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Judgment: approved by the Court for handing down | *Delivered:* **02/09/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEENS BENCH DIVISION (JUDICIAL REVIEW)

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Preorius's (Amanda Menzies) Application [2010] NIQB 97

IN THE MATTER OF AN APPLICATION BY AMANDA MENZIES PRETORIUS FOR JUDICIAL REVIEW

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MORGAN LCJ

[1] The applicant is a South African national. She seeks judicial review of a decision made by the Immigration Service on 28 June 2008 to detain her and further complains that she was thereafter unlawfully detained until she was released on 8 July 2008 on temporary admission. Mr Kennedy QC and Mr Flanagan appeared for the applicant and Ms Connolly for the respondent. The Northern Ireland Human Rights Commission intervened by written submissions prepared by Mr McEvoy. I am grateful to all counsel for their helpful written and oral submissions.

Background

[2] The applicant has a history of difficulty with the immigration authorities. The papers suggest that she arrived in the United Kingdom in 1998 as a visitor. She formed a relationship but did not regularise her immigration status. She was detected in September 2005 and served with papers as an overstayer.

[3] According to her she last entered the United Kingdom on 28 October 2007. She again came as a visitor but intended to meet up and live with her boyfriend to whom she subsequently became engaged. At 4:30 p.m. on 28 June 2008 she was interviewed by an immigration officer at Belfast Docks. She stated that she had lost her South African passport but accepted that she had stayed beyond the time permitted by her visa. She said that she was 10 weeks pregnant. The applicant stated that it was her intention to obtain a new passport which she hoped could be done in one day as long she had her birth certificate. She planned to get married to her boyfriend in Cape Town.

[4] The immigration officer carried out checks which established that the applicant had breached her bail conditions by failing to report to a Reporting Centre on 18 May 2007 as required by her bail conditions. The applicant also had a criminal record for offences of assault, drunk and disorderly, dishonesty and failing to surrender to custody. Further matters relating to assault and dishonesty were pending. The Chief Immigration Officer considered the content of the interview and the available information. He concluded that it was highly unlikely that the applicant would comply with any temporary admission restrictions as she had a history of absconding. He authorised the detention of the applicant pending the preparation of travel documentation, receipt of her passport and her removal from the United Kingdom as an illegal entrant under section 10 of the Immigration and Asylum Act 1999 and section 33 of the Immigration Act 1971.

[5] The applicant then indicated that she wished to voluntarily depart the United Kingdom and chose to give up the minimum 72 hours notice period between receiving notification of removal directions and removal. She signed the relevant form to that effect. It was her intention to return to South Africa, get married and regularise her immigration status.

[6] The applicant was transferred that evening to Antrim Road PSNI station. A senior immigration official noted in particular her criminal record containing 7 convictions for assault. He concluded in light of her record that she was unsuitable for detention at an immigration holding centre for reasons of security or control. A protocol entitled "The Management of Foreign National Detainees Held in Prison Custody" established between the immigration authorities and the Northern Ireland Prison Service provided for the management of foreign nationals detained solely under immigration legislation and who were also deemed unsuitable for transfer to an immigration managed holding centre.

[7] Despite the existence of the protocol it appears that the Northern Ireland Prison Service initially refused to accept the applicant on the basis that she was not facing criminal charges. The respondent wrote to the Governor of Hyde Bank Wood prison on 1 July 2008 giving the reasons for his decision and inviting the Northern Ireland Prison Service to reconsider their position. The applicant was thereafter transferred from Antrim Road PSNI station to the prison on 2 July 2008.

[8] By 3 July 2008 the removal of the applicant was no longer imminent. An emergency travel interview was required and the turnaround time for obtaining a travel document from the South African Embassy was approximately 3 months. The applicant had also changed her mind about voluntary removal after discussion with her solicitor and boyfriend. She was

offered bail on condition that her boyfriend lodged a surety of £3000. He was unable to provide that sum.

