consider not to advance the applicant's position, was outside the agreement relating to the amendment of the form 86A to seek relief in the form that it is now sought. I, therefore, declined to allow such argument although Mr Henderson tried to persuade me that he was not arguing a distinct basis but was using the argument to illustrate the unreasonableness of the Secretary of State's decision to detain. It soon became apparent that this was not the case and I declined to hear further argument on this point.

The challenge to be considered is, therefore, limited to failure to follow the policy stated and *Wednesbury* unreasonableness.

#### *The original decision to detain*

It is argued on behalf of the Secretary of State that the original decision to detain was fully justified by consideration of the policy and was in no sense irrational.

The application was one that was identified as one that could be dealt with speedily. Indeed the decision was given a fraction over a month after arrival. The applicant had arrived with no proof of his identity and could point to no one in this country with whom he had any connection who could verify his identity.

A A It is submitted that from the point of view of the Secretary of State, he could have been anyone with any sort of immigration history and that there was no means by which the Secretary of State could reassure himself that he was dealing with the man whom he claimed to be.

B B Further, as he himself expressly conceded, there did not seem to be any real merit in his application at that stage. His own view was clearly significant because if he himself had no faith in his application succeeding, it was tempting for him not to comply with the requirements of temporary admission.

C C On behalf of the applicant it is pointed out that he had indicated immediately upon arrival that his passport was false and had been used in order to come to this country to seek asylum. Thus as Lord Donaldson MR pointed out in *Vilvarajah and Skandarajah v Secretary of State for the Home Department* [1990] Imm AR 457, 459-460, the use of a false passport may have been the only way that he could travel to claim asylum. However, whilst this factor had to be borne in mind, the reality was that there was nothing but the applicant's word to suggest that his account of how he came to be arriving in this country was true.

D D Having considered the matter carefully, I find it quite impossible to say that at that initial stage the decision to detain was not in accordance with the stated policy. Applying the criteria there were factors that could justify detention. I do not consider that there is any basis for holding that the consideration of the question was flawed nor do I think that the decision can in any way be said to be irrational. Accordingly I view the initial detention as lawful.

E E *Did the position change?*

F F The first potentially significant change was the notification by the applicant of the true state of affairs. Clearly, if accepted, that account strengthened his application for asylum, but there remained no way in which the Secretary of State could make any inquiry to reassure himself that the applicant was telling the truth. I do not believe that this so altered the position as to require his release in an application that seemed to be progressing with due speed.

G G It is pointed out that despite the fact that he was represented by a solicitor who is clearly competent and alert to all the considerations, there was no challenge to the decision to detain by way of judicial review until June 1996 and no bail application to a special adjudicator until the end of October 1995. It is submitted that this is an indication that on the facts as they appeared at that time, the decision cannot have appeared to be an unreasonable one capable of challenge. I consider that to be a not unrealistic inference to draw.

H H The next potential change was the submission of the birth certificate, first in its Arabic form and later in its French form. Again I do not consider that this altered the position so significantly as to require that the applicant be released. It is clear from the respondent's evidence that there was no possibility of making inquiries in Algeria to check whether the documents did relate to the applicant.

The applicant had by now had his application for asylum refused by the Secretary of State and his appeal dismissed by the special adjudicator. His successful appeal to the Tribunal clearly must have given him some hope but it is to be noted that the point remitted was the limited question of risk as

a failed asylum-seeker. The main conclusions of the special adjudicator stood and although the applicant could hope for a different conclusion, the success of his application was a long, long way from assured.

That situation really remained the same until April 1996, when the new evidence was submitted on behalf of the applicant, and in particular the apparent confirmation from Mr Benaissa. It seems clear to me that it was at this stage that the whole process took on a distinctly new appearance. It was, I have no doubt, this new information that transformed the application for asylum into one likely to succeed and I have no doubt that it was essentially this evidence that caused the Secretary of State to alter his decision.

When that new information was available, it would clearly require some time for evaluation and I do not think that it was in any way unreasonable for the Secretary of State to seek a period to reconsider his refusal of asylum. However, it became of importance carefully to review the decision to detain at that stage. A number of crucial changes had taken place. There was now supporting evidence for the applicant's account including evidence confirming his identity. There were two people in this country prepared to stand surety for any grant of bail. The applicant, now that his account was confirmed, could view his application in a far more optimistic light.

Having regard to the length of time that he had already been detained, it was clearly imperative that these factors were carefully weighed. Some time could be allowed for consideration of the veracity of Mr Benaissa's evidence but in the circumstances it was necessary for an urgent reappraisal of the detention situation. I consider that by the bail application heard on 8 May 1996, it should have been possible to reach provisional conclusions as to whether there was merit in the new evidence and that such conclusions should have led to a realisation that the balance had now swung firmly in favour of release on bail.

In these circumstances, I conclude that there was no justification for the continued detention of the applicant beyond 8 May 1996 and that he should have been released. Accordingly in my judgment his detention between 8 May and 10 July 1996 was unlawful in that a decision to continue to detain him was against the weight of all the then available evidence, and was therefore irrational. I am therefore to this extent prepared to grant the applicant relief by way of declaration.

*Application allowed. Declaration granted. Matter transferred to master of Queen's Bench Division for assessment of damages.*

Solicitors: *A. J. Paterson* for the applicant  
*Treasury Solicitor*