

IN THE SPECIAL IMMIGRATION APPEALS COMMISSION

Case No. SC/179/2020

Wednesday, 15 June, 2022

Before:

THE HONOURABLE MR JUSTICE LANE

BETWEEN

D8

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

MS S. KNIGHTS QC and MR A. BURRETT (instructed by J D Spicer Zeb Sols) appeared on behalf of the Applicant.

MR J. KINNEAR QC (instructed by the Government Legal Department) appeared on behalf of the Respondent.

MR M. GOUDIE QC and MR D. LEMER (instructed by the Special Advocates' Support Office) appeared as Special Advocates.

**OPEN JUDGMENT
BAIL APPLICATION**

MR JUSTICE LANE:

1. This is my OPEN judgment in the application for bail by D8. He is an Iranian national, who entered the United Kingdom clandestinely by lorry on 18 February 2016 and applied for asylum. His asylum claim was refused on 4 August 2016.
2. On 30 March 2017, the First-tier Tribunal allowed D8's appeal against the refusal, following a hearing on 22 March 2017 before First Tier Tribunal Judge Colvin. Importantly, Judge Colvin found that the basis upon which D8 had come to the United Kingdom in alleged need of international protection was false. D8 had not, contrary to his assertions, come to the adverse attention of the Iranian authorities on the basis of actual or perceived support for the KDPI in that country (paras.20 to 22 of the decision).
3. Judge Colvin allowed D8's appeal, however, on the sole basis that D8 had, since coming to the United Kingdom, posted anti-government and pro-Kurdish material on his Facebook page.
4. Following Judge Colvin's decision to allow D8's appeal, he was granted leave as refugee for five years, until 22 April 2022.
5. On 19 February 2020, D8 left the United Kingdom on a Home Office travel document.
6. On 2 April 2020, the respondent directed that D8 should be excluded from the United Kingdom on grounds of national security; and on 15 October 2020, she made a decision to revoke D8's refugee status on the basis that D8 had an Islamist extremist mind-set, was supportive of ISIL and had voluntarily re-availed himself of the protection of Iran.
7. D8 has appealed to the Commission against the decision to revoke his protection status (that is to say, his status as a refugee). D8 has also applied to the Commission under s.2C of the Special Immigration Appeals Commission Act 1997 to set aside the respondent's direction relating to D8's exclusion. A substantive hearing in respect of both matters has been listed, to commence on 28 November 2022. It is also anticipated that, at that hearing, the Commission will consider any appeal that D8 may bring, should the respondent refuse D8's current asylum claim.
8. That claim was made following D8's arrival on 23 March 2021 in Kent, having travelled there by a small boat from France, knowingly in breach of his exclusion order, and in breach of immigration laws. D8 was arrested and detained following that arrival. He is currently held at HMP Belmarsh.
9. On 21 March 2022, D8 applied to be released on bail. The respondent opposed that application on the basis that:-
 - (a) D8 poses a risk to national security. The respondent assesses that D8 holds an Islamist extremist mind-set and is supportive of ISIL and that detention is the only way to manage this risk;
 - (b) D8 is capable of travelling clandestinely (as he has demonstrated by his journey from Iraq, via Italy and France), engaging in behaviour to evade official attention, engaging in unlawful behaviour; and that D8 has a history of acting dishonestly and in breach of immigration law. There is, accordingly, said to be a high risk that D8 may offend;

(c) D8 returned to the United Kingdom knowingly in breach of his exclusion order and knowingly without refugee status, in breach of immigration laws. The respondent therefore assesses that there is a very high risk of D8 absconding, breaching any bail conditions imposed and evading the authorities, given his demonstrated desire to return to the United Kingdom, even after he had been excluded; and

(d) in view of the above, there is no realistic prospect of D8 agreeing to return voluntarily.

10. Pursuant to Sch.3 to the 1997 Act and para.3(2) of Sch.10 to the Immigration Act 2016, the matters to which the Commission must have regard in determining whether to grant bail are:-

(a) the likelihood of the person failing to comply with the bail conditions;

(b) whether the person has been convicted of an offence (whether in or outside the United Kingdom or before or after the coming into force of this paragraph);

(c) the likelihood of a person committing an offence while on immigration bail;

(d) the likelihood of the person's presence in the United Kingdom, while on immigration bail, causing a danger to public health or being a threat to the maintenance of public order;

(e) whether the person's detention is necessary in that person's interests or for the protection of any other person;

(ea) whether the person has failed without reasonable excuse to co-operate with any process –

(i) for determining whether the person requires or should be granted leave to enter or remain in the United Kingdom,

(ii) for determining the period for which the person should be granted such leave and any conditions to which it should be subject,

(iii) for determining whether the person's leave to enter or remain in the United Kingdom should be varied, curtailed, suspended or cancelled,

(iv) for determining whether the person should be removed from the United Kingdom, or

(v) for removing the person from the United Kingdom, and

(f) such other matters as the Secretary of State or the Special Immigration Appeals Commission thinks relevant.