[9] On 4 July 2008 the applicant commenced the present judicial review proceedings. Although the applicant asserted that she was pregnant there was at that time no medical or other material to confirm her assertion. She was seen by a doctor on the evening of 28 June 2008 at Antrim Road PSNI station. She disclosed that she had a liver problem and was 10 weeks pregnant. She said that she had no mental health problems, nervous disorder or depression but indicated that she had tried to harm herself the previous month when she had tried to hang herself. The doctor concluded that she was fit for detention.

[10] In her affidavit the applicant indicates that she found the experience of detention in the police station extremely distressing. She said that she had suicidal thoughts during this period, vomited every day and was dizzy, nauseous and could not eat. The custody record confirms that she did refuse food on each morning but later each day was provided with and accepted meals. There are numerous entries to indicate that the applicant was sleeping when inspected. There were no representations apparently made directly to the custody officer in relation to her detention during the period of custody at the police station. Despite the fact that she had decided to retain the services of a solicitor who was in contact with her from the morning of 30 June 2008 no request for further medical examination was apparently made. There is nothing in the custody record recording any sickness. There is correspondence from the solicitor to the respondent on 30 June 2008 and 2 July 2008 referring to the applicant's extremely distressed state and the effect on her physical and mental health.

[11] On the afternoon of 4 July 2008 the applicant's solicitors sought to obtain confirmation of the applicant's pregnancy. The prison had made an appointment for the applicant to see a midwife on 7 July 2008 and the applicant herself had previously arranged an appointment with her GP for 10 July 2008. In fact it was not possible to arrange for a pregnancy test to be carried out until the afternoon of 7 July 2008 and in light of the confirmation of the applicant's pregnancy she was then released on temporary admission on 8 July 2008 by the respondent.

Consideration

[12] The primary ground advanced on behalf of the applicant was that the respondent had failed to follow its own policy contained in Chapter 55 of Enforcement Instructions and Guidance. In particular that policy dealt with the position in relation to the detention of pregnant women.

> *"Pregnant women should not normally be detained. The exceptions to this general rule are where removal is imminent and medical advice does not suggest confinement before then, or, for pregnant women of less than 24 weeks, at Yarl's Wood as part of a fast-track process."*

[13] The applicant's counsel submitted that it was necessary to consider two separate periods in relation to the detention of the applicant. The first period was from 28 June 2008 until 3 July 2008. The evidence indicates that during that period the respondent proceeded on the basis that removal was imminent. The applicant herself had accepted a shorter notice period and agreed to voluntary removal. She believed that she could obtain a South African passport within one day. It was not until 2 July 2008 that she advised her solicitor that she wished to change her position. In those circumstances I consider that this period falls within the first exception within the second sentence of the policy because removal was imminent.

[14] The real issue between the parties concerned the period of detention between 3 July 2008 and 8 July 2008. The applicant submitted that once she had asserted that she was pregnant she was entitled to the benefit of the policy. Since, therefore, it is now accepted that she was pregnant the applicant contends that she has unlawfully been deprived of the benefit of the policy.

[15] The respondent submits that a mere assertion of pregnancy is not sufficient to entitle an applicant to the benefit of the policy. There must be some independent confirmation of the fact of pregnancy communicated to the respondent before it is obliged to act in accordance with the policy.

[16] These submissions raise the issue of the extent to which there is a duty of inquiry on the respondent before it can go behind an assertion of pregnancy and correspondingly the nature of the responsibility on the person asserting the right in this case to provide independent or credible evidence to support the assertion. The policy itself does not provide an answer to the question. Each party suggested that guidance was to be obtained from the decision of Mr Justice Cranston in R(MT) v Secretary of State for the Home Department and others [2008] EWHC 1788 (Admin) and particularly from paragraph 36.

