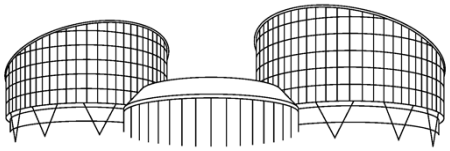

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF V.M. v. THE UNITED KINGDOM (No. 2)

(Application no. 62824/16)

JUDGMENT

STRASBOURG

25 April 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of V.M. v. the United Kingdom (No. 2),

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Ksenija Turković,
Aleš Pejchal,
Krzysztof Wojtyczek,
Tim Eicke,
Jovan Ilievski,
Gilberto Felici, *judges,*
and Abel Campos, *Section Registrar,*

Having deliberated in private on 12 March 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 62824/16) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Nigerian national, Ms V.M. ("the applicant"), on 24 October 2016. The President of the Section acceded to the applicant's request not to have her name disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented by Mr Stefan Vnuk, a lawyer practising in Harrow. The United Kingdom Government ("the Government") were represented by their Agent, Mr James Gaughan, of the Foreign and Commonwealth Office.

3. The applicant alleged, that her detention pending deportation had been in violation of Article 5 § 1.

4. On 1 February 2018 notice of the complaints concerning Article 5 § 1 was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1977 and lives in Uxbridge.

A. The Facts

6. The applicant claims to have entered the United Kingdom illegally on 18 November 2003. She pleaded guilty to offences of cruelty towards her son and was sentenced to twelve months' imprisonment with a recommendation that she be deported. On 5 August 2008 the Home Secretary served her with notice of intention to make a deportation order. On 8 August 2008 the applicant's criminal sentence ended and she was thereafter detained under immigration powers from 8 August 2008 to 6 July 2011 (2 years, 10 months, 27 days). The present application is the second one made to this Court by the applicant.

7. In her first application the applicant complained about her detention from 8 August 2008 to 28 April 2010. This Court found that during this period, there was a lack of due diligence on the part of the authorities from 19 June 2009 to 14 December 2009 (a period of five months and 26 days). Accordingly, it found a violation of Article 5 § 1 in light of the authorities' delay in considering the applicant's further representations in the context of her claim for asylum (see *V.M. v. the United Kingdom*, no. 49734/12, § 99-100, 1 September 2016). The Court did not examine the period of detention after 22 July 2010 in that judgment noting that this was the subject of separate litigation proceedings (see *V.M. v. the United Kingdom*, cited above, § 92).

8. The present case concerns that later period of her detention from 22 July 2010 to 6 July 2011 (11 months, 14 days). A detailed summary of the facts up to 25 July 2010 is set out in *V.M. v. the United Kingdom*, cited above, §§ 16-51.

9. On 25 November 2010 a deportation order was served on the applicant. The applicant subsequently brought a number of legal challenges arguing that the order should be revoked. Removal directions were set for a flight departing on 7 February 2011, but the High Court enjoined the Home Secretary from effecting removal on 4 February 2011.

10. On 14 January 2011 an immigration judge refused bail after an oral hearing.

11. On 10 February 2011 Dr A-D, a clinical psychologist, prepared a psychological report on the instruction of the applicant's representatives. She concluded that the applicant had given a plausible history of suffering physical and sexual abuse at the hands of her uncle; that she suffered from particularly severe post-traumatic stress disorder; that she was not receiving appropriate treatment for her mental health problems in detention; that release would benefit her mental health; and that her deportation was likely to precipitate further suicide attempts. On 16 February 2011 the representatives submitted this report to the Secretary of State.

12. On 7 March 2011 and 17 June 2011 a tribunal judge refused to grant bail to the applicant. On 30 June 2011 Dr A-D provided an addendum report

which recommended the applicant's immediate release. Professor K who had previously examined the applicant (see *V.M. v. the United Kingdom* cited above, §§ 20-35) also wrote a further report indicating he now agreed with Dr A-D. The tribunal judge granted bail on 1 July 2011 and the applicant was released on 6 July 2011.

13. Six reviews of the applicant's detention were written by the applicant's 'caseworker' between 4 March 2011 and 4 July 2011. Brief reference was made to the report of Dr A-D. Inserted into the recital in each review of the applicant's protracted immigration history was reference to "yet another psychiatric report", which had been "treated as a further request to revoke" the deportation order. The reviews identified the applicant's most recent diagnosis as being that of Dr R on 15 March 2010 (see *V.M. v. the United Kingdom*, cited above, § 33). In each case the senior officers endorsed the conclusion that the risk of the applicant's reoffending and absconding outweighed the presumption in favour of release.

