Neutral Citation Number: [2020] EWHC 732 (Admin)

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

No. CO/1101/2020

Royal Courts of Justice

Wednesday, 25 March 2020

Before:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION

MR JUSTICE SWIFT

B E T W E E N:

THE QUEEN
on the Application of

(1) DETENTION ACTION
(2) MIKHAIL RAVIN

Claimants

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT Defendant

MR C. BUTTLER and MISS A. CHRISTIE (instructed by Duncan Lewis Solicitors) appeared on behalf of the Claimants.

MISS L. GIOVANNETTI QC and MR D. MANKNELL (instructed by the Government Legal Department) appeared on behalf of the Defendant.

APPROVED JUDGMENT

THE PRESIDENT:

1 This is an application for interim relief in an application for judicial review which challenges *"the on-going detention of all immigration detainees, in particular those with pre-existing conditions which increase vulnerability to COVID-19 ...[and] ... the absence of an effective system for protecting immigration detainees from COVID-19"*. The proceedings for judicial review were filed on 18 March 2020. The Claimants are Detention Action a charity whose purposes are to promote the welfare and protect the rights of persons in immigration detention, and Mikhail Ravin an Estonian national who is subject to a deportation order. He has been in immigration detention since 26 June 2019, and since November 2019 has been detained at Morton Hall IRC. In May 2019 he was diagnosed as suffering from hypertension, for which he has, intermittently, been prescribed medication.

2 As interim relief, the Claimants originally sought an order requiring the immediate release of all persons in immigration detention who suffer from medical conditions that would put them at increased risk of harm if they contracted COVID-19, unless the SSHD considered continued detention was necessary for reasons of public protection; and an order requiring the SSHD, within 48 hours, to review the case of each person in detention to determine whether or not that detention should continue, given the present likelihood of removal from the UK within a reasonable time.

3 The target of the application for judicial review is the steps taken by the Secretary of State (and which she continues to take) to address the position of persons in immigration detention in light of the COVID-19 pandemic. In January and February 2020 documents were issued internally about the possible impact of COVID-19 on persons in prison or in detention centres. On 16 March 2020, the SSHD published guidance titled *"COVID-19: prisons and other prescribed places of detention guidance"*. This is a public document. The Secretary of State issued further public documents on 20 March 2020, specifically addressing the position of those in immigration detention: first *"General Principles for Managing COVID-19 in an immigration removal centre (IRC), residential short-term holding facilities (RSHTF) and during escort"*, and second *"Operational Instructions: COVID-19 – Detention Considerations"*. We have also been provided with a copy of a letter to managers of detention centres dated 24 March 2020. The combined effect of these documents can be summarised as follows.

4 *First*, guidance and instruction is given about hygiene practices in detention centres in accordance with Public Health England ("PHE") guidance (e.g. regular hand washing); cleaning practices in detention centres are to comply with PHE guidance, including that objects and surfaces that are frequently touched are to be regularly cleaned and disinfected; cleaning materials are to be made available to detainees on request, for cleaning their own rooms. Each detention centre is to devise a plan to enable isolation of persons who are in increased-risk groups, or who are symptomatic. Routine movements in and out of detention centres have been curtailed; social visits have ceased.

5 *Second*, guidance and instructions are given about circumstances in which the Secretary of State will exercise her power to detain. With a view to minimising the number of persons held in detention, the Secretary of State has decided that she will not exercise her power to bring into detention persons liable to removal from the UK to countries where removal is not

possible by reason of COVID-19 (presently some 50 or so countries), unless the person concerned is considered to present a high risk of harm to the public.

6 *Third*, steps will be taken reduce the numbers of persons already in immigration detention.

7 The evidence is that as at 1 January 2020 some 1,200 persons were in immigration detention. As at 24 March 2020 (yesterday) the number is 736. Whether or not detention should be continued is being reviewed case by case. Reviews are taking place in an order of priority. The first group considered are those in detention who fall into any of the groups identified by PHE as being at increased risk of serious harm if they were to contract COVID-19. Whether persons in this group should remain in detention is being determined on the basis of the Secretary of State's existing policy *"Guidance on adults at risk in immigration detention"* ("the AAR policy"). The AAR policy was issued by the Secretary of State pursuant to the obligation under section 56 of the Immigration Act 2016 to issue guidance concerning the position of persons vulnerable to harm if in detention. The AAR policy requires identification of any person which is likely to be particularly vulnerable to harm if placed in detention; and assessment of the likely risk of harm to the individual if detained for the period likely to be necessary to effect removal from the UK. Under the AAR policy there is a presumption that any person identified as vulnerable should not be detained; the presumption can be rebutted by "immigration control considerations" which are stated to include public protection concerns, and situations where it is assessed as likely that if released, the person concerned would abscond.

