SPECIAL IMMIGRATION APPEALS COMMISSION

TRS/295/2011

Field House,
Breams Buildings
London
EC4A 1WR

Thursday, 28th July 2011

BEFORE:

THE HONOURABLE MR JUSTICE MITTING

BETWEEN:

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Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MR H BLAXLAND Q.C. and MS C GALLAGHER (instructed by Messrs Birnberg Peirce & Partners) appeared on behalf of the Appellant.

MR R DUNLOP (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

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J U D G M E N T

(As approved)

MR JUSTICE MITTING:

1. The appellant applies for bail again after I revoked it provisionally at the end of last month. The incident which caused bail to be revoked involved alleged tampering with the tag or personal identification device strapped around the appellant's ankle. Its purpose is to register whenever he leaves or re-enters an area close to his home in which is located a home monitoring unit. Once the tag is within range the monitoring unit sends out a signal to the G4S centre, G4S being responsible for monitoring arrangements. Some 300,000 of these devices have been used since this particular devise was introduced in 2005, according to the evidence of Mr Paul Fenley, the head of equipment services at G4S, whose evidence on that point and generally I accept as careful and truthful.

2. A new tag was fitted on 18th April 2011. By 2nd June 2010 when the incident which gives rise to the revocation of bail occurred the tag had accordingly been worn by the appellant for about six weeks. On 2nd June he went with my permission on a family outing to Blackpool. He returned to the area within range of the home monitoring unit at 18.03.50 in good time to return home before his curfew began. A signal was transmitted which recorded that he had re-entered the area. At 18.16 he called G4S to tell them that he had returned home. At 18.34.51 a tamper alert sounded at G4S headquarters, immediately prompting a telephone call to the appellant in which he confirmed that the tag was on his ankle as usual. At 20.07 officers from G4S and from UKBA attended at the appellant's home. I

have heard from two of them. They have both, I am satisfied, told me the truth as they remember it. Their memory is in part supported by contemporaneous electronic and manual notes.

3. The field management officer, Siobhan Burke, told me that she could see immediately on examining the tag that the clips were slightly out of the tag case. I will explain the significance of that in a moment. She tells me, and I accept, that she did not exert any significant force on the tag. Her instructions were, and I am satisfied that she complied with them, that where the tamper alert had been sounded she was to remove the tag by cutting the strap and should not do anything which might alter the appearance or mechanical properties of the tag. She was, as she put it, very wary of pulling it. The appellant was asked whether anything had happened which might have caused the tag to be damaged, whether he had tampered with it. He replied that as far as he knew nothing had happened that day. He did ride a bicycle, but he had not ridden it that day. He said, and then signed a document in which he stated, that he had not tampered with the tag.

4. One of the UKBA officers who attended the appellant's home gave evidence anonymously. He said that either then or on another day the appellant had told him that he had sustained an injury to his arm which he showed him - a graze on his left arm - when he fell down the stairs. He recalls the appellant telling him that he had had a lucky escape and that he had fallen down the stairs from the top step. The officer was unable to remember whether he told

him on that day, 2nd June, or on some earlier day. He thought that had it been on the 2nd June he would have recorded it in a document or electronically. The fact is that he is simply not sure now whether the report was made on that day or earlier, and there is nothing in the records that have so far been obtained to prove or disprove that it was said on that day. I am prepared to accept that the appellant did fall down the stairs, as he said in his evidence, two days before 2nd June, that is to say on the 31st May, and told the anonymous officer on the 2nd June that he had done so.

5. The tag consists of a hard plastic casing with a battery operated electronic transmitter inside. It is held in place on the ankle by a robust composite strap. The strap is held secure in the casing by plastic clips at either end. Once the clips are inserted they cannot be removed except by the application of mechanical force. They are held in place by lugs at the top and bottom of a plastic clip which surrounds and is firmly fixed to the strap. The lugs are on the outer part of four points on the clip which are deliberately weakened to permit the failure of the connection under heavy load. This is a safety device. If the tag were to become snagged and could not separate under heavy load it might put the safety of the wearer at risk. The load required to break the lugs is designed to be 25-40 kilograms imposed at both ends of the strap. Testing of three examples in June 2010, part of a routine programme, demonstrated that the lugs at one end of the strap failed under loads of between 25-29 kilograms

approximately - within the design capacity. These devices are I am told manufactured to fairly strict tolerances. Plainly that is necessary to avoid unexpected failure or unexpected overstrength of the connections.