B. The applicant's legal challenge to her detention

14. The applicant initiated judicial review proceedings of the period of her detention from 22 July 2010 to 6 July 2011. The High Court refused her permission to bring judicial review proceedings on 3 April 2012. However, permission was granted by the Court of Appeal to appeal that decision.

15. In its judgment of 17 July 2014, the Court of Appeal found that there had been procedural errors in the reviews of the applicant's detention but it upheld the decision of the High Court that the challenge should fail. Lady Justice Arden gave the lead opinion:

> "***Conclusion***
>
> 68. Accordingly, I would dismiss this appeal. The new diagnosis of Dr [A-D] proposed a new treatment for curing her illness but her condition could still be satisfactorily managed in detention. She could still be held in an acceptable stable mental condition in detention under the existing treatment. In any event, there was a risk of reoffending and absconding. While these would have diminished with the passage of time, there still needed to be safeguards if [the applicant] was released into the community and these were not put in place to the satisfaction of the court until 6 July 2011 when she was in fact released on bail."

16. The Court of Appeal refused the applicant permission to appeal its decision but permission was subsequently granted by the Supreme Court. The Supreme Court, in its judgment of 27 April 2016 (*R (O) v Secretary of State for the Home Department* [2016] UKSC 19), also concluded that some of the applicant's detention reviews did not refer to available medical evidence where they should have done so. Lord Wilson giving the lead judgment in the Supreme Court summarised the failings in the applicant's six detention reviews between 4 March 2011 and 4 July 2011:

"25. ... The reviews

(a) failed to refer to Dr [A-D]'s diagnosis of [the applicant] as suffering from [post-traumatic stress disorder] PTSD:

(b) indeed wrongly stated that the most recent diagnosis of [the applicant]'s mental condition was that of Dr [R];

(c) failed therefore to consider whether [the applicant] could be "satisfactorily managed" at Yarl's Wood [detention centre] and, even if not, whether there were very exceptional circumstances which nevertheless justified her continued detention.

26. In the above circumstances the Court of Appeal concluded that the Home Secretary had unlawfully failed to apply the policy set out in para 55.10 of the manual when deciding to continue to detain [the applicant] between March and July 2011. This conclusion the Home Secretary now accepts. She does not suggest that the evidence which she would be entitled to file in the event that the claim was permitted to proceed would be likely to throw a different light on it. The defects in the reviews already filed speak for themselves."

17. He went on to comment:

"34... Realistically [the applicant] accepts that the proper application of the Home Secretary's policy to her case in the light of the report of Dr [A-D] would not have led to her immediate release in March 2011. She correctly contends that the report should have led the Home Secretary to make inquiries, most of which, judging by the contents of the reviews, seem never to have been made ... At least however, the limited period between March and her release on bail on 6 July 2011 makes one thing clear: even on the dubious assumption that proper application of her policy should in due course have led the Home Secretary to direct [the applicant]'s release, it is unrealistic to consider that the conditions necessary for her release would have been in place prior to 6 July 2011.

35. For the above reasons, in agreement with the Court of Appeal, I regard it as already clear that, although the Home Secretary unlawfully failed to apply her policy under para 55.10 of the manual to [the applicant]'s continued detention between March and July 2011, a lawful application of her policy would not have secured [the applicant]'s release from detention any earlier than the date of her actual release on bail."

18. Lord Wilson concluded:

"37.... The overall refusal to release [the applicant] ... was procedurally flawed. What however is clear is that, even in the absence of any flaw, no decision to release [the applicant] would in any event have been made prior to 6 July 2011.

...

50. ... were [the applicant]'s claim for judicial review permitted to proceed, the result in all likelihood would be a declaration that her detention from 4 March 2011 to 6 July 2011 was unlawful and an award to her of damages in the sum of £1. The Court of Appeal decided that, since such was – "at most", so it added – the likely result of the claim, it was appropriate to uphold the refusal of [the High Court] to grant permission for it to proceed. I agree. By the time of its issue [the applicant] had been released and it could bring her no practical benefit. To the extent that her contentions in these proceeding have deserved to be vindicated, she has secured their vindication in this judgment. I would dismiss the appeal."

19. The Supreme Court dismissed the appeal on 27 April 2016.

II. RELEVANT DOMESTIC LAW AND PRACTICE

20. For a detailed summary of the relevant law and practice see *V.M. v. the United Kingdom,* cited above, §§ 52-65.

21. The Secretary of State for the Home Department's policy publication, Enforcement Instructions and Guidance, contains specific provisions pertaining to the use of immigration detention. The Guidance provides that, in general terms, there is a presumption in favour of temporary admission or release and that, wherever possible, alternatives to detention should be used.