11. Sub-para.(ea) was inserted, on 28 June 2022, by s.48 (matters relevant to decisions relating to immigration bail) of the Nationality and Borders Act 2022: see para.25 of Sch.1 to the Nationality and Borders Act 2022 (Commencement no.1, Transitional and Saving Provisions) Regulations 2022. I received no discrete submissions on this sub-paragraph. Although I have considered it, I do not conclude that it has any material bearing on the

present application, over and above the fact that D8 has seen fit to return to the United Kingdom in breach of the law.

12. As Elizabeth Laing J (as she then was) said in Z3 v Secretary of State for the Home Department (SC/157/2018), sub-para.(f) confers a broad discretion on the Commission to give such weight as it thinks fit to any further factor which it considers is significant and relevant on the facts of a particular case. In Z3, Elizabeth Laing J decided that the risk which Z3 posed to national security was an obvious relevant matter within that sub-paragraph.
13. It is not for me, in the context of this bail application, to reach a substantive decision on the facts or to analyse the national security case, as the Commission will be required to do in the forthcoming appeal and s.2C review. As part of my multi-factorial assessment, I give significant weight to the respondent's national security concerns, given the expertise of the Security Service in that vital area. As Keith J said in D2 v Secretary of State for the Home Department (SC/116/2012), if the respondent's assessment of risk is correct, the critical question becomes whether there is a real risk that, if the applicant is released on bail, he will continue to pose such a risk to national security whatever conditions might be imposed. Keith J held that, on that issue,

“respect, but not undue respect, should be accorded to the views of the Security Service, which has, of course, considerable expertise in assessing how the risk which someone ... is assessed to pose can be managed”.
14. For the purposes of this application for bail, I am satisfied that I should proceed on the basis that D8 poses a risk to national security by reason of holding an Islamist extremist mind-set, is supportive of ISIL and poses a risk of engaging in terrorist related activity. As para.13 of the respondent's OPEN national security case indicates, supporters of ISIL may engage in any one or more of seven kinds of activities, ranging from expressing support for ISIL and sharing material relating to it, to attack planning in the United Kingdom and/or overseas. The reasons why the respondent has formed this view are contained in the CLOSED material.
15. The respondent also assesses that D8 is capable of travelling clandestinely, engaging in behaviour to evade official attention and engaging in unlawful and criminal behaviour, as well as having a history of acting dishonestly and in breach of immigration law. None of these matters are inherently ones that raise an issue of national security. They are relevant in the present case only because of the respondent's view of D8's mind-set. They are, however, matters that go to the second issue discussed by Keith J in D2; namely, whether the risk that D8 poses to national security can be managed by permitting him to be released on bail, subject to suitable (and, if necessary, onerous) conditions.
16. D8 gave evidence on oath at the hearing, in which he adopted a detailed written statement, running to some 63 paragraphs, which he signed on 14 June 2022.
17. So far as concerns acting opportunistically and dishonestly, the respondent takes three points against D8. First, there is the finding of Judge Colvin in his 2017 decision that D8's claim to have left Iran in fear of the authorities was not credible. Ms Knights, for D8, counters this by pointing out that, since Judge Colvin allowed D8's appeal, there was no way in which D8 could seek to challenge that finding.
18. Second, the respondent relies upon an interview conducted by the police with D8 at Heathrow Airport on 19 February 2020, immediately prior to his departure from the United

Kingdom for Iraq. The record of this interview states that D8 said he was travelling to Iraq to spend time with his cousin there and that he was unable to provide an exact address for that person. D8 denies that he said any such thing. He also denies saying on 19 February that he had never lived in Iran, which of course would be entirely inconsistent with the account given to Judge Colvin.

