EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 48078/09
Mohammed Hussein ISMAIL
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 17 September 2013 as a Chamber composed of:

Ineta Ziemele, *President*,
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Paul Mahoney,
Krzysztof Wojtyczek,
Faris Vehabović, *judges*,

and Françoise Elens-Passos, *Section Registrar*

Having regard to the above application lodged on 4 September 2009,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Mohammed Hussein Ismail, is an Iraqi national who was born in 1983 and lives in Ipswich. He is represented before the Court by J. Hickman, a lawyer practising in London with the Public Law Project. The United Kingdom Government ("the Government") were represented by their Agent, Ms A. Sornarajah, of the Foreign and Commonwealth Office.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

3. On 16 November 2006 the applicant was detained under powers contained in the Immigration Act 1971 on the basis that he was subject to a decision to make a deportation order (see paragraph 10 below). He had previously been detained for six months while serving a sentence of one year's imprisonment for the offence of being in possession of a forged document.

4. On 22 March 2007 the applicant applied for bail. Bail was refused on the basis that the Immigration Judge was satisfied that there were substantial grounds for believing that the applicant would abscond. In addition, the bail application was said to be premature as the applicant's appeal against the decision whether to make a deportation order had not yet been determined. On 27 March 2007 the applicant's appeal against the decision whether to make a deportation order was dismissed by the Asylum and Immigration Tribunal (AIT) following a hearing. On 18 April 2007 an application for reconsideration was refused. On 26 April 2007 a deportation order was issued. The applicant was subsequently detained on the basis that he was subject to a deportation order. On 10 July 2007 the applicant applied for bail for a second time and requested a bail hearing within three working days, relying on the AIT Practice Direction (see paragraph 12 below). However, the applicant's representatives were informed that the bail application would not be listed before the week commencing 23 July 2007.

5. On 12 July 2007 the applicant's solicitors wrote a letter before claim arguing that the failure to list the applicant's bail application in accordance with the relevant Practice Direction was a violation of his rights under Article 5 § 4 of the Convention. No response was received. On 13 July 2007 the applicant's solicitors were informed that his bail application would be listed for 20 July 2007. On 16 July 2007 the applicant commenced judicial review proceedings. On 20 July 2007 the applicant was granted bail.

6. Following the applicant's commencement of judicial review proceedings, the AIT filed summary grounds arguing that Article 5 § 4 of the Convention had no application when an immigration detainee applied for bail. On 23 October 2007 Lloyd Jones J refused permission to apply for judicial review on the papers. In finding that the application did not disclose any arguable grounds for judicial review, he took the view that Article 5 § 4 of the Convention had "no application because an application for bail does not determine the lawfulness of the detention". Reference was made to the case of *R (Konan) v SSHD* [2004] EWHC 22 (see paragraph 13 below).

7. The applicant renewed his application for permission to apply for judicial review. In a judgment delivered on 14 July 2008 Sullivan J refused permission. He observed that the applicant had been granted bail within eight working days of his second application. Although this was in excess of the three working days cited in the Practice Direction, there was no satisfactory evidence that the problem was in any way a widespread one. Simply looking at the facts of the present case, and even assuming that

Article 5 § 4 of the Convention applied and that there was an entitlement to have one's bail application heard speedily, if the overall period fell to be measured in working days rather than weeks or months, it was very difficult to maintain any argument that the application was not being heard speedily. The three working days referred to in the Practice Direction was patently a guideline and one which recognised that in practice it could take longer to arrange for a bail hearing. In light of the foregoing, it would be disproportionate to grant permission for judicial review "to enable a lengthy trawl through the authorities in order to ascertain whether or not Article 5 § 4 would have been of assistance in his case".

8. The applicant sought permission to appeal. On 8 January 2009 permission was refused on paper by Buxton LJ. He considered that once it was conceded, as it was in the applicant's skeleton argument, that bail applications did not determine the legality of continuing detention, it was very difficult to hold that Article 5 § 4 could have any application. However, even if the application of Article 5 § 4 was more arguable than it appeared to be, Sullivan J's reasons for not permitting the case to proceed were unanswerable, or, at least did not "give (the) court licence to differ from the assessment of a judge exercising the discretionary jurisdiction of the Administrative Court".