8 The Secretary of State is now applying the AAR policy to detainees who are in any of the PHE-identified increased-risk groups. To date 24 such detainees who were not persons being deported following commission of criminal offences have been identified; 21 have been approved for release; in the other 3 cases the Secretary of State is waiting on certain practical arrangements to be made. A further 74 detainees who fall into increased-risk groups and who were offenders due for deportation have been identified; their cases are presently under review, and as at the time the Secretary of State's evidence was served last night, the expectation was that the review process would be completed by the end of today and decisions whether to release or not would have been taken.

9 *Fourth*, the guidance addresses the position of detainees who fall into any of the increased risk groups but who are not released. If persons who fall into any of the increased-risk groups are not released, steps are to be taken to reduce their contact with others, for example by putting them in single occupancy accommodation. If they wish, they are provided with face masks. Further guidance is contained in a letter issued on 24 March 2020. This restates the matters we have just mentioned. It also requires all social visits to detention centres to cease, and instructs detention centre managers to work with healthcare teams in detention centres and Home Office staff to ensure that any person in any of the increased risk groups is provided with support to self-isolate and is subject to an individual care plan.

10 *Fifth*, for those who are in detention but not in any of the increased risk groups, the Secretary of State is to review the detention taking account in particular whether the person is due to be

11 removed to a country not presently accepting returns, and whether in those circumstances, their continued detention satisfies the principles stated in *R v Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704. Thus, the focus of many if not all detention reviews will now be whether it has ceased to be practicable within a reasonable time to remove the person concerned from the UK in light of any restrictions on returns applied by the relevant receiving country by reason of COVID-19.

12 *Sixth*, guidance is given relating to persons who remain in immigration detention. Any detained person showing symptoms of COVID-19 is to be pleased in protective isolation for 7 days. All persons isolated are provided with the regime available to detainees who are removed from association under rule 40 of the Detention Centre Rules. If any detained person is not well enough to remain in detention they will be transferred to hospital.

13 Thus, the combined effect of the second, third, and fifth points is that the Secretary of State is acting to reduce the number of persons in immigration detention, and to date those numbers have been significantly reduced; and the fourth and sixth points show that for those who will remain in detention, whether pending review or for a longer period measures are being put in place to address the specific risks arising for those in closed communities such as detention centres.

14 Yesterday (24 March 2020), in light of the measures already taken by the Secretary of State, the Claimants indicated they no longer sought interim relief in the terms originally stated, but instead wanted different orders. This morning we were provided with a draft order that further modified the relief sought. Further versions of the Claimants' proposed order were filed during the hearing.

15 What the Claimants seek by way of interim relief in this hearing is to the following effect.

(a) An order that the Secretary of State notify all detainees of the conditions which increase risk from COVID-19 and request detention centre healthcare teams to provide all detainees forthwith with an opportunity to report such a condition and be assessed by the IRC healthcare team.

(b) An order that the Secretary of State disclose a copy of a letter referred to at §31 of a witness statement served yesterday evening on behalf of the Secretary of State. This was the 21 March 2020 letter we have referred to above.

(c) An order that the Secretary of State release all persons who would otherwise be removed to any country not presently accepting returns because of COVID-19, unless the person is a foreign national offender assessed by her to present a high risk of harm to the public if not in detention.

(d) An order that the Second Claimant be released and provided with accommodation by 4pm this Friday (27 March 2020).