> "59. This presumption is qualified in paragraph 55.1.2 by the "risk that ... a person will abscond" or otherwise pose a risk to the public. In such circumstances the presumption in favour of release can be displaced after a global assessment of "the need to detain in the light of the risk of re-offending and/or risk of absconding."

22. A further qualification is contained within paragraph 55.10 of the Guidance which lists cases in which detention may be unsuitable for certain individuals. In particular the policy provides:

> "The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or prisons:
>
> - those suffering from serious medical conditions or the mentally ill ..."

23. The effect of paragraph 55.10 was subsequently qualified in that the words "which cannot be satisfactorily managed in detention" were added with effect from 25 August 2010.

COMPLAINT

24. The applicant complained under Article 5 of the Convention that her detention had been arbitrary as the authorities had failed to act with appropriate "due diligence".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

25. Article 5 of the Convention provides as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

3. (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. Admissibility

26. The Government submitted that the application had not been made within six months of the last domestic decision as it was received by the Court on 2 November 2016. However, according to the Court's settled case-law it is the date of dispatch which is the relevant date for the purposes of calculating the six-month period in Article 35 of the Convention (see by way of example *Shishkov v. Russia*, no. 26746/05, § 83, 20 February 2014). The postal records show that the application was dispatched on 24 October 2016 and was therefore made within six months from the date on which the final decision was taken in the case, which was that of the Supreme Court of 27 April 2016. It follows that the application was made within the six-month time limit.

27. As to the question of whether the applicant could still be considered a victim in light of the Supreme Court's decision, the Government contended that she could not as the domestic courts had acknowledged that her detention had been unlawful. The applicant contended that she remained a victim as she had not been afforded sufficient redress.

28. A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him or her of his or her status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (*Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 180, ECHR 2006-V; *Gäfgen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010; *Nada v. Switzerland* [GC], no. 10593/08, § 128, ECHR 2012).

29. In *V.M. v. the United Kingdom*, cited above, the Court found that the applicant's complaint concerning the lawfulness of her detention during an earlier period from 8 August 2008 to 22 July 2010 had been dealt with adequately by the domestic courts, which acknowledged the breach of the Convention and awarded nominal damages of GBP 1. The Court therefore concluded that element of the applicant's complaint to have been inadmissible (see *V.M. v. the United Kingdom,* cited above, § 48 and §§ 68-73).

30. In the present case, the Supreme Court acknowledged the violation in the sense of making clear that the applicant's detention had been unlawful

from 4 March 2011 to 6 July 2011 (see paragraphs 16-17 above). It was not necessary for the domestic courts to remedy the applicant's situation, as by the time of their examination of the case she had already been released. Therefore the only question is whether, in refusing her permission to challenge that unlawfulness on the basis that she would only be entitled to nominal damages, they afforded the applicant sufficient redress (see paragraphs 18 above). For the reasons set out below (see paragraphs 36-40) the Court considers that they did not offer sufficient redress and the applicant can therefore claim to be a "victim" of the violation of the Convention within the meaning of Article 34 of the Convention.

B. Merits

1. The parties' submissions

31. The applicant argued that taking into account the fact that she had been detained for nearly three years overall; and that this Court had found a violation of Article 5 in respect of an earlier period of her detention, the period of detention at issue in the present case had been unreasonably long and so arbitrary. Moreover, the authorities had not acted with sufficient "due diligence" where they failed to take into account relevant medical reports in the detention reviews in the context of the policy for those suffering from mental health problems.

32. The Government accepted that there had been a violation of the Convention as the applicant was not detained "in accordance with a procedure described by law" from 4 March 2011 to 6 July 2011. They submitted that this acknowledgement was sufficient and no further redress was needed. Therefore the domestic courts acted appropriately in refusing her permission to judicially review that period of detention. They underlined that her detention remained lawful until the arrangements that were essential to mitigating the significant risks of releasing her, were in place.

33. The Government recalled that in *V.M. v. the United Kingdom,* cited above, the Court had not found any violation concerning the period of detention from 20 December 2009 to 22 July 2010, which was immediately prior to the period challenged in the present application. As such, it was not possible for the applicant to argue that her detention from 22 July 2010 onwards must be in violation of the Convention. The applicant was at all material times a person against whom action was being taken with a view to deportation; they had not acted in "bad faith", and aside from the acknowledged deficiencies in the detention reviews, the authorities had not failed to act with "due diligence".