19. Third, at his interview, following his arrival by small boat, D8 is recorded as stating that he received a diagnosis in Iran for depression; and that this condition started “about six months ago”. Since the interview was conducted in March 2021, this means, according to the respondent, that D8 was diagnosed in Iran around September 2020, contradicting his claim that he had not been in Iran since he claimed asylum in the United Kingdom.
20. D8 denies saying such a thing at his interview. He exhibits to his witness statement a photograph, taken by D8 using his mobile telephone, of a “To whom it may concern” letter from a psychiatrist in Iraq, written in English, concerning a visit said to have been made by D8 to the psychiatrist on 23 August 2020. This would have been after D8 was returned to Iraq by the authorities in Turkey, where he had gone on what he intended to be the first leg of his return to the United Kingdom. The letter describes findings that D8 was “depressed” and “feeling blue, in the dumps and worthless”. This was said to have arisen following D8’s inability to return to the United Kingdom because of “lockdown”. The letter states that the psychiatrist recommends “to help him by any means possible and through related NGOs”.
21. Mr Kinnear QC, for the respondent, cross-examined D8 vigorously regarding this letter and other aspects of D8’s witness statement, such as why he allegedly forgot his date of birth, when interviewed in March 2021.
22. It is unnecessary for me to attempt to make any definitive findings on these matters. They will, no doubt, feature at the forthcoming hearing in the Commission. For present purposes, I proceed on the basis that the respondent may be right to contend that D8 is frequently untruthful in his dealings with the respondent.
23. Even if she is, the question for me is whether (along with matters to which I shall turn) they demonstrate that, if released on bail and despite any conditions that the Commission might impose, there is an unacceptable risk that D8 would abscond or breach conditions in a way that would prejudice national security.
24. Linked to this is the undoubted fact that D8 has, as the respondent contends, shown ingenuity and determination in returning to the United Kingdom, in stark defiance of the law. I am entirely satisfied that, at the time he arrived in Kent in 2020, D8 knew that he had been excluded by direction of the respondent; and that his refugee status had been revoked.
25. Both Ms Knights and D8 asked, rhetorically, what else D8 could have done. The simple answer is, of course, that he should have obeyed the law and remained outside the United Kingdom. For present purposes, however, the central question is whether, now that he is here, there is a risk that D8 would breach the terms of his bail, so as to risk damage to national security. The answer to that question involves an interrogation of the respondent’s national security case, which can be addressed only in CLOSED.
26. I agree with Ms Knights that it is of significance that D8 did not abscond whilst in the United Kingdom, following the first refusal of his asylum claim. Despite the attacks by the respondent on D8’s credibility, I am satisfied that D8 intends (as he did before the First-tier Tribunal) to make his case against revocation and exclusion to the Commission at the hearing in November. There is a certain coherence in his stance, which is to see his

previous status restored and secure entry to the United Kingdom for his fiancée, to whom he became engaged in Iraq in 2020. Absconding would put an end to any hope of either.

27. D8's case for bail is strengthened by the fact that he has already spent some 450 days in detention in HMP Belmarsh, under a rigorous detention regime; and that detention has caused or aggravated D8's mental health problems, such that D8 is now assessed to be at Level 2 under the Adults At Risk Policy; that continued detention poses difficulty for those acting for D8 in terms of obtaining instructions; and that, if not released on bail, he faces a prolonged period of detention, since any adverse decision of the Commission, following the hearing in November 2022, would be subject to appeal. Ms Knights points to the Detention & Case Progression Reviews of the respondent, which indicate that, notwithstanding that D8's exclusion was based on national security grounds and there is a national security risk to the public associated with his release, "should it become clear that there are not any imminent removal prospects, we will look to prepare [D8's] immediate release".
28. I take account of the significant period of time spent by D8 in immigration detention. So far as his mental health is concerned, the respondent acknowledges D8's Level 2 status. Both of those factors strengthen the case for bail.
29. I am not, however, persuaded that the psychiatric report of Dr Galappathie, filed on behalf of D8, in itself bears significant weight. I agree with the respondent's criticisms of the report. The suggestion in it that D8's mental state is such that he is not in a position to give satisfactory instructions to his legal team is, furthermore, belied not only by the detailed nature of his written statement but also by D8's oral evidence on 15 June, which betrayed no signs of mental confusion or difficulty.
30. Whilst I accept that there are practical difficulties in taking instructions from a detainee in HMP Belmarsh, those acting for D8 have been able to obtain instructions from him in order to mount a detailed case for bail. There is no reason to suppose that the position would be otherwise, as regards the substantive appeal and review.
31. The respondent submits that D8 has had six negative entries in respect of HMP Belmarsh's Incentives and Earned Privileges Scheme. On 5, 15 and 16 November 2021, D8 declined to attend purposeful activity. On 8 November 2021, he refused to attend work without a valid reason. On 9 November 2021, he had an unacceptable absence from his cell and, on 16 November, he was again missing from his cell after returning from exercise. He was located in another cell 30 minutes later, despite being aware he was to return to his own cell.
32. D8 puts these entries down to his low mood at the time and his desire to converse with a fellow Kurdish detainee.
33. Overall, I do not consider that these instances show a significant degree of non-co-operation on the part of D8 with the prison authorities, such as to have any material bearing on the question of whether he would comply with the terms of any bail.
34. It is time to draw the threads together. I proceed, for the purposes of this application, on the basis that D8 poses a risk to national security. The nature of that risk is addressed in CLOSED. In the light of my findings at paras. 25 to 27 above, as amplified in CLOSED, I conclude that the risk posed by the likelihood of D8 absconding and/or not complying with conditions of bail is not such as to outweigh D8's case for bail.
35. Mr Kinnear helpfully outlined the respondent's position regarding conditions, should the Commission decide in principle to grant bail. These would include the requirement to report

on a regular basis; electronic monitoring; a prohibition on work; and a requirement to live at a particular address. So far as that last matter is concerned, Ms Knights drew my attention to material which indicates that consideration has begun to be given to the nature and location of such accommodation. D8, in his witness statement, accepts that this may not be in London.

36. My decision is, therefore, that D8 is entitled to bail in principle. There will, however, be necessarily significant conditions.

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