6. When the tag is fitted the tamper alert is set automatically to "no tamper". Once tampering sufficient to register a tamper alert occurs the tamper alert cannot be reset to “no tamper”. It will from that moment continue to indicate a tamper alert. Between every one and ten seconds the device transmits a signal. Once within the range of the home monitoring unit that signal is automatically transmitted to the G4S centre. Accordingly once the tag is within range of the home monitoring unit there is in effect a constant automatic monitoring of the tag. If it has not been tampered with, it will repeatedly transmit "no tamper".

7. A tamper alert is sounded in one of two circumstances. The strap of the tag has running through it a fibre optic cable. It is closely and firmly aligned to a light emitting device within the casing of the PID. If the alignment is disturbed the tamper alert will sound. So too will it sound if ambient light is admitted to the casing. It follows that if the clips at either end are broken, so displacing the end of the strap and the fibre optic cable within it, the tamper alert will sound. If the strap comes out of its housing then ambient light will be admitted and the tamper alert will, if it has not already sounded, do so for that reason as well.

8. The appellant is adamant, as he has said in evidence this

afternoon, that he did not tamper with the device.

9. The first task which I have is to determine whether or not he did so. It is common ground that this being a past fact I should determine it to one of the two traditional standards applicable to the determination of a past fact, balance of probabilities or so that I am sure, the criminal standard. Because the appellant's liberty is involved I think it right to apply the criminal standard and propose to do so.

10. I have heard evidence from three men who are, in their respective fields, experts. First Mr Fenley, whose practical business experience of the tags is probably unrivalled. Secondly Mr Campbell, who helped set the specification for the tags for the Home Office, and has prepared reports in which it is alleged that they have been tampered with in 240 cases until two years ago and more, but an unknown number, since. His impartiality is questioned on the footing that he has an interest in seeing that these devices are held to be reliable. Mr Fenley's impartiality is also questioned on the basis that it would redound to the pecuniary disadvantage of his company and to its reputation if it were to be believed that these devices unaccountably failed when not tampered with. I do not accept either reservation. Both witnesses impressed me as witnesses of truth and both were expert in their fields, and Mr Campbell, as Mr Blaxland accepts, is probably the individual in the United Kingdom with the most experience and expertise in the design and operation of these devices. I also heard from Professor

Fitzpatrick, a knowledgeable and forthright expert, whose reservations I must address, but whose expertise I acknowledge. He has had a chance to test to destruction a small number of these devices. He would wish to have had further opportunity to conduct experiments to see if relatively small loads applied repeatedly to the clips at the end of the straps could produce the signs which permit Mr Campbell and Mr Fenley to say that this tag was unquestionably tampered with. In an ideal world Professor Fitzpatrick should have had that opportunity, but I must deal with the situation on the footing that he has not had it and ask myself whether further experiments would in fact have been likely to produce useful information about the workings of the tags.

11. What caused this tag to fail can be approached from two points of view. If both point in favour of tampering then a powerful case is established which in practice would be required to be displaced by convincing evidence from the appellant or from the expert opinion of Professor Fitzpatrick. The two approaches are electronic and mechanical.

12. As far as electronic is concerned Mr Fenley told me, and I accept because there is nothing to disprove what he says, to suggest that it might be wrong or even to call it into question at all, that because the tag registered "no tamper" when it came back into range of the home monitoring unit at 18.03.50 it cannot have failed then. That must be right, given his explanation, which I accept, that once the tag has indicated a tamper alert it cannot

reset itself so as to indicate no tampering. The moment at which the tamper alert sounded, 18.34.51, is therefore the moment at which either of the two events capable of setting it off - the disturbance at the end of the fibre optic cable from the light emitting device or the admission of ambient light into the casing - must have occurred. For either of those two events to have occurred the mechanical failures to which I will now turn must have occurred, or have occurred finally.