Decision

16 Matters (a) and (b) above are not ones that require any order to be made. The Secretary of State had intended that that letter referred to at (b) should be exhibited to the witness statement served yesterday; it was omitted in error. A copy has now been disclosed. As to the first part of (a), it is apparent that the Secretary of State has already provided this information to those at some detention centres. She has undertaken to ensure that information about the conditions within the Public Health England increased risk groups will be provided to those who remain in detention. As to the latter part of (a), we do not see that this is a matter requiring an order of the court. Once any person detained has informed healthcare staff at a detention centre that they believe that they suffer from one of the relevant conditions we have no doubt that this matter will be taken up by the healthcare staff at the detention centre. All the guidance and instructions issued by the Secretary of State to date indicate that the Secretary of State is taking sensible, practical and precautionary steps to address the possible effect of the COVID-19 pandemic in immigration detention centres. We see no reason to think that any person reporting a relevant underlying condition would either be ignored or that steps would not be taken to ensure that he or she was treated in accordance with the instructions already given at (c), for example, above, as to the consideration for release from detention and treatment while still in detention.

17 We turn, then, to the application for interim relief in the form of (c) above. The approach to be taken on an application for interim relief in public law proceedings is not in dispute. *American Cyanamid* principles apply, subject to appropriate modification for the public law context. In this case, the claimants must show a real prospect that at trial they will succeed in obtaining a permanent injunction, taking account of the fact that any decision to grant any such relief would include consideration of the public interest. If the required "real prospect" exists, the issue is whether or not the balance of convenience favours the grant of relief and at this stage, too, the public interest is a relevant consideration (see *Smith v Inner London Education Authority* [1978] 1 All ER 411 and *R (on the application of Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425 (Admin)). In this case, the relevant public interest is that of the Secretary of State continuing to operate an effective system of immigration control. We also accept the submission made by the Secretary of State that since the relief sought at (c) is, for all practical purposes, final relief, and for that matter also is an application for a mandatory order, this application for interim relief cannot succeed unless a particularly strong case is shown.

18 The Claimants' case is put on two grounds. The first is that, on the basis of the principles set out in *Hardial Singh*, once a country has indicated it will not accept returns because of the COVID-19 pandemic the detention of any person detained pending removal to that country, without more, immediately becomes unlawful. The Claimants permit only one exception to this, that the Secretary of State may continue to detain such persons if she assesses they present a high risk of harm to the public.

19 We do not consider the Claimants' case on this ground is arguable. When removal ceases to be possible within a reasonable period, the Secretary of State's power to detain will come to an end. But even when a country informs the Secretary of State that it will no longer accept removals, the Secretary of State is entitled to a period (albeit short) in which to review the detention of those concerned and decide what steps to take. For now, the Secretary of State

faces exceptional circumstances; they have affected removals to a large number of countries. The Secretary of State has put in place a process for detention reviews and is working to that system. As part of that system the Secretary of State has prioritised consideration of the position of those who fall into the increased-risk groups. Thus, decisions on persons outside that category will have to wait for a short period. We can see nothing that is arguably unlawful in this. The Claimants contend that because the Secretary of State has decided as a general rule not to initiate detention for persons who would be removed to countries who, because of COVID-19 are not presently accepting removals, it must follow that detention of any person in an immigration detention centre pending removal to such a country is already unlawful. We do not agree. The two classes are not in materially the same position. For those in detention, the Secretary of State is entitled to adopt the approach explained above.

20 Even if we are wrong on this, the balance of convenience is clearly against the Claimants on this ground. The Secretary of State has acted and is continuing to act, as we have explained. That being so, it is in the public interest that she should have the opportunity to complete the exercise she has commenced. We do not consider that on this ground, the Claimants have demonstrated any real prospect that at trial they would obtain an order for final relief.

21 The second ground on which the Claimants put their case is that continuing to detain persons (whether or not they fall into any of the increased-risk groups) gives rise to a breach of the Secretary of State's obligations arising under ECHR articles 2 and 3, (a) only to detain persons within a system of detention that does not *per se* give rise to an unacceptable risk of breaches of article 2 and/or article 3 rights; and (b) not to continue to detain persons if the circumstances of their detention give rise to a real risk of article 2 or 3 ill-treatment.