9. The applicant renewed his application for permission to appeal. Permission was refused by Thomas LJ on 9 March 2009. Thomas LJ stated that he was inclined to take the view that Article 5 § 4 of the Convention was not engaged for the reasons given by Buxton LJ. Notwithstanding, he considered that Sullivan J was entitled to conclude that it was not really arguable that the listing of the applicant's bail application had not been "speedy" for the purposes of Article 5 § 4. It was, in Thomas' LJ opinion, important to take into consideration the fact that the courts were subject to extreme resource pressures, particularly "in the middle of a current economic crisis". Delays of greater duration, such as those measured in weeks or months would, by contrast, be a matter of concern.

B. Relevant domestic law and practice

1. The power to detain pending deportation

10. The Secretary of State has wide powers under Schedule 3 to the Immigration Act 1971 to detain persons liable to deportation. Paragraph 2(1) to (3) of Schedule 3 provides the power to detain where a court has made a recommendation for deportation pending the making of a deportation order, once notice has been given of a decision to make a deportation order and where a deportation order is in force.

2. Remedies to challenge the legality of immigration detention

11. An individual detained pending deportation can challenge the legality of the detention through an action for habeas corpus or an application for judicial review. An action for habeas corpus can be brought at any time during the detention and, if necessary, can be heard by a judge at short notice and at night and during the weekend. Judicial review of the lawfulness of detention is available on common law grounds and, by virtue of sections 6 and 7 of the Human Rights Act 1998, on grounds invoking rights under Article 5 of the Convention. Judicial review applications of this type can be brought before the Administrative Court on very short notice and outside office hours in urgent cases.

3. Bail in respect of immigration detention

12. In all cases where the Secretary of State has a power to detain, she also has a power to release. Everyone detained under the Immigration Act 1971 may seek bail from the immigration authorities or from the First-tier Tribunal (Asylum and Immigration Chamber) (formerly the AIT), under paragraphs 22 and 23 of Schedule 2 to the 1971 Act. A grant of bail is the release of a person detained on his entering into a recognizance conditioned for his appearance before an immigration officer or at a time and place named in the recognizance or at such other time and place as may be notified to him in writing by the immigration officer (paragraph 22(1A) of schedule 2 to the 1971 Act). Such bail may be subject to conditions including sureties and residence conditions (paragraph 22(2) of Schedule 2 to the 1971 Act). Paragraph 19.1 of the Practice Direction issued by the Asylum and Immigration Tribunal in force at the relevant time provided that:

> "An application for bail shall if practicable be listed for hearing within three working days of receipt by the Tribunal of the notice of application."

13. In the case of *R (Konan) v SSHD* [2004] EWHC 22, the High Court held the following at paragraph 30 of its judgment:

> "...An adjudicator in considering a bail application is not determining (indeed, he has no power to determine) the lawfulness of the detention. The grant of bail presupposes the power to detain since a breach of a bail condition can lead to reintroduction of the detention. Further, the requirement imposed by Article 5(4) of the E.C.H.R. that a detainee must be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court is not met by a right to seek bail. In *Zamir v United Kingdom* (1983) 40 D.R. 42 at 59 (Paragraph 109) the Commission said: ... this right must be seen as independent of the possibility of applying to a court for release on bail."

In *Walumba Lumba v. Secretary of State for the Home Department* [2011] UKSC 12, Lord Dyson stated at paragraph 118 that:

> "Bail [in the immigration context] is not a determination of the legality of detention, whether at common law or for Article 5(4) purposes."

However, this point was not one of the issues in the case and was not, therefore, the subject of argument before the Supreme Court.

COMPLAINTS

14. The applicant complained under Article 5 § 4 of the Convention that his second bail application was not decided "speedily", or in accordance with the relevant domestic Practice Direction and that the authorities failed to give good reason for the delay. He also complained under Article 13 of the Convention that he was deprived of an effective domestic remedy as the courts failed to consider the merits of his judicial review application in which he raised his Article 5 § 4 complaint, finding that it would be a disproportionate use of the court's time.

THE LAW

15. The applicant complained that his second bail application was not decided "speedily" and that this constituted a breach of Article 5 § 4 of the Convention, which provides:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The parties' arguments

1. The Government

16. The Government submitted that Article 5 § 4 was not applicable, since the bail application was not a procedure under domestic law to challenge the lawfulness of immigration detention. They emphasised that, under domestic law as interpreted by the courts, a decision to release a person on bail, subject to conditions designed to ensure his future attendance, presupposed the legality to detain; and they pointed out that the applicant had accepted that his application for bail could not and did not determine the legality of his detention, both in his skeleton argument to the Court of Appeal and in his application to the Court. Under English law, the applicant could have challenged the lawfulness of his detention through either habeas corpus or judicial review proceedings, and the existence of

these remedies was sufficient to meet the United Kingdom's obligations under Article 5 § 4 in the present case.