34. They also submitted that the applicant was responsible for the delays having initiated different legal challenges to her detention and that the

domestic courts had examined the applicant's present claim with the appropriate scrutiny given the length of her detention.

2. General principles

35. For a summary of the general principles see *V.M. v. the United Kingdom*, cited above, §§ 82-87. 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) to (f), be "lawful". In other words, it must conform to the substantive and procedural rules of domestic law. In addition to the requirement of "lawfulness", Article 5 § 1 also requires that any deprivation of liberty should be in keeping with the purpose of protection the individual from arbitrariness (see *(V.M. v. the United Kingdom,* cited above, §§ 83-84).

3. The Court's assessment

36. The Court notes that the applicant has not directly argued that her detention was 'unlawful'. Rather she has argued that the deficiencies in the reviews of her detention identified by the domestic courts in the context of unlawfulness "sound" as a failure of "due diligence", and accordingly her detention was "arbitrary". However, the Court sees no reason to call into question the findings of the Supreme Court that her detention during the period 4 March 2011 to 6 July 2011 was 'unlawful', as also accepted by the Government (see paragraph 32 above).

37. The question is therefore whether the applicant received sufficient redress for that period of unlawful detention. In this connection the Court notes that, in taking the view that the applicant could not have been released sooner had her detention reviews been correctly conducted, the domestic courts accepted that it would not have been possible to release her sooner for practical reasons (see paragraphs 17 and 18 above).

38. The Court has difficulty accepting the Government's submission that because the necessary practical arrangements had not been made, the applicant could not have been released sooner and in particular that her detention would have been lawful until such arrangements had been made (see paragraph 32 above). Some delay in implementing a decision to release a detainee is understandable, and often inevitable, in view of practical considerations relating to the running of the courts and the observance of particular formalities. However, the national authorities must attempt to keep this to a minimum. It is for the Contracting States to organise their systems in such a way that their authorities can meet the obligation to avoid unjustified deprivation of liberty (see *Ruslan Yakovenko v. Ukraine*, no. 5425/11, § 68, ECHR 2015 with further references). As the Government have submitted elsewhere, as a matter of domestic law the right to liberty is recognised as being of ancient origin and the burden is on the person who

has detained another to show that he had lawful authority to do so: the responsibility lay with the Government to ensure that the detention was (and remained) lawful (see *S.M.M. v. the United Kingdom*, no. 77450/12, § 85, 22 June 2017). In this connection, the Court takes account of the applicant's 'worryingly long' detention and her vulnerability as someone suffering from mental health problems, and that both these elements of her situation must have been known by the relevant authorities.

39. The applicant accepted in the domestic proceedings that she would not have been immediately released in March 2011 even if the detention reviews had been carried out correctly (see paragraph 17 above). The Court observes that the Supreme Court found this concession was probably realistic but it considers equally that it is not possible to know when the applicant would have been released had the detention reviews been correctly conducted and the appropriate arrangements for her release made in light of the obligation identified above. In this respect, the circumstances of the period of unlawful detention in the present case are different from those examined in its previous judgment concerning the applicant, where the Court of Appeal had reassessed all the evidence in the case and had concluded that the applicant could have been detained lawfully during the relevant period (see *V.M. v. the United Kingdom,* cited above*,* § 45). What can be said in the present case is that the applicant was unlawfully detained from 4 March 2011 to 6 July 2011 due to the deficiencies in her detention reviews; the need to redress that unlawfulness was not lessened because the State did not make appropriate arrangements for her release during that period.

40. There has accordingly been a violation of Article 5 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

41. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

42. The applicant claimed 3,500 euros (EUR) in respect of non-pecuniary damage.

43. The Government argued that this figure was excessive.

44. Taking account of the circumstances of the case, including the fact that it was the second, successful application relating to the applicant's detention (see paragraphs 7 and 8 above); the Court considers that the

applicant must have suffered distress as a result of being unlawfully detained and awards the applicant EUR 3,500 in respect of non-pecuniary damage.

B. Costs and expenses

45. The applicant also claimed twenty-five thousand eight hundred and fifty-five pounds (GBP 25,855) for the costs and expenses incurred before the Court.

46. The Government argued that this figure was excessive.

47. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of ten thousand seven hundred euros (EUR 10,700) for the proceedings before the Court.

C. Default interest

48. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds*, by five votes to two,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 3,500 (three thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 10,700 (ten thousand seven hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 April 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Linos-Alexandre Sicilianos
President