Neutral Citation Number: [2011] EWCA Civ 860

Case No: T2/2010/2412

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE SPECIAL IMMIGRATION APPEALS COMMISSION
(Appeal No: SC/61/2007, BAILII: [2010] UKSIAC 61/2007)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2011

Before :

LORD JUSTICE MAURICE KAY
(Vice President of the Court of Appeal, Civil Division)
and
LORD JUSTICE RICHARDS

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Between :

XX	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Timothy Otty QC and **Kate Markus** (instructed by **Birnberg Peirce**) for the **Appellant**
Steven Kovats QC (instructed by **The Treasury Solicitor**) for the **Secretary of State**
Anuja Dhir QC and **Cathryn McGahey** (instructed by the **Special Advocates' Support Office**) appeared as Special Advocates

Hearing date : 22 June 2010

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Judgment

Lord Justice Richards :

1. On 22 June 2011 the court heard a renewed application for permission to appeal against a decision of SIAC dated 10 September 2010, together with a linked application for permission to adduce further evidence. I have concluded that permission to appeal should be granted on most, but not all, of the grounds advanced on the appellant's behalf at the hearing. The nature of the case makes it appropriate for me to deal with the matter somewhat more fully than would generally be appropriate at the permission stage.

Background

2. The appellant, XX, is an Ethiopian national aged about 32 who came to the UK in 1992 and was subsequently granted indefinite leave to remain. Between 2000 and 2005, having become a committed Muslim, he made various trips to Ethiopia. In May 2005 he went to Somalia. In September 2005 he flew from there to Dubai and then to Ethiopia, where he learned that one of his brothers, his two sisters and the husband of one of them had been arrested and were detained in connection with the failed bombing attacks in London on 21 July 2005. He remained in Ethiopia until December 2006, when he decided to return to the UK but was detained at Bole airport and transferred into the custody of the Ethiopian Security Service (NISS). He was detained for two weeks and questioned about his trip to Somalia, the failed attacks of 21 July 2005 and those involved in them. He was released and returned to his family in Addis Ababa. He then flew to the UK on 27 December 2006.

3. A few days earlier a decision had been taken to exclude him from the UK; and on his arrival he was detained and refused leave to enter on the ground that his presence in the UK would not be conducive to the public good. His indefinite leave to remain was cancelled. In January 2007 he was arrested under the Terrorism Act 2000, questioned and released without charge into immigration detention. He filed a notice of appeal to SIAC against the decision to exclude him. Eventually, on 11 January 2008 he was again granted indefinite leave to remain, with the result that his appeal was treated as abandoned, and on the same day he was served with a non-derogating control order. In a judgment handed down on 12 August 2008, Keith J held that the statutory conditions for making and upholding a control order were satisfied but that the cumulative effect of the terms imposed on XX by the order were such as to deprive him of his liberty and were unlawful. There were subsequent appeals to the Court of Appeal and the Supreme Court but it is unnecessary to deal with them because the control order was revoked on 2 July 2009.

4. Revocation of the control order followed a decision by the Secretary of State on 21 May 2009 to deport XX on conducive grounds for reasons of national security. XX appealed against that decision to SIAC and was meanwhile released on bail. SIAC dismissed the appeal on 10 September 2010. That is the decision against which permission to appeal to this court is now sought.

5. In setting out their reasons for that decision SIAC gave not only an open judgment and a closed judgment but also a third, confidential judgment, arising out of the fact that certain confidential documents had been disclosed mistakenly to XX's open advocates and, rather than requiring those advocates to hand back the documents and put them out of mind, SIAC directed that the part of the hearing relating to those

documents should be held in private, excluding the public and XX but not XX's open advocates.

The open judgment

6. In the open judgment, SIAC indicated that XX was not challenging the national security case against him, but the judgment nevertheless summarised the evidence that satisfied SIAC, on the balance of probabilities, that XX was in 2004 and 2005 closely associated with individuals who went on to carry terrorist acts in and against the UK; that he shared and supported their views; and that he then posed, and continued to pose, a threat to the national security of the UK.

7. The judgment then dealt with the ECHR grounds on which XX resisted deportation. First, in relation to article 3, it considered a contention that on return to Ethiopia he would be liable to be detained and interrogated, with a real risk of prohibited ill-treatment, even though he had not been ill-treated when detained in December 2006. SIAC expressed themselves satisfied that there was no such real risk.