17. They noted that the applicant argued that Article 5 § 4 applied because, if bail had been ordered and if the detaining authorities had ignored the decision, the detention would have become unlawful. In response, the Government underlined that the applicant was released as soon as bail was granted and that this was invariably the case. A mere theoretical possibility that a State might ignore a decision of a court or tribunal was not sufficient to mean that a bail application somehow determined the legality of the applicant's detention.

18. In relation to the applicant's argument, concerning the judgment in *Garcia Alva v. Germany*, no. 23541/94, 13 February 2001, the Government reasoned that the Court had not held that bail applications in general engage Article 5 § 4. *Garcia Alva* concerned detention under Article 5 § 1(c), pending a criminal trial, where different considerations applied given that Article 5 § 3 guaranteed a right to bail in certain circumstances, but only in relation to Article 5 § 1(c) detention. Moreover it was clear from the judgment that the proceedings in issue "reviewed the lawfulness of the applicant's detention on remand", which was not the case for the immigration bail application brought by the present applicant.

19. In addition the applicant's reliance on the domestic judgments in *R (Cart) v. Upper Tribunal* [2009] EWHC 3052 (Admin) and *R (BB) v. Special Immigration Appeals Commission* [2011] EWHC 336 (Admin) was misplaced. Those two judgments concerned judicial review of decisions of the Special Immigration Appeals Commission (SIAC) to revoke or refuse release on bail of a person facing deportation on national security grounds, on the basis of secret evidence. In each case, the Divisional Court interpreted House of Lords' case-law as requiring the disclosure of a summary of the allegations against him to the person requesting release on bail, and in each case the Divisional Court held that SIAC's failure to disclose this material gave rise to a violation of Article 5 § 4. The Government underlined, however, that the present case was entirely different as there was no issue of national security or non-disclosure of secret material.

2. The applicant

20. The applicant submitted that, while the Government relied on *R (Lumba) v. Secretary of State* (see paragraph 13 above) as authority for the proposition that immigration bail proceedings did not determine the legality of detention for the purposes of Article 5 § 4, that issue had not been the subject of direct argument in that case. He underlined that in other recent cases, concerning procedural guarantees in the context of cases with a national security element decided by the Special Immigration Appeal Commission, the domestic courts had accepted that Article 5 § 4 applied to

immigration bail (the applicant cited *R (Cart) v. Upper Tribunal* and *R (BB) v. Special Immigration Appeals Commission*, both cited above).

21. He argued, further, that no proper basis had been found for distinguishing *Garcia Alva*, cited above, or *Allen v. the United Kingdom*, no. 18837/06, 30 March 2010, from the present case. The fact that the detention in both cases was under Article 5 § 1(c), rather than Article 5 § 1(f) was immaterial, since the wording of Article 5 § 4 did not differentiate between different types of detention.

22. The existence of the right to apply for habeas corpus and judicial review was irrelevant. Those proceedings were essentially to allow a detainee to argue that his or her detention had become unlawful, and the decision in *R (Konan)* (see paragraph 13 above) made it clear that a bail application determined different issues. The fact that the applicant did not apply for habeas corpus did not mean that bail was not an important remedy from his point of view.

23. Finally, the applicant emphasised that the State would comply with a decision to grant bail because it would be unlawful to continue to detain where bail had been ordered. This demonstrated that the legality of detention was in issue in bail proceedings.

B. The Court's conclusions

24. The Court recalls that Article 5 § 4 guarantees a right to "everyone who is deprived of his liberty by arrest or detention" to bring proceedings to test the legality of the detention and to obtain release if the detention is found to be unlawful. It provides a *lex specialis* in relation to the more general requirements of Article 13, entitling an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the "lawfulness" of his or her deprivation of liberty. The notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1 (see, amongst many other authorities, *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 201-202, ECHR 2009).

25. The present applicant's detention would appear *prima facie* to fall within the second limb of Article 5 § 1(f), that is "lawful ... detention ... of a

person against whom action is being taken with a view to deportation". In order to determine whether the bail hearing could be qualified as "proceedings to test the legality of [his] detention", it is necessary first to determine what "legality" meant in this context.

