Case No: C4/2008/1228

Neutral Citation Number: [2008] EWCA Civ 1080
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT, QUEEN'S BENCH DIVISION
(MR JUSTICE PITCHFORD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 24th September

Before:

LORD JUSTICE LLOYD

- -

Between:

KS (SRI LANKA) **Appellant**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

- -

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Ms S Jegarajah (instructed by Messrs K Ravi) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

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Judgment

(As Approved)

Lord Justice Lloyd:

1. This is the oral renewal of an application for judicial review against an order of Pitchford J on 19 May 2008 refusing permission to apply. That was itself an oral application following refusal on the papers by Sir Michael Harrison on 10 December 2007. The appeal came before Richards LJ on paper on 8 August and was rejected, although a short extension of time required was granted. However, it is fair to say that Ms Jegarajah for the applicant has sensibly reconsidered the grounds on which the application is made as compared with the way it was put at the time when Richards LJ had to look at it.

2. The applicant, whom I will refer to as KS, is from Sri Lanka. He entered this country in June 2001 on a false passport. His asylum claim was allowed by an adjudicator but the Secretary of State's appeal succeeded at that stage due to the ceasefire in relation to the LTTE. Ms Jegarajah tells me that there is now a fresh claim for asylum which she submits would have substantial merit following the effective collapse of the ceasefire.

3. The applicant's first attempt to secure asylum came to an end in August 2003 but he stayed. In 2006 he applied for a residence permit, which was refused. His appeal against that was dismissed. Later in 2006 an application was made for discretionary leave to remain, which was refused by a letter of 8 February 2007. Before that, removal directions had been set with a view to removal on 12 February. He reported, pursuant to the requirements then imposed on him, on 8 February and on that occasion he was detained, in anticipation, no doubt, of the removal. Further submissions were made on 11 February by new representatives on his behalf, which were refused on 12 February, but the removal directions were cancelled on his making an application for judicial review on 12 February.

4. On 22 February he was required to attend for tagging and he was subjected to an electronic tag to which he has been subject ever since and he was put on reporting restrictions, which require, relevantly, that he must reside at the address which was then his address and still is, and that he must be present at that address every Tuesday and Friday between the hours of 11am and 2pm and must report to the Croydon Enforcement Unit once a week on Thursday between 11 am and 1 pm.

5. The present proceedings are directed at his being subject to tagging. As I said, he was fitted with the tagging device on 22 February 2007. His solicitors wrote making representations as to why this should not proceed or, having proceeded, should be released on the same day. On 26 February the Home Office replied saying that, the case having been reviewed, Mr KS was seen as a suitable candidate for electronic monitoring. The electronic monitoring is justified in statutory terms by Section 36(3) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, under which, where a reporting constriction could be imposed on an adult, (a) he may instead be required to cooperate with electronic monitoring, and (b) the requirement should be treated for all purposes of the Immigration Acts as a reporting

restriction. As Ms Jegarajah says, that is a section which could apply to really every person whose immigration status is in doubt, except, I suppose, those who are actually detained.

6. The application before the Administrative Court was put on the basis first of all that the tagging was a breach of Article 5 of the European Convention; secondly, that the section did not apply; and thirdly, that even if the section did apply and Article 5 was not infringed, it was in effect an irrational, perverse use of the power. As I say, the grounds have been reconsidered and Ms Jegarajah, in my view rightly, does not now contend that these restrictions amount to deprivation of liberty under Article 5, nor does she argue that the section does not apply.

7. She does seek to challenge the basis on which the power was exercised, and in particular she does so by reference to the fact that only when, on 24 September 2007, the Secretary of State's summary grounds of defence were put forward, was it said that on three occasions before the imposition of tagging Mr KS failed to report and on five occasions afterwards he broke the terms of the tagging direction. When one notices that one of the failures to report is said to have been on Christmas Day, one has to wonder whether that was truly an occasion on which he was expected to report, even it if was the relevant day of the week. Ms Jegarajah also points out that the five occasions when he is said to have broken the, as it were, curfew restrictions, all lasted for no more than somewhere between 5 minutes and 11 seconds and 6 minutes and 13 seconds, and suggests that it is more likely that there was some failure of the transmission system at that stage. At all events, she argues that the decision to tag and the refusal to remove the tag is in effect perverse or Wednesbury unreasonable in circumstances in which KS has, she submits, been a model in terms of reporting and attending as required. The only circumstances said to be inconsistent with that were advanced very late in the day and lack some elements of plausibility.

8. The matter was considered by Pitchford J on all three grounds and I can ignore what he said about the first two. On the perversity point he noted the submission that in respect of some of the alleged failures to report, it may well be that the more probable explanation was a failure of the communication line, but he went on to say this:

> "11. Furthermore, it is submitted on behalf of the Secretary of State that she is entitled to take into account the following factors: first, the entry on a false passport; and secondly, the failure to leave when the claimant's appeal rights were exhausted and the fact that there had been persistent attempts since that time to ensure his remaining within the United Kingdom.
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> 12. The decision I have to make is whether it is arguable that in taking into account the facts which I have summarised, the Secretary of State acted arguably unreasonably in the **Wednesbury** sense.

> What the Secretary of State had to do was to weigh up the necessity for the imposition of conditions so as to ensure that the claimant did not abscond. In no sense, in my judgment, could it be said that the Secretary of State acted unreasonably, and in this regard also I agree with the view of Sir Michael Harrison that the contrary is unarguable."

9. Ms Jegarajah contends that KS should be seen as a person who has a genuine fresh claim for asylum in the light of what has happened in Sri Lanka as regards the ceasefire. It is not entirely clear to me that a fresh claim has formally been made although, as I say, there was an application for judicial review on 12 February 2007, but I think that was probably for judicial review of the removal directions having been made at a time when a decision had not yet been reached on the application for discretionary leave to remain. But I am not clear about that. That application for judicial review was refused on 20 April 2007, so it seems, and that was then followed by the judicial review application which is before me, in effect.

10. Richards LJ treated the matter as not being pursued in respect of perversity. That may or may not have been the right view before him, but any rate Ms Jegarajah makes it clear that it is now pursued on that ground and only on that ground. In support of that the submissions well and eloquently made by Ms Jegarajah to the court proceed to a significant extent on the basis that tagging treats the applicant as a criminal without any kind of justification. It seems to me that, even accepting that there may be substantial grounds for supposing that the suggestion that he failed to comply with his reporting restrictions is based on errors of fact, nevertheless it seems to me that the judge was right to say that there were adequate grounds on which the decision to tag was based, and that the challenge on Wednesbury grounds to the exercise of the statutory power would not succeed; and accordingly, it seems to me that this application must be refused. I should say that Ms Jegarajah submitted, in tandem with her principal application, that it was an important point which ought to be considered even if there was no sufficient prospect of success, on the basis of a compelling reason why the appeal should be allowed to proceed. I respectfully disagree. If this is a practice which, as she says, is being more widely used, I do not say that there may not at some point be a case where it can properly be considered on appeal, but I do not think that this is the case, and accordingly I propose to dismiss the application.

Order: Application refused