8. The judgment referred next to a Memorandum of Understanding ("MoU") signed by the British and Ethiopian Governments on 12 December 2008, and to a related exchange of side letters. The MoU included agreement by the governments to comply with their human rights obligations under international law regarding any person in respect of whom assurances were given under the MoU. Provision was made for an independent monitoring body, whose responsibilities were to include monitoring the return of, and any detention, trial or imprisonment of, the person. The Government of Ethiopia had agreed to accept XX's return under the terms of the MoU. SIAC were satisfied that it was, and would be perceived by the Government of Ethiopia to be, in that government's interests to ensure that the assurances in the MoU were fulfilled; and primarily for that reason, rather than because of the arrangements put in place for monitoring compliance, they were satisfied that there was no real risk that XX would be subjected to prohibited ill-treatment by NISS or any other interrogator.

9. The relevant monitoring body was the Ethiopian Human Rights Commission, but SIAC found that it was not an independent body and that it offered only a partial safeguard against breaches of the MoU: it could not, and would not, challenge a deliberate breach by the government, but could detect and would report upon unauthorised breaches by lower ranking officials.

10. Turning to articles 5 and 6, the judgment referred to the evidence of the expert witnesses, Mr Debebe for the Secretary of State and Mr Semeneh for XX. SIAC accepted Mr Debebe's evidence about Ethiopian law and practice. They found, in line with his opinion, that the prosecution of XX in Ethiopia would be both very difficult and very unlikely, in particular because there was no evidence available to the Ethiopian authorities of involvement by XX in acts directed at and hostile to Ethiopia. They did not accept that he would be ill-treated for the purpose of coercing him to make a confession on which a prosecution could be based. They were therefore satisfied that there were no substantial grounds for believing that there was a real risk that he would be subjected to a trial process so flagrantly unfair that the UK could not deport him without infringing his rights under article 6. Since it was accepted on behalf of XX that articles 5 and 6 stood together for this purpose, they

said that the finding on article 6 would preclude any separate finding of breach of article 5.

11. The judgment went on to refer to the very serious shortcomings in the Ethiopian criminal justice system. But if, contrary to SIAC's view, there was a real risk that XX would be exposed to a trial in that system, they considered that his deportation would not be in breach of article 5 or article 6 unless the evidential foundation for his prosecution and conviction was a confession procured by torture or ill-treatment of such severity as would amount to a breach of article 3 in a Convention state. Returning to the MoU, SIAC expressed themselves satisfied that the Secretary of State could rely securely on the promises made in it by the Government of Ethiopia.

12. All this led to a concluding paragraph expressed in these terms:

> "32. Applying the yardsticks identified in *BB* [i.e. the case reported on appeal to the House of Lords as *RB (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110], we are satisfied that the assurances, if fulfilled, are such that XX will not be subjected to treatment contrary to Article 3, that the assurances have been given in good faith, that there is a sound objective basis for believing that they will be fulfilled and that, by reason of the right guaranteed to XX by paragraph 5 of the Memorandum of Understanding, to contact and receive visits from the EHRComm …, the assurances are capable of being verified. (If he is detained and no contact occurs, it will be obvious that something has gone wrong.). For substantially the same reasons, we are satisfied that the United Kingdom would not be in breach of its obligations to XX under Articles 5 and 6. Accordingly, we dismiss this appeal."

The confidential and closed judgments

13. In this, my open judgment on the applications before us, I can say nothing about SIAC's confidential and closed judgments beyond indicating that (1) SIAC did not suggest that anything in the confidential or closed material altered the conclusions expressed in the open judgment, and (2) in the course of the confidential judgment SIAC rejected an abuse of process argument which is pursued in one of the grounds of appeal before this court.

The applications before the court

14. The grounds of appeal attached to the appellant's notice are, first, that SIAC erred in law in four respects in their approach to articles 3, 5 and 6; and, secondly, that SIAC erred in law in rejecting the abuse of process argument advanced on behalf of XX. Permission to appeal on those grounds was refused on the papers by Maurice Kay LJ.

15. Since then an application has been added to adduce fresh evidence, consisting of an open statement and an open witness statement served on behalf of the Secretary of State in the case of *J1 v Secretary of State*: the appeal in that case was heard recently by SIAC and judgment was handed down on 11 July 2011.

