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Prosecutions for telling the truth

26 JULY 2016 BY JAMES PACKER

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In the first successful challenge to prosecutions under s.35 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, the Administrative Court in *R (on the application of JM (Zimbabwe)) v Secretary of State for the Home Department* [2016] EWHC 1773 (Admin) held that the Home Office may not lawfully require the Claimant, under section 35 of the 2004 Act, to tell Zimbabwean officials that he agrees to return voluntarily.

Facts of the case

JM, a Zimbabwean national subject to deportation, was placed in immigration detention immediately on the expiry of his sentence in May 2013. The Home Office attempted to obtain an Emergency Travel Document (ETD) from the Zimbabwean High Commission which would allow them to remove JM to Zimbabwe. It is the policy of the government of Zimbabwe that they will only provide ETDs to nationals of their country if they are willing to return. As the judgment records:

> On 11th February the Claimant attended the Embassy. He was asked if he wanted to return to Zimbabwe and he replied that he did not … he explained that he did not want to go, but if they forced him, he would. On 21st April 2015 the Claimant was charged with an offence under section 35 of the 2004 Act. The particulars of the offence were that the Claimant had failed to consent to return to Zimbabwe when requested by an Embassy official. On the Claimant's account, he was advised to plead guilty; and on 22nd May 2015 he did so, and was sentenced to 9 months' imprisonment. During the currency of the Claimant's sentence, he was no longer detained under immigration powers, and he was transferred to prison. On 13th August 2015 the Defendant wrote to the Claimant asking whether he could confirm that he would comply in attending the Zimbabwean Embassy for the purpose of a face-to-face interview. On 21st August the Claimant's case was discussed at the "section 35 Tasking Board meeting" and the "prosecutions' team" confirmed that they would prosecute "as many times as it takes before he complies".

Section 35 Prosecution

The central issue of the case was therefore the true construction of s.35; that is analysed in depth at [61]-[84]. Jay J agreed with the Claimant that the general power in s.35(1) – which allows the Secretary of State to 'require a person to take a specified action' (if it could lead to an ETD) is governed by s.35(2). In summary he then further held that *'a stipulation which in substance required an individual to lie to an embassy or consular official would have to be covered by clear statutory wording'* [82] and pointed out the tension that would arise on any other reading, given the terms of s.35(2)(g):

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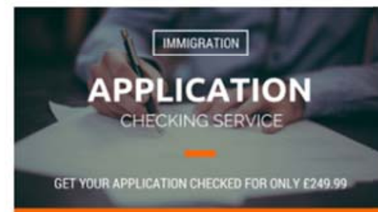

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> The Claimant's actions did not amount to refusing to give consent to the application, particularly in circumstances where the requirement in sub-paragraph (g) is to attend an interview and "answer questions accurately and completely". The Claimant would not be answering the Zimbabwean official's question accurately if he had said that he was willing to return there. Thus, sub-paragraph (g), which precisely fits the circumstances of this case and the Defendant's real complaint, has been complied with by the Claimant. It would be anomalous, in my view, if an individual who is wholly compliant with one provision could be said to be non-compliant with another, in circumstances where the first provision achieves this perfect fit. [78]

Mr. Justice Jay, well known to the public as counsel to the (Leveson) Inquiry into press standards, further stated:

> any notion that section 35 could be used "as many times as it takes" is so Kafkaesque as to be inimical to the rule of law.

The unlawful detention claim

Naturally the Court's conclusion on s.35 had a major bearing on the legality of detention. There were some further elements worth noting – both encouraging and disappointing.

It is hard to understand why JM was considered by the Court to have posed at all times a medium risk of absconding, given that (a) he reported as required for 5 years when there was no barrier to his removal – to the extent that the Home Office's own documents noted him as 'genuinely keen' and (b) he is unfortunately HIV+ with particularly complex treatment needs.

On the other hand, Jay J was forthright in pointing out that in complying with the ETD process but not stating that he was willing to return, JM was not obstructing his removal as the obstacle came from the Zimbabwean authorities [105]-[106].

There was also a welcome focus on the length of time taken to produce the refusal letter [119]-[121] – as Greg O'Callagh has pointed out there is a marked distinction in the time taken to produce a comprehensive letter in respect of a detainee if RDs have been set. Doubtless Rory Dunlop, the able counsel for the Claimant, would have made more of that issue if the previous attitude of the courts to delays at this juncture had not been so permissive; if this case is indicative of a change of judicial attitude on that point so much the better.

Notably while at [128]-[133] Jay J 'abstained' from ruling on the legality of repeat s.35 prosecutions, he 'struggled' to see that detention under immigration powers for that purpose could be lawful (if the detention would otherwise breach the *Hardial Singh* principles).

More disappointing was the ruling that JM could not advance a claim for the period he served in criminal detention pursuant to his conviction for his s.35 offence [112]-[116]. Until very recently it was settled law that any such claim would be caught by the public policy considerations in the principle of *ex turpi causa*. However the Supreme Court in its recent review of the principles in *Les Laboratoires Servier v Apotex Inc* [2015] AC 430 has hinted at a modification of approach to the strict application of these principles holding for example that *it does not follow that the courts should be insensitive to the draconian consequences which the ex turpi causa principle can have if it is applied too widely* [22]. It is hard to see the justice of the Court stating at one and the same time that no offence is committed under s.35(2) in failing to state willingness to return, but that the moral turpitude of having pleaded guilty (JM simply followed the advice of his criminal solicitor) to exactly that "offence" is a complete bar to recovery for that period. Given that there was no basis to apply to the CCRC until this very judgement was promulgated, some may think that a short stay to allow his conviction to be overturned would have been a better course.

The Home Office have indicated an intention to seek permission to appeal.

James Packer and Kate Newman of the Public Law Department at *Duncan Lewis* represented JM.

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