> "Drawing these threads together it is possible to derive certain principles about the duty to inquire. Whether there is a duty to inquire or a duty to inquire further turns, firstly, on an analysis of the statutory framework for the exercise of discretion. The statute may be such that it identifies a key factor in any decision to be made under it so that inquiry about

> that key factor is demanded. Secondly, regard must be had to the policy framework. There is a duty on decision-makers generally to follow their own policy. Given the centrality of a factor to the proper application of a policy a decision-maker may have to be proactive in eliciting information about it. Thirdly, despite the absence of a statutory or policy context which points to a duty to inquire, inquiry may be demanded by procedural fairness. The individual interests at stake may be such as to require a proactive approach by the decision-maker to obtaining relevant information for the decision. Such interests include liberty, basic sustenance and social care."

[17] It appears relatively clear that if a woman wishes to obtain the benefit of this policy while she is in the early stages of pregnancy it would be necessary for her to advise the respondent. The critical information is within her knowledge. It is also clear that in most cases immigration officials would be entirely unable to verify or take issue with such an assertion. Since we are dealing with people who in some cases are being detained because of the risk that they would ignore and undermine the immigration system it would be surprising if the respondent found itself bound to the policy by a mere assertion. On the other hand if the policy is to be practical and effective and thereby avoid being arbitrary the circumstances must enable the applicant to have a reasonable opportunity to take advantage of the policy. I reject any suggestion that it would be open to the respondent to force a person to undergo such a medical test or to disclose sensitive medical records in order to avail of this policy.

[18] I consider, therefore, that in this case it is necessary to examine whether the applicant had a reasonable opportunity to provide evidence by way of pregnancy testing in order to benefit from the policy. The applicant did not seek to obtain such information until the afternoon of Friday 4 July 2008. The Northern Ireland Prison Service had arranged for the attendance of a midwife on Monday 7 July 2008. A pregnancy test was carried out on that date and when its results were communicated to the respondent the applicant was released the following day. The applicant's solicitor's grounding affidavit recognises that the intervention of the weekend hampered efforts to put the testing in place. Although these circumstances may be towards the outer boundary I do not consider that it can be said that the opportunities available to the applicant were unreasonable in the circumstances.

[19] The applicant has relied on the decision of the European Court of Human Rights in Nasrulloyev v Russia (App no 656/06) which establishes that any deprivation of liberty should be in keeping with the purpose of

Article 5 which is to protect the individual from arbitrariness. I entirely accept the correctness of that submission but since I have found that there is a responsibility on an applicant asserting this right to provide a credible basis for the entitlement and a corresponding responsibility on the respondent to ensure that a reasonable opportunity is available to do so I do not accept that any question of arbitrariness arises in this case.

[20] In the written submissions advanced on behalf of the applicant there was some suggestion that the decision of the respondent to detain the applicant was without a proper foundation. The basis for this assertion was apparently that during her period in police custody she had not manifested control problems. I do not accept that submission. The applicant had an extensive and recent criminal record for offences of violence and I do not consider that the decision to place her in prison detention can be characterised as unreasonable or irrational or that it constituted a disproportionate interference with her freedom.

[21] Finally the applicant placed reliance on articles 3 and 8 of the ECHR. It is common case that the ill-treatment necessary to find an application under article 3 must attain a minimum level of severity which may reflect the duration of treatment, its physical or mental effects and in some cases the sex, age and state of health of the victim (see Mayeka v Belgium (2008) 46 EHRR 23). In this case there is no medical evidence other than that disclosed in the custody record. The allegations arise in relation to the period in police detention but there is no record of any contemporaneous complaint to police. I do not consider that there is a basis for a complaint based on article 3.

[22] Similarly I accept in principle that a claim can be founded upon article 8 in relation to a period in detention. That follows from the decision of the House of Lords in R (Razgar) v Secretary of State for the Home Department [2004] UKHL 27. I have accepted that in light of the antecedents of the applicant the decision to detain was reasonable and proportionate. In my view the material available in relation to this aspect of the case does not come close to what Lord Bingham described as the high threshold of successful reliance if article 8 is to be successfully invoked.

[23] For these reasons I consider that this application must be dismissed.