**Neutral Citation No. [2012] NIQB 6**

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*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

**Reuter's (Hans) Application [2012] NIQB 6**

**IN THE MATTER OF AN APPLICATION BY HANS REUTER FOR JUDICIAL REVIEW**

**TREACY J**

## Introduction

[1] The applicant is Hans Ulrich Reuter, a former prisoner of HMP Magilligan. By this judicial review he seeks relief in respect of his detention by the United Kingdom Borders Agency ("the respondent") including a claim for damages arising out of his detention.

[2] He challenges the manner in which the respondent executed a deportation order on 16 December 2010 alleging that the steps taken by the respondent were characterised by delay and that his detention became unlawful in consequence. The sole ground upon which relief was sought was expressed as follows in the Order 53 statement:

> **"The failure of the UK Borders Agency to deport the applicant from the UK to Germany, thereby discharging him from his custody, care or control upon his release from HMP Magilligan on 20 June 2011, in a timely fashion is unlawful and ultra vires in that the delay is Wednesbury unreasonable, in breach of the applicant's right to liberty (Article 5 ECHR) without any lawful basis."**

## Factual Background

[3] The applicant, a German national, was arrested at Belfast Airport on 20 June 2006 in connection with the importation of class A drugs into Northern Ireland. He

was subsequently convicted at Antrim Crown Court on 24 April 2007 of offences under Section 3(1) of the Misuse of Drugs Act 1971 and Section 170(2)(b) of the Customs and Excise Management Act 1979. On 8 June 2007 he was sentenced to ten years imprisonment. Following his conviction and sentence the respondent gave consideration to his deportation pursuant to Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006. On 25 November 2010 the respondent wrote informing him that a deportation order was to be made against him and of his right to appeal. A deportation order was signed on 16 December 2010 and served on him at Magilligan Prison on 20 January 2011. No appeal was instituted by the applicant against the deportation order.

[4] The applicant's sentence was due to expire on 20 June 2011 and prior to that date removals directions (RDs) had been put in place by the respondent providing for his removal from the UK on 20 June by way of escorted transfer from Magilligan to Belfast City Airport for a flight on the same date to Berlin via Heathrow. His detention for the purposes of this escort was authorised. The respondent's agent and allocated escort company, Reliance, did not however collect him from Magilligan Prison since they erroneously thought he was to be collected from Maghaberry Prison. When the problem came to the respondent's notice it appears it was too late to put steps in place to ensure compliance with the removal directions which had been previously set and accordingly the applicant missed his scheduled flight. Authorisation was then given for the applicant's further detention and on foot of this he was detained overnight in Magilligan Prison on 20 June 2011. On 21 June 2011 he was taken by ferry and car to Dungavel IRC ("Immigration Removal Centre"), Scotland. On 23 June 2011 he was taken by car from Dungavel to Pennine House IRC in Manchester and on 24 June 2011 he was taken by car from Pennine House to Colinbrook IRC, London. On 22 June 2011 he was informed of the new removal directions which involved a new departure date to Berlin from London on the morning of 25 June 2011.

[5] Margaret German, Inspector with the Criminal Case Work Directorate [CCWD] of the Agency, deposed in her affidavit that the removals directions originally booked for 20 June 2011 failed due to "an in-country escort administrative error" and that removal directions were then re-requested on **21** June 2011 to arrange a flight for 24 June. She then refers to the Agency's enforcement instructions guidance which, she avers "dictate" 72 hours notice of removal to the applicant being required. Mr Ogunmisi, Executive Officer, CCWD at para13 of his affidavit states that in accordance with the 72 hour rule RDs **could not** be set prior to 24 June 2011 and as no flight was available on 24 June the removals directions were set for the next available date, 25 June.

He then states:

> **" It was and remains the respondent's *practice* not to apply the exception to the 72 hour rule regarding the re-setting of RDs within ten days of the original**

> **RDs in circumstances where the original removal failed as a result of fault on the part of the respondent or its servants and agents as occurred in this case."**

[6] This "practice" does not appear in the exhibited policy document . At para14 he avers:

> **"The applicant was released from immigration detention by his escort at Heathrow at 8.10 hours on 25 June and he was deported from and left the UK in compliance with those RDs. In the circumstances the notice provided to the applicant of the new RDs was approximately 4 hours short of the full 72 hours envisaged by the policy. However in light of the fact that the applicant was keen to leave the UK his removal proceeded as per the above in order to minimise his detention."**

[7] The updated version of Chapter 60 of the Enforcement Instructions and Guidance provides a more extended version of the exception to the 72 hour rule.