26. First, it must be recalled that in relation to the second limb of Article 5 § 1(f), the Court has held that States enjoy an undeniable sovereign right to control aliens' entry into and residence in their territory and that detention of persons in relation to whom deportation or extradition proceedings are being pursued is a necessary adjunct to this right (see, *mutatis mutandis, Saadi v. the United Kingdom* [GC], no. 13229/03, § 64, ECHR 2008). Detention may be permissible as long as the State is taking active steps to effect the deportation and as long as such proceedings are pursued with due diligence (see, for example, *Chahal v. the United Kingdom*, 15 November 1996, §§ 112-113, *Reports of Judgments and Decisions* 1996-V; *A. and Others*, cited above, §§ 162-172; *Mikolenko v. Estonia*, no. 10664/05, §§ 63-65, 8 October 2009; *Al Hanchi v. Bosnia and Herzegovina*, no. 48205/09, § 51, 15 November 2011). Article 5 § 1(f) does not demand that the detention be reasonably considered necessary, for example to prevent the detainee committing an offence or fleeing; in this respect Article 5 § 1(f) provides a different level of protection from Article 5 § 1(c), which must be read in conjunction with Article 5 § 3 (see *Chahal*, cited above, § 112).

27. Secondly, it is well established in the Court's case-law under the sub-paragraphs of Article 5 § 1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a)-(f), be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (see *Saadi*, cited above, § 67).

28. Turning to the facts of the present case, the Court notes that the applicant was detained from 16 November 2006 to 26 April 2007 on the basis that he was subject to a decision to make a deportation order, and from 26 April to 20 July 2007 on the basis that he was subject to a deportation order. He did not seek to challenge the lawfulness of his detention, including whether it was compatible with the requirements of Article 5 § 1 (f); had he chosen to make such a challenge, he could have

issued a writ of habeas corpus or made an application for judicial review (see paragraph 11 above). Instead, the applicant chose to apply for bail, on the ground that, notwithstanding that his detention was lawful, less coercive means, such as release subject to reporting requirements or other conditions, would also have ensured that he would be available at such time as the deportation were scheduled to go ahead. In the Court's view, it follows from the fact that the lawfulness of the detention under Article 5 § 1 (f) was not in issue, that Article 5 § 4 was not engaged.

29. The applicant relies on the judgment in *Garcia Alva v. Germany*, no. 23541/94, 13 February 2001, where the Court remarked at § 39 that: "A court examining an appeal against detention must provide guarantees of a judicial procedure". The applicant contends that his bail application fell within the broad category of "appeals against detention" and that he was therefore entitled to the procedural guarantees of Article 5 § 4, including "speediness". However, the Court underlines that the sentence relied on must be read in context. *Garcia Alva* concerned pre-trial detention under Article 5 § 1(c), in connection with which the case-law under Article 5 § 3 has established that "continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention" (see, amongst many other examples, *Kudła v. Poland* [GC], no. 30210/96, § 110, ECHR 2000-XII). In the *Garcia Alva* judgment, immediately before the sentence relied on by the applicant, the Court made it clear that the "appeal against detention" at issue in that case involved the "competent court" in examining "not only compliance with the procedural requirements set out in domestic law but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention" (*Garcia Alva*, cited above, § 39). In *Garcia Alva,* the hearing of the applicant's appeal against detention involved an examination of the lawfulness of the detention, in terms of domestic law and compliance with Articles 5 §§ 1(c) and 3 of the Convention; this was also the case in the other judgment relied on by the applicant, *Allen v. the United Kingdom* (cited above).

30. Where a person is arrested or detained with a view to deportation, sub-paragraph (f) of Article 5 § 1 does not make possible release, whether or not subject to conditions, a component of the "lawfulness" of the detention that the Convention requires proceedings under Article 5 § 4 to address. The present case is, therefore, entirely different from that at issue in *Garcia Alva* and *Allen* (both cited above), since the applicant's immigration bail hearing did not involve any examination of the "lawfulness" of the detention, either under national law proper or in terms of the Convention.

31. In the light of the foregoing, the Court concludes that Article 5 § 4 did not apply to the bail application brought by the applicant. It follows that

this complaint is inadmissible as incompatible *ratione materiae* with the provisions of the Convention and its Protocols under Article 35 §§ 3 (a) and 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President