16. At the hearing before us, Mr Timothy Otty QC re-cast and re-ordered the principal grounds of appeal into three "core propositions", which were in substance as follows:

    (1) SIAC were wrong not to exclude evidence from unofficial detention centres housing individuals held in incommunicado arbitrary detention and in particular if such evidence was obtained by the attendance of Security Service officers at such places of detention ("Ground 1");

    (2) SIAC's conclusion that there was no real risk of a flagrant breach of article 6 involved an irrational finding of fact as to the risk of XX facing prosecution, and an error of law as to the meaning of flagrant breach ("Ground 2"); and

    (3) SIAC's conclusion that there was no real risk of ill-treatment inconsistent with article 3, or of a flagrant violation of article 5, involved the error of law identified at (1) above, irrational findings of fact, and a failure to follow House of Lords guidance as to the mandatory pre-requisites to be satisfied before a deportation pursuant to assurances can be lawful ("Ground 3").

    The fresh evidence application was encompassed within the development of those grounds.

17. Mr Otty addressed us on the open and confidential material relevant to those grounds. Mr Steven Kovats QC, for the Secretary of State, opposed the grant of permission and was able to draw for the purpose on the closed material as well as on the open and confidential material. We also heard brief submissions from Ms Anuja Dhir QC, as Special Advocate, on the closed material relevant to Mr Otty's grounds (no additional grounds of appeal were advanced by the Special Advocates).

18. I would grant permission to appeal on each of Grounds 1 to 3 (adopting the numbering given by Mr Otty to his three core propositions). I summarise my reasons below. I can deal with the matter adequately in this open judgment.

19. Mr Otty did not abandon his separate ground of appeal relating to abuse of process but, instead of taking time on it in his oral submissions, he adopted the sensible course of relying on the written skeleton argument lodged in support of the original grounds of appeal. I would refuse permission to appeal on this ground. My reasons are set out in a separate, confidential judgment confined to this one issue.

Ground 1

20. The appellant's submissions on this ground have as their premise that SIAC may have taken into account information or evidence adverse to the appellant's case arising out of or to do with the unlawful detention of individuals held in prolonged incommunicado detention at unofficial detention centres in Ethiopia. I leave to one side the factual correctness of that premise, in relation to which Mr Kovats made clear that the Secretary of State makes no concession. It is sufficient for present purposes that reference is made in SIAC's open judgment, at [15], to the experience of certain individuals held in detention in Ethiopia and that SIAC rejected, at [16], a submission that they were not entitled to take into account evidence or information adverse to XX's case arising out of or to do with the unlawful detention of those individuals. In rejecting the submission, SIAC stated:

> "There is no internationally acknowledged principle – or jus cogens – prohibiting detention except in circumstances prescribed by internationally accepted law, nor any international agreement that unlawful detention is a crime of such gravity that no evidence resulting from it – still less any evidence about it – should be admitted in proceedings before an English court. If there were such a rule, it could not be one-sided."

21. Mr Otty submitted that (i) contrary to SIAC's analysis, there is an internationally acknowledged principle equivalent to a peremptory norm prohibiting prolonged arbitrary, unacknowledged and incommunicado detention; and (ii) evidence obtained by UK authorities, in circumstances which show they have been involved in a breach of a peremptory norm of international law, will be inadmissible as a matter of principle, pursuant to the court's supervisory jurisdiction to prevent the abuse of process which would be involved in the executive taking advantage of its own involvement in wrongful conduct; and SIAC were wrong to see the potentially one-sided application of the rule as problematic, since the abuse of process jurisdiction focuses on wrongful conduct by or involving the executive and presents no obstacle to the exclusion of the evidence in issue here.

22. The extensive citation of authority in support of (i) included *A v Secretary of State for the Home Department (No.2)* [2006] 2 AC 221, since Mr Otty sought to align the argument with the analysis in that case of the prohibition on the use of evidence obtained by torture, including the observation of Lord Bingham at [34] that "there is reason to regard it as a duty of states … to reject the fruits of torture inflicted in breach of international law". The principal authorities in support of (ii) were *A (No.2)* and *R v Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 AC 42, including the observation of Lord Griffiths at pp.61-62 that the judiciary should "accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law".

23. I see serious obstacles in the path of Mr Otty's submissions. Even if SIAC erred in stating that there is no internationally acknowledged principle prohibiting detention of the kind in issue, they were right to refer to the absence of any international agreement equivalent to Article 15 of the Convention against Torture etc (imposing an express prohibition on the use in evidence of any statement made as a result of torture), which is an important distinguishing feature. More importantly still, the submissions do not distinguish sufficiently between evidence *obtained as a result of* unlawful detention (cf. "the fruits of torture inflicted in breach of international law" in *A (No.2)*) and evidence *about the conditions experienced during* such detention: even if there is a prohibition on the former, it is difficult to see why there should be a prohibition on the latter. The situation is also very different from that under consideration in *ex p. Bennett*.