[8] Para3.2 of the Guidance entitled "Where a Second Period of Notification is not Needed" provides:

> **"Where removal fails or is deferred and the individual was given standard notice of removal it may not be necessary to give a further period of standard notice when resetting removal directions within 10 days of the failed or deferred removal.**
>
> **When could I apply this."**
>
> **<u>The list below is *not exhaustive* and is subject to the circumstances outlined below:</u>**
>
> **1. The flight cannot depart as scheduled due to a technical fault with the aircraft or transport difficulties with the relevant contractor including problems with the availability of aircraft, related aircrew or the scheduled departure slot.**
> **2. The scheduled departure time of the flight has had to change for other reasons such as adverse weather conditions, industrial action or other significant factors that can be reasonably deemed to be outside of the UK Border Agency's control.**

**3. The individual has attempted to frustrate their removal by being non-compliant e.g. refusing to leave the immigration removal centre or board the vehicle.**
**4. Where removal has been disrupted by another individual's behaviour.**
**5. Removal was deferred following a JR of removal which has been concluded and the judge has given a finding of "no merit" or "renewal should not as a bar to removal" subject to the following conditions.**

**<u>When could I not apply this?</u>**
**Standard notice must continue to be given in cases where there has been more than 10 days since the initial deferral/cancellation or where there has been a significant change in circumstances, such as:**

- **We are re-setting removal directions to a different country;**
- **Further submissions have been received and refused since the earlier removal direction failed or;**
- **In certain circumstances if there has been a change of route, see below.**

**<u>Removal via a different route</u>**
**If for operational reasons it is required to change the route of return to remove a place of transit you do not need to allow a further period of notice when re-setting removal directions for within 10 days of the failed removal, providing the place of final destination remains unchanged. For example, the alteration is from a flight from London to Abidjan via Lagos to a direct flight from London to Abidjan.**
**If for operational reasons it is required to change the route of return to insert or amend a place of transit you must give a new standard notice period unless the new place of transit is in a safe country. A new standard notice period will not be required when the new place of transit is in Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, or Switzerland. For example, if the original removal directions were set from London to Abidjan via Lagos, you may alter the place of transit (Lagos) to Paris without a new**

> **notice period. However, if you changed the transit point from Lagos to Nairobi, a new notice period would be required."**

**Legal Framework**

[9] The authority for the making of deportation orders and detention pending deportation is found in Regulation 19(3)(b) of the 2006 Regulations and para2(3) of the Schedule 3 to the Immigration Act 1971.

[10] Regulation 19(3)(b) of the Regulations of 2006 provides:

> **"(3) ... a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if-**
> **...**
> **(b) he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21"**

[11] Para2(3) of Schedule 3 to the Act of 1971 provides:

> **"(3) Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom ..."**

[12] The respondent has acknowledged that the relevant principles governing immigration detention in these circumstances are set out in the judgment of Woolf J in the case of ***Ex Party Hardial Singh*** **[1984] 1 WLR 704** at p706 (a view confirmed by the Supreme Court in the recent decision of ***Kambadzi*** **[2011] UKSC 23)**. In ***Hardial Singh*** Woolf J said:

> **"Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time I am quite satisfied that it is subject to limitations. First of all it can only authorise detention if the individual is being detained pending his removal. It cannot be used for any other purpose. Secondly, as the power is given an order to enable the machinery of deportation to be**

> **carried out I regard the power of detention as being impliedly limited to a period which is reasonably necessary to that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more if there is a situation where it is apparent to the Secretary of State that he is not being to be able to operate the machinery provided in the act for removing persons who are intended to be deported within a reasonable period it seems to me that it would be wrong for the Secretary of State to exercise his power of detention. In addition I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time."**

[13] I was also referred by both parties to the judgment of Lord Justice Dyson and to his summary of the relevant principles in ***R (I v Secretary of State for the Home Department)*** **[2002] EWCA Civ 888.** At para46 he summarised the principles as follows:

> **"1. The Secretary of State must intend to deport the person and can only use the power to detain for that purpose.**
>
> **2. The deportee may only be detained for a period that is reasonable in all the circumstances.**
>
> **3. If before the expiry of the reasonable period it becomes apparent that the Secretary of State will not be able effect deportation within that reasonable period he should not seek to exercise the power of detention.**
>
> **4. The Secretary of State should act with reasonable diligence and expedition to effect removal."**

**Submission**

[14] It is quite clear from submissions made on behalf of both of the parties in this case that the applicant's challenge centres on the fourth of these principles namely the requirement that the Secretary of State act with reasonable diligence and expedition when effecting removal. The respondent contended that the SoS had not so acted.

