Case No: C5/2010/0990

Neutral Citation Number: [2010] EWCA Civ 1586
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM AND IMMIGRATION TRIBUNAL
ASYLUM AND IMMIGRATION TRIBUNAL JUDGE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 4th November 2010

Before:

LORD JUSTICE LAWS
LORD JUSTICE CARNWARTH
and
LORD JUSTICE PATTEN

- -

Between:

SK (Sri Lanka)

Appellant

- and -

The Secretary of State for the Home Department

Respondent

- -

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Mr J Dann (instructed by Messrs TTS) appeared on behalf of the **Appellant**.

Mr Vickram Sachdeva (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Laws:

1. This is an appeal, with permission granted on some grounds only by Sir Scott Baker on 12 July 2010, against the decision of the Asylum and Immigration Tribunal (Designated Immigration Judge Shaerf) given on 16 February 2010. By that decision the Immigration Judge dismissed the appellant's appeal against the Secretary of State's refusal to grant him asylum. The decision was taken at a second stage reconsideration.

2. The appellant is a national of Sri Lanka, born on 20 April 1983. He is a Hindu Tamil. He arrived in the United Kingdom on 3 or 4 September 2008 and claimed asylum on 4 September 2008. That was refused on 24 October 2008. The appellant's appeal was first dismissed by Designated Immigration Judge Shaerf on 6 May 2009. A reconsideration was ordered on 15 July 2009 by Senior Immigration Judge Gill, and on 9 November 2009 Senior Immigration Judge Waumsley found that Designated Immigration Judge Shaerf's decision was legally flawed. He so found on one ground only, namely (paragraph 15) that it was:

   > "unclear whether the DIJ accepted or rejected the appellant's account of his claimed detention and release on bail in Colombo."

3. SIJ Waumsley was at pains to emphasise that all other aspects of DIJ's Shaerf's conclusions were "safe and sustainable" (paragraph 16) and he proceeded to direct that the matter be returned to DIJ Shaerf for him to make a clear finding as to whether he accepted or rejected the appellant's claims as to his detention and release on bail in Colombo, and, if he did accept it, whether the appellant would be at risk of persecution for a Convention reason if he were now returned.

4. So it was the matter went back before DIJ Shaerf on 18 January 2010. The essence of the appellant's asylum claim was crisply described by SIJ Waumsley at paragraphs 2 to 3 of his determination 9 November 2009 as follows:

   > "2. The background to this appeal is that the appellant arrived in the United Kingdom on or about 3 September 2008. He obtained entry using a Malaysian passport to which he was not entitled. He applied for asylum the following day. The grounds on which he did so were that he stated that he was of Tamil ethnicity, and came from the Jaffna area in the north of Sri Lanka. He had been detained by the security forces there on 11 June 2007 on suspicion of assisting the LTTE [Liberation Tigers of Tamil Eelam]. He was ill-treated during his detention, but was released some five weeks later after he had identified the individual who had commissioned him

> to carry out graphic design work on behalf of the LTTE. He was required to sign on regularly as a condition of his release until May 2008. He was not required to do so after that date.
>
> 3. On 5 August 2009, he flew from Jaffna to Colombo. He was detained there whilst he was on his way to the police station to register as required by law. He was held for 10 days and ill-treated, but was then released on bail, subject to reporting and residence conditions. He left Sri Lanka with the assistance of a paid agent on 3 September 2008. He applied for asylum following his arrival in the United Kingdom on he basis that he would be at risk on return to Sri Lanka for two reasons, namely from the Sri Lankan authorities because he had 'jumped bail' and from the LTTE because they suspected him of having disclosed the identity of their member who had commissioned him to carry out graphic design work on their behalf."

5. Much of the argument turns on DIJ Shaerf's treatment of certain written evidence from a Mr Purushotthamam, an attorney in Colombo who had acted for the appellant. At the first hearing before DIJ Shaerf there was a letter from Mr Purushotthamam dated 3 December 2008. At paragraph 71 of his first determination DIJ Shaerf stated that the asylum claim turned on the assertion that the appellant had jumped bail in Colombo where he was detained for having failed to register on arrival in Colombo from Jaffna. The DIJ continued in his first determination:

> "71. …There is a confirmation that he was released on bail subject to a residence and reporting condition contained in the letter of 3 December 2008 from Mr Purushotthamam. However he writes that on or about 5 September 2008 he received enquiries from the police about the Appellant. Mr Purushotthamam states that the Appellant had to report every Monday. He was released by magistrates on Monday 18 August 2008. At first hearing reply 150 [that is a reference, I understand, to either questionnaire or evidence] the Appellant stated he reported on two occasions: the two Mondays immediately following the grant of bail were 25 August and 1 September. Consequently on 5 September, the Appellant on his own evidence would not have been in breach of his reporting condition. I appreciate that Mr Purushotthamam in his letter of 3 December 2008 stated the police made enquiries of him on or about 5 September 2008. He gives no explanation for being uncertain as to the

> date or why he is unable to ascertain the precise date from his own records. In the absence of any further explanation, I find this leads me to give less weight than I would otherwise have done to the evidence of Mr Purushotthamam."