22 The Claimants rely on 3 reports by Richard Coker, Emeritus Professor of Public Health at the London School of Hygiene and Tropical Medicine. In the first two reports he explains that the chance of infection of a closed community, such as a detention centre increases the more that community is exposed to a virus, and that risk of infection will be substantially increased by multiple visitors, staff movements in and out of a detention centre, and by movement of detainees in and out of a detention centre. He points out that if infection is present, transmission could be very rapid and would be increased by any of over-crowding, poor ventilation or poor hygiene levels. He recommends that steps should be taken to reduce movements in and out of detention centres, avoid over-crowding, increase standards of cleanliness, isolate any persons in detention centres who show symptoms, and isolate members of the increased-risk groups. In his third report (dated 23 March 2020), Professor Coker does accept that the guidance that has been issued by the Secretary of State will improve the chances of controlling COVID-19 if the infection does enter detention centres, and says that the Secretary of State's response is *"... encouraging in terms of reducing the risks to ..."* those in increased-risk categories. He maintains his concerns about possible over-crowding and hygiene standards in detention centres.

23 The Claimants further rely on an expert report by Dr Selina Rajan a doctor of public health medicine, also at the London School of Hygiene and Tropical Medicine. She states that without access to healthcare, persons in immigration detention will be at much greater risk of deterioration because of the chance that if they contract COVID-19 they may go on to develop pneumonia which goes untreated for so long as they remain in immigration detention.

24 We do not consider, based on the evidence now available that a serious issue is raised by the claims based on article 2 and/or article 3 ECHR. It is clear to us that the measures put in place to date by the Secretary of State are all directed to ensuring that, even in the extreme circumstances that presently prevail, the immigration detention regime will in systemic terms remain compatible with the obligation to provide safe arrangements for detention. As we have already explained, the Secretary of State is seeking to reduce the numbers of persons detained; steps are being taken to render detention safe for those who are in increased-risk groups but who cannot, for example, for reasons of public protection, be released; those who are not released but are too ill to remain in detention are to be transferred to hospital. As we see it, the measures taken to date by the Secretary of State address the material points raised in Professor Coker's reports and Dr Rajan's report.

25 In addition, we attach significant weight to the matters covered by Ms. Hardy's witness statement for the Secretary of State. She explains the healthcare facilities ordinarily available in immigration detention centres; she explains the steps ordinarily taken by the Secretary of State to identify detainees whose circumstances may fall within the scope of the AAR policy, both at the point of detention, and during the period that a person remains in detention. These matters demonstrate that the specific guidance the Secretary of State has now put in place builds upon systems already well-established for identifying the health and welfare needs of those in detention. All this points to the conclusion that the additional guidance which has, to date been put in place to address the specific circumstances of the COVID-19 pandemic are likely to work effectively. We accept that the position of those in immigration detention is not without risk of serious harm. Mr Buttler for the Claimants stated that COVID-19 presents a risk of serious harm to perhaps 1 in 5 of those who contract it. Yet that risk is no different from the risk faced by the entire population. We accept that those in detention, in what was described as a congregate setting, are exposed to particular risks arising from that setting. But in our view, in light of the measures that the Secretary of State has put in place already, and given also that all the evidence to date indicates her intention is to continue to review the situation and act as required, we do not consider that the particular problems presented by congregate settings are such as to give rise to an arguable claim that the immigration detention system fails to meet the standard required by article 2 and/or article 3. In particular, we are satisfied that the Secretary of State is taking appropriate action to safeguard those who fall into any of the PHE identified increased-risk categories.

26 In addition to expert evidence, the Claimants rely on four witness statements by Bella Sankey, the Director of Detention Action. We do not consider these witness statements take any matter material to the First Claimant's case any further. Ms Sankey explains a number of matters reported to her either by detainees or by other organisations that provide support to those in immigration detention. We do not consider that this information, which without any disrespect to Ms Sankey is properly described as anecdotal, is sufficient (either on its own or in conjunction with the other evidence advanced by the Claimants) to make the case that immigration detention, in the context of the present pandemic, is systemically unable to comply with the standards required by ECHR article 2 and/or article 3.

27 In various respects the Claimants contend that there are different steps the Secretary of State might have taken or might take now relating to those in immigration detention. However, we must emphasise that it is the role of the court to assess the legality of the Secretary of State's actions, not to second-guess legitimate operational choices. The circumstances presented by the COVID-19 pandemic are unprecedented and are unfolding hour by hour and day by day. Within sensible bounds the Secretary of State must be permitted to anticipate such events as

she considers appropriate and respond to events as they unfold. As matters stand, it does seem to us that she has taken and will no doubt continue to take prudent measures, both precautionary and reactive. That being so, the Claimants' evidence does not demonstrate an arguable case that maintaining the immigration detention system including the measures taken to date by the Secretary of State gives rise to a real risk of death or article 3 ill-treatment of persons who remain in detention.