[15] The applicant contended that the respondent should have set aside the 72 hour rule when securing reset removal directions, and failed to act with sufficient urgency when seeking to reset removals directions.

[16] The applicant contended that there had not been reasonable diligence and expedition in this case and that the applicant ought to have been deported as arranged or in any event much sooner than 25 June and that his continued detention until 25 June was unnecessary. The applicant submitted that this was a situation where the reasonable length of time in custody had been unnecessarily prolonged by carelessness, negligence or incompetence and that this was a straightforward deportation case since the applicant did not dispute or appeal his deportation. He was not maintaining a bogus asylum application which might complicate the deportation process nor were there any difficulties with the receiving State, in this case Germany.

[17] The respondent in this case insisted on giving 72 hours notice of the reset deportation arrangements even though the applicant had previously been given the requisite notices of the deportation arrangements originally scheduled for 20 June. The respondent refused to employ the exception to the 72 hour rule set out in its own Guidance even though, according to the applicant, it would appear rational and prudent to have employed that exception in this case. The applicant contends that the wording of the exception as it appears in the guidance would have allowed for it to be employed in the circumstances of this application.

[18] The respondent accepted that the general purpose of the 72 hour rule is to **protect** the interests of persons being deported.

**Discussion**

[19] In the present case however the imposition of the rule, far from protecting the interests of an EU national, led in fact to a period of extended detention while he was shunted from one immigration removal centre to another. I am certain that this must have been a disquieting and disorientating experience for the applicant who no doubt was looking forward to his freedom in Germany upon the completion of his lengthy term of imprisonment and immediate deportation.

[20] Whether there has been due diligence and reasonable expedition in respect of a deportation will depend on the circumstances of each deportee. Lord Dyson in ***Lumba*** **[2011] UKSC 12** stated:

> **"104. How long is a reasonable period? At para 48 of my judgment in *R (I)*, I said:**
>
> > **'It is not possible or desirable to produce an exhaustive list of all the circumstances that are, or may be, relevant to the question of how**

> **long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of Schedule 3 to the Immigration Act 1971. But in my view, they include at least: the length of the period of detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences'."**

[21] In the circumstances of this case the respondent, in my judgment, failed to act with reasonable diligence and expedition to effect the removal of the applicant. Once the original removal directions fell apart because the allocated escort company did not arrive at Magilligan Prison to escort the applicant it was incumbent on the respondent to rectify their problem as a matter of urgency. By failing to do so they unnecessarily and unreasonably prolonged the detention of the applicant who was not released from deportation detention until 25 June. The conditions of his detention during this period involved, amongst other things, further detention at Magilligan and three different immigration removal centres in Scotland, Manchester and London. I accept the applicant's contention that reasonable diligence and expedition in this case required the respondent to (i) set aside the 72 hour rule in securing reset removal directions, (ii) to have sought the reset removal directions on 20 June and not 21 June, and (iii) to have sought confirmation of the reset removal directions urgently and by no later than 21 June.

[22] Accordingly I conclude that the continued detention of the applicant in those circumstances was unlawful.

[23] The applicant has claimed damages in this case for unlawful detention and at the invitation of the parties a separate hearing will be arranged for that purpose if agreement on quantum is not otherwise reached. When the matter comes back before the court, if it does, in relation to the question of damages I expect an affidavit from the respondent explaining why it was necessary for the applicant to have been taken from Magilligan to immigration removal centres in England and Scotland and why it was necessary for him to be brought to three different immigration removal centres. I also expect an affidavit from the respondent setting out how much this failure to pick up the applicant as arranged on 20 June 2011 cost and how much the subsequent arrangements that had to be put in place cost.

[24] If the issue of damages is not resolved between the parties there should be an affidavit from the applicant setting out in some detail the conditions to which he was exposed between 20 June 2011 and his departure to Germany on 25 June. I appreciate that he is in Germany at the moment but I presume his solicitors are in contact with him or can maintain contact with him and in the first instance in order to expedite the completion of the case I would be prepared to accept an affidavit from the applicant's solicitor deposing to his instructions in that respect.