24. Despite my reservations about the substance of the submissions, however, I take the view that the issues raised are of sufficient importance to justify the attention of the court on a full appeal and that it would be wrong in the circumstances to block off full argument by the refusal of permission.

Ground 2

25. This ground challenges SIAC's findings that, in substance, (i) there would be no real risk of XX facing prosecution if deported to Ethiopia, and (ii) even if he were prosecuted, the shortcomings in the Ethiopian system of justice did not mean that there would be a real risk of a flagrant breach of article 6.

26. The challenge to the finding of no real risk of prosecution has a number of strands to it. One is that, on the evidence before SIAC, it was perverse to conclude that XX would not be regarded as a threat to Ethiopian interests and that there was no evidence available to the Ethiopian authorities of involvement by XX in acts directed at and hostile to Ethiopia. The focus here is on whether there was sufficient evidence of links between XX and a group called Al Shabaab: in particular, the significance of the fact that XX was assessed as having attended, in 2005, a terrorist training camp in Somalia associated with a man called Sheikh Ayro, who subsequently came to prominence as leader of the emergent Al Shabaab (Sheikh Ayro was killed in May 2008 but the threat posed by Al Shabaab remained). A further strand in the argument brings in the fresh evidence, which is relied on as showing that XX would be linked in the perceptions of the Ethiopian authorities with J1, who is himself alleged to be an active extremist providing support to Al Qaeda and Al Shabaab. It is submitted that the fresh evidence should be admitted on the principles laid down in *E and R v Secretary of State for the Home Department* [2004] QB 1044, in that it shows that SIAC proceeded on a mistake of fact amounting to a mistake of law as to the extent of communications by the UK authorities to the Ethiopian authorities about XX and as to the likely perception of him by the Ethiopian authorities. A yet further strand in the argument is that SIAC did not have regard to the potential for any evidential gaps to be filled by confession evidence extracted from XX or others or by the fabrication of evidence.

27. The contention that SIAC's findings of fact are tainted by errors of law is plainly a difficult one to make good. Mr Kovats drew attention in this connection to the observations in *AH (Sudan) v SSHD* [2008] 1 AC 678 at [46] and *MA (Somalia) v SSHD* [2010] UKSC 49 at [44]-[47]. So far as the fresh evidence is concerned, the criteria in *E and R* for establishing a mistake of fact amounting to a mistake of law are rigorous. In my view, however, there are three broad reasons why permission should nevertheless be granted to challenge SIAC's finding of no real risk of prosecution.

28. First, Ground 1 and Ground 2 may be considered to be interlinked, so that the grant of permission on one should lead to the grant of permission on the other. It is unnecessary for me in this judgment to go into the detail of why they may be interlinked.

29. Secondly, the evidence before SIAC to which Mr Otty drew our attention causes me a degree of concern as to whether SIAC's finding was reasonably open to them; and whilst a complete understanding of the evidence (embracing confidential and closed as well as open material) might well remove that concern, the exercise is more easily undertaken at the hearing of a substantive appeal than at the permission stage.

30. Thirdly, the fresh evidence adds to my concern; and although a complete understanding of the relevant evidence concerning J1 (again including closed as well as open material) might again remove that concern, this too is an exercise more easily

undertaken at a substantive hearing than at the permission stage. Whether the *E and R* criteria are met is likewise an issue better resolved in this case at a substantive hearing (and I should therefore make clear that the question of permission to rely on the fresh evidence ought in my view to be left open for decision at the substantive hearing).

31. Even if Mr Otty is able to undermine SIAC's finding as to absence of risk of prosecution, he also needs to succeed on the second limb of Ground 2, to the effect that SIAC erred in law in finding that there was in any event no risk of a flagrant breach of article 6. SIAC identified numerous shortcomings in the Ethiopian system of justice (though it is submitted that others can be added to the list, on the evidence before SIAC). Referring to *RB (Algeria)* at [138]-[141], SIAC described the jurisprudence concerning breach of article 6 as tentative and obscure, and expressed the view that the UK would be in breach of article 6 only if it were to deport XX to face trial in circumstances where the evidential foundation for his prosecution and conviction was a confession procured by torture or ill-treatment of such severity as would amount to a breach of article 3 in a Convention state. Mr Otty submitted that this was too narrow a view. For example, it was considered in *Brown v Government of Rwanda* [2009] EWHC 770 (Admin) and [2009] EWHC 1473 (Admin) that the risk of executive interference with the judiciary, together with substantial difficulties in the way of defendants presenting their cases, created the risk of a flagrant denial in justice. But those and other features are also present in this case: indeed, almost every aspect of article 6 would be in jeopardy if XX were to face prosecution and trial in Ethiopia.