It is not clear from the DIJ's concluding paragraph in his first determination (paragraph 76) what he ultimately made of the appellant's claim to have jumped bail; and that, of course, is the point that was made by SIJ Waumsley.

6. At the second stage reconsideration DIJ Shaerf made it clear that he accepted that the appellant had indeed been detained twice, not once only, before leaving Sri Lanka (see paragraph 4). He also had before him a further letter from Mr Purushotthamam. This one was dated 15 January 2010. It stated:

> "Further to your letter dated 21 December 2009 I confirm that on or about 15 September 2008 I had received enquiries from the police about his current whereabouts. It was mistakenly typed as 5 September 2008. I apologise for the error"

7. The appellant, by Mr Dann of counsel, who appears this morning, attaches much importance to this fresh letter from Mr Purushotthamam. It is said in Mr Dann's skeleton (paragraph 12) -- and the point was made by Mr Dann in his oral submissions -- that the letter effectively resolves the evidential conflict or uncertainty identified by the DIJ at paragraph 71 of his first decision. The appellant would have been in breach of his bail conditions by 15 September 2008 even if he had reported twice, and there would have been nothing surprising in the fact that the authorities were enquiring after him. It is said that this new letter from Mr Purushotthamam was not properly considered by the DIJ. There is no doubt that the DIJ considered that there were features of the letter which were troublesome. Though dated 5 January 2010, its faxed transmission date seems to have been 10 January 2010. The letter of 21 December 2009 to which it was apparently a reply was not produced to the court and DIJ Shaerf had no opportunity to see it. The DIJ held that the second-stage reconsideration at paragraph 22 that Mr Purushotthamam's new letter did not address the concerns that he had expressed in his first decision as to the want of explanation of Mr Purushotthamam's uncertainty as to the date when the police went looking for the appellant.

8. I should read the following paragraphs in the second determination, paragraphs 23 to 27. They are in these terms:

> “23. The Appellant’s account was that his uncle in Canada had been the contact with Mr Purushotthaman: see Mr Kathravelu’s statement paragraph 2. The Appellant also claimed it was his uncle in Canada who had subsequently told him the authorities had searched the house of his aunt and her husband in Colombo as well as the homes his

mother and his aunt in Uduvil: see first statement paragraph 87 and the original hearing replies 143-154 as well as paragraphs 20 and 21 of my original determination.

24. By the date of the reconsideration hearing there was still no evidence from the Appellant's uncle in Canada or indeed any other relative of his in Sri Lanka and no explanation for the absence of such evidence. There was no copy of any attendance note written by Mr Purushotthaman relating to the enquiries made 'on or about 15 September 2008'. There was certainly no suggestion from him that the authorities had subsequently again attended his offices enquiring about the Appellant. 15 September 2008 would be a Monday. It would have been the second occasion on which the Appellant would not have reported. There is still no copy of any attendance note or other evidence of basis of which Mr Purushotthaman confirms that enquiries were made on or about 15 September 2008 and there is no explanation for any absence of such information to support this statement in his letter of 15 January 2010.

25. At the time the Appellant sought reconsideration he knew that this would have been an issue as clearly described in paragraph 71 of his original determination. There was no explanation for his absence of the letter of 21 December 2009 from the Appellant's solicitors to Mr Purushotthaman or why the letter was sent so close to the reconsideration hearing, bearing in mind that the error of law hearing before SIJ Waumsley was 9 November 2009. In all the circumstances I find that Mr Purushotthaman has not fully and properly addressed the issue of the date that he received enquiries from the police in September 2008. The Appellant has till not supplied any evidence from his uncle in Canada despite his claim to be in touch with him on a regular basis and is without an explanation for the absence of such evidence: see paragraph 21 of my original determination.

26. There was no evidence to support the Appellant's claim that the authorities have searched the house of the Appellant's aunt and her husband in Colombo and no explanation advanced for the absence of any such evidence.

> 27. The Appellant claimed he had been detained in Colombo and interrogated about bomb plots. Rather I find he was detained and arrested for lack of an identity document or residence document. He said that it was not until he was being interrogated in detention that he was accused of involvement in bomb plots. If the authorities had genuine reason to suspect him of involvement in such activities, I do not find it plausible that he would have been released after ten days on bail and that having 'jumped bail' the authorities should only make enquiries of his lawyer on one occasion. I do not accept that further enquiries were made of his other relatives in Colombo and Uduvil in the absence of any evidence, other than the Appellant's mere assertion, or an explanation for lack of evidence. The Appellant may have been interrogated about involvement in bomb plots but he has not shown that there is any reason to think he was interrogated on the basis of any suspicion. There was no suggestion that such questions about bomb plots were other than the common practice of the authorities in Colombo to suggest to any young male Tamil arrested without sufficient identity documentation that they were involved in bomb plots. The actions or rather lack of action on the part of the authorities subsequent to the Appellant 'jumping bail' points to a lack on interest in the Appellant. It follows that in the light of the explanation I have given in relation to my original determination and in the light of my other findings given in this reconsideration, this appeal must fail."