28 We reach this conclusion without needing to take account of the public interest in the Secretary of State being able to continue to maintain an effective system of immigration control. However, were it necessary to consider the balance of convenience, given the steps taken so far to reduce the numbers in detention and to protect the health of those remaining in detention, the balance clearly favours permitting the Secretary of State to continue to assess and manage the measures necessary in immigration detention centres as she has done to date.

29 The Second Claimant's claim to the effect that continuing his detention gives rise to a real risk of article 3 ill-treatment, or an article 2 risk to life has been largely overtaken by events. The Secretary of State has agreed to release him from detention subject to identifying suitable accommodation. That pragmatic outcome seems to us to be entirely in keeping with the pragmatic approach the Secretary of State has taken to date. We say pragmatic because in our view there was nothing in the evidence concerning the Second Claimant's own circumstances that approached establishing a case that would cross the threshold for a grant of interim relief. We suspect that the same conclusion would apply in many other individual cases. The guidance already issued by the Secretary of State has as a focus, consideration of individual cases on their own terms. In principle, it seems to us that it is likely that the arrangements already put in place by the Secretary of State, which where necessary include the option of transferring detainees to hospital, will be sufficient to address the risks arising in the vast majority of cases.

30 The argument advanced by the Second Claimant is that the Secretary of State is not moving fast enough to identify suitable accommodation for him. We do not consider there is anything in this that warrants a grant of interim relief requiring his release. The Second Claimant is subject to a deportation order having been convicted of arson with intent to endanger life. We are told that the Offender Management Service do not consider it appropriate for him to live with his family. The Secretary of State continues to liaise with the Offender Management Service to identify suitable accommodation. Given the nature of his offending the decision as to appropriate accommodation may not be a straightforward decision. While those steps are in progress it is not appropriate for us to order that he be released and provided with accommodation within the next 48 hours.

31 For these reasons, this application for interim relief is refused.

32 Finally, we must say something about the way in which applications like this are to be brought before the Court. Present circumstances are exceptional. As counsel for Secretary of State submitted, the Government response to the pandemic has evolved at pace; decisions are made and reviewed daily or even hourly. This applies not just to immigration control but to all areas of Government responsibility for all persons living in the United Kingdom. The Courts will always stand ready to determine urgent cases, and in particular those touching on matters of

public interest. But the golden rules are that representatives who bring claims must prepare those claims cogently and conduct the litigation sensibly and proportionately, and most of all, they must cooperate with each other when preparing cases and bringing them to the Court. These golden rules are particularly relevant now, and must be adhered to.

33 We shall deal first with the question of permission. It is late in the day. We have focused our judgment on the issue of interim relief and it seems to us that it will be appropriate to allow the parties to reflect on the content of the judgment once they have had an opportunity to look at the transcript and we would remind the parties of what we said about a sensible and proportionate approach to litigating matters before the court in the current circumstances.

34 Next, we turn to the question of costs. We have determined that the Defendant is entitled to her costs which should be assessed on a standard basis if not agreed. We shall refer briefly to the two arguments that were advanced on behalf of the Claimants in relation to the issue of costs. First, in our view, no party has to bring a claim to court. Had the legal representatives had considered that the Secretary of State's evidence after the claim had been commenced, they ought to have concluded that the application for interim relief should have been withdrawn. We are not persuaded that the Secretary of State's response to the claim or the evidence arrived late. In fact, in our view, the Claimants' case has presented something of a moving target.

35 As to the second point made, which is the benefit of these proceedings, we are not persuaded either that it was necessary to bring this matter to court to achieve what has been identified. In our view, a sensible co-operation before this case would have led to the same result. In any event, we would add that there is nothing that suggests that the Secretary of State's guidance has been reactive in any real sense to this claim.

36 In those circumstances, as we have already identified, we have decided that the Defendant is entitled to her costs on the basis that we have described.