32. Although the threshold for establishing the risk of a flagrant breach of article 6 is a high one, it seems to me that the features of the Ethiopian justice system identified by SIAC, together with the additional matters which Mr Otty put forward by reference to the evidence before SIAC, are sufficient to give rise to a real prospect of success on this aspect of the case, if one gets this far in the light of the decision on the earlier issues.

Ground 3

33. The first part of the challenge under Ground 3 relates to SIAC's finding of fact that, even without the MoU, there was no risk of ill-treatment contrary to article 3. The arguments flow largely from those already considered under Grounds 1 and 2; and if permission is granted on those grounds, then I think that it must also be granted on this aspect of Ground 3. (Mr Otty contended that there would be a flagrant violation of article 5 as well as a breach of article 3. According to SIAC's open judgment at the end of [28], however, he accepted before SIAC that articles 5 and 6 stood together. Whether that concession precludes his advancing the argument under Ground 3 can be determined, if necessary, at the substantive hearing. For my part, I doubt whether article 5 adds much to the overall argument in any event.)

34. The second part of the challenge under Ground 3 relates to the effect of the MoU, which on SIAC's findings removes the risk of ill-treatment contrary to article 3 even if such risk would otherwise arise. Mr Otty focused his submissions on the consequences of SIAC's finding that monitoring by the Ethiopian Human Rights Commission offered only a partial safeguard against breaches of the MoU. He relied upon the analysis by the Court of Appeal in *MS (Algeria) v Secretary of State for the Home Department* [2011] EWCA Civ 306 of the judgments of the House of Lords in

RB (Algeria). Sir Anthony May PQBD said in *MS (Algeria)* at [4] that the question of monitoring arose in *RB (Algeria)* because SIAC had articulated four conditions that had to be satisfied if assurances of this kind were to carry the necessary credibility. The fourth condition was that fulfilment of the assurance had to be capable of being verified. He continued:

> "The House of Lords held that effective verification was an essential ingredient. An assurance the fulfilment of which was incapable of being verified would be of little worth."

35. Whether the categoric reference to effective verification as "an essential ingredient" is correct may be open to argument: on one view, the judgments in *RB (Algeria)* left the matter less clear-cut than that. But if effective verification is an essential ingredient, then it is arguable that it is missing in this case. At [23] of their open judgment, SIAC do not appear to have regarded the Ethiopian Human Rights Commission as capable of providing full verification: the Commission could detect and would report on unauthorised breaches by lower ranking officials but could not and would not challenge a deliberate breach by the government. SIAC were of course satisfied that there would be no deliberate breach by the government, but that is distinct from the question of verification. In their conclusion at [32], on the other hand, SIAC stated that the assurances were "capable of being verified" through the role of the Ethiopian Human Rights Commission under the MoU. That does not sit happily with the reasoning in [23]. If the Commission's role does leave a gap in verification, I doubt whether it is filled by the point made in parenthesis in [32], upon which Mr Kovats placed reliance, that "[i]f he is detained and no contact occurs, it will be obvious that something has gone wrong". Accordingly, I take the view that Mr Otty's challenge under Ground 3 to SIAC's reliance on the MoU does have a real prospect of success.

Conclusion

36. For the reasons given above I would grant permission to appeal on Grounds 1, 2 and 3 in the form advanced at the hearing (see [16] above for their substance, but Mr Otty may prefer to use the wording in para 3 of the speaking note he provided to the court for the hearing). For the reasons given in my confidential judgment, however, I would refuse permission to appeal on the separate ground relating to abuse of process.

37. In my view the hearing of the appeal should be before three Lord/Lady Justices, with a time estimate of 2-3 days.

Maurice Kay LJ, V-P :

38. I agree. Although I originally refused permission on the papers, I am now persuaded that XX should have permission to appeal on the grounds indicated by Richards LJ.