9. I have concluded that this reasoning deals adequately both with Mr Purushotthamam's evidence and the suggestion at ground 2 in the notice of appeal that there was no proper consideration of risk on return. I do not accept Mr Dann's strictures as to the DIJ's approach to Mr Purushotthamam's letter. The judge was entitled to have in mind the fact that there was no explanation, no reference to contemporary documents which might show how Mr Purushotthamam could identify so firmly the date of 15 September 2008 --- well over a year before his fresh letter was written; and the other points in paragraph 22 seem to me also to be matters to which he could properly give weight. So are the factors in paragraphs 23 and following. There is no error of law in the judge's treatment of Mr Purushotthamam's written evidence. It is to be noted that Mr Purushotthamam was not in this country to give any oral testimony at either hearing before DIJ Shaerf.

10. As regards risk on return, Mr Dann submits that the appellant engaged a number of the risk factors in the country guidance cases of LP and TK, not least that of being a bail jumper, a matter dealt with in paragraphs 212 and 213

of the tribunal's decision in the LP case. I will set out the terms of paragraph 213:

> "213. We noted in particular the comments made by Professor Goode that the appellant's account here is an unusual one. It is unusual that it has been shown that the appellant was granted bail by a court in Colombo. We agree with the logic that those who have been released after going to court and released from custody on formal bail are reasonably likely, on the evidence, to be not only recorded on the police records as bail jumpers but obviously on the court records as well. Thus we would indentify those in the situation such as this appellant who have been found to have been to court in Colombo, and subsequently released on former bail, as having a profile that could place them at a higher level of risk of being identified from police computers at the airport. Their treatment thereafter will of course depend upon the basis that they were detained in the first place. It is important to note that we did not have before us any information as to the treatment of bail jumpers from the ordinary criminal justice system, and there may be many of them, when they again come to the attention of the authorities, be they Tamil or Singhalese. We had no evidence that Tamil bail jumpers are treated differently from Singhalese ones. Clearly punishment for jumping bail will not make someone a refugee. As we have said, the risk of detention and maltreatment will depend on the profile of the individual applicant."

11. I do not consider there is anything in this reasoning which should lead us to disapprove the approach of the designated Immigration Judge at paragraph 27. The reason for an appellant's detention in a case where he has jumped bail is obviously of the first importance when a tribunal comes later to assess the question of risk on return. In paragraph 27 the DIJ was at pains to explain his view as to the reason for the appellant's detention. As we have already seen, the judge said:

> "The appellant claimed he had been detained in Colombo and interrogated about bomb plots. Rather I find he was detained and arrested for lack of an identity document or residence document."

12. Mr Dann, in the course of his submissions this morning, questioned where that confusion had come from and on what was it based. Mr Sachdeva, on behalf of the Secretary of State, was able to point to a passage in DIJ Shaerf's first decision, in which at paragraph 20 he had said this:

> "The appellant said that on the way to the police station on 8 August 2008 he was arrested when he could not produce a pass. He was detained and ill treated."

13. Mr Dann's riposte to this was to say that a distinction between "arrest" and "detention", but we also have before us the Home Office decision letter, in which at paragraph 7(m) this is said:

> "However, on your way there you were arrested and asked to show your pass to prove you had registered in Colombo."

Then at 7(n):

> "You were unable to show any pass and so were detained for ten days."

14. In my judgment, there was material on which the DIJ could properly conclude that the reason for the appellant's arrest and detention was his failure to produce appropriate documents. That is clearly an important feature of the factual scenario here which the judge had to consider in assessing risk on return.

15. There are, according to Mr Dann, some other risk factors present here, including that of scarring, but in my judgment they do no more to require a finding that the appellant was a refugee than does the factor relating to bail.

16. It is important to have in mind that the risk factors set out in the LP case are mediated through the reasoning of the tribunal in the TK case at paragraph 25 which is in these terms:

> "The desire for refinement is a valid one, especially when the risk factors run into double figures, but it seems to us that it can be achieved without any subdivision. We see an intrinsic danger in differentiating between 'risk factors' and 'background factors' if the former are then elevated to de facto risk categories, which they are not. The wisdom we derive from the ECtHR's analysis of the LP approach is that treats each factor as furnishing a point of focus for considering related indicators and also allows for adjustment in respect of each in the light of new evidence (in LP and in NA some factors were considered to be merely contributory, others as more significant)."

17. In the light of that approach, it seems to me all the more difficult for Mr Dann to have solved the reasoning in paragraph 27.

18. Having considered the reasoning of the Designated Immigration Judge with, I hope, proper care and, as the cases enjoin us, anxious scrutiny, I for my part have come to the conclusion that there is no material error of law and I would dismiss the appeal.

Lord Justice Carnwath:

19. I agree.

Lord Justice Patten:

20. I also agree.

Order: Appeal dismissed