13. It is common ground between all three of the expert witnesses that considerable force had to be applied on more than one occasion, in fact at least four occasions, to the strap. That is because the top of the strap at the point where it emerges from the clip attaching it to the casing, has four indentations in it. They were caused, it is common ground, by the inner surface, in the form of a small ridge, of the clip which holds the strap in the casing. Mr Campbell tells me, and I accept, that the strap itself does not flex significantly. It is designed not to. It is the plastic components which hold it in place in the casing, in other words the clip and the lugs, which give way. For them to give way sufficiently to cause four separate indentations to be made there must have been four separate applications of significant force which resulted in the distortion of the plastic components of the clip. Both Mr Campbell and Professor Fitzpatrick are satisfied that force which was significantly axial must have been applied at the end of the strap where the damage occurred, because three of the four weak points of

the clip have fractured. Mr Campbell believes that the undamaged fourth weak point must in fact have come out of the casing and been replaced, but for the purpose of analysing what happened that conclusion is not necessary. What is necessary and what is common ground is that three out of the four weak points were damaged, indicating that force was applied not just to the top or to the bottom of the strap but to both the top and the bottom. The effect would be to compress the inner moulding of the clip and produce indentations. Although indentations have only been seen on the side on which two weak points have failed because that side has come out of the casing both Mr Campbell and Professor Fitzpatrick accept that it is either inevitable or at least very highly likely that there will be corresponding indentations on the underside of the strap, the unrevealed side.

14. I am invited to accept that that damage might have occurred when the appellant fell down the stairs in his home as I have assumed in his favour on 31st May. Mr Campbell excludes that as a possibility because there are no signs of damage on the strap consistent with it. The strap is designed, I am told and accept, readily to reveal any sign of damage. The purpose is obvious - to permit those charged with investigating alleged tampering to determine whether mechanical force has been applied to the strap, and if so what force and by what means. This strap contained no such sign. Further, Mr Campbell draws attention to the likelihood that if mechanical force had been exerted by falling downstairs and catching the bottom

of the strap on the stairs as the appellant fell down then the damage to the clip would have been likely to have occurred only at the top or bottom and not as happened, both at the top and bottom. Professor Fitzpatrick accepts that the damage to the strap is not consistent with falling down stairs alone. He accepts that there would have to be other damaging incidents as well. Accordingly falling downstairs cannot be a sufficient explanation of the damage to this device. Further, and here an element of common sense is permissible, the incident of falling downstairs occurred two days before the tamper alert sounded. If it is a substantial part of the explanation for the damage to this device then it is remarkable that the tamper alert did not sound at the time, and equally remarkable that if it were to have sounded later it did not do so as a result of something which the appellant could remember.

15. It is unnecessary for me to resolve the possible difference of opinion between Mr Campbell and Professor Fitzpatrick about whether the final event which caused the tamper alert to sound must have been the application of great force or might have been, to use the colloquial phrase, the straw that broke the camel's back. It follows inexorably from Professor Fitzpatrick's own acceptance of the fact that the damage to the strap was not consistent only with falling down the stairs, and with the design of the device, that significant force must have been exerted after the incident of falling downstairs occurred. Mr Campbell is unable to say which of the four events that

caused the four indentations was the one which set off the tamper alert. His difficulty is however premised on the basis that the four events, or at any rate some of the four events - more than one - must have occurred in very close succession. His belief, which is plainly the most likely answer, is that considerable force was exerted on four occasions close to each other and at the time that the tamper alert sounded at 18.34.51 on 2nd June. If that is the true explanation then it must follow that I have not been told the truth by the appellant about what he did with this device after he returned home from Blackpool on that day. I am driven to that conclusion for the reasons which I have indicated.

16. In summary, both the electronic and mechanical occurrences seem to me only to be explicable on the basis that considerable force was deliberately applied on more than one occasion to this device by the appellant at about 18.34 on 2nd June. It follows that I am sure that he deliberately breached a significant condition of his bail.

MR BLAXLAND: Sir, what that leaves is the further question as to whether or not despite that finding the court should grant bail, because that is the next independent question which has to be determined.

MR JUSTICE MITTING: I have of course read the reports and I am well aware of the background of this family. I would not entirely shut out an application for bail made in the future in the light of circumstances as they then obtain, but my present view is that he has so broken the trust which SIAC must have in those that it admits to bail as to

exclude that possibility, perhaps until litigation has ended, but at any rate for a considerable time.

MR BLAXLAND: Sir, yes. That raises the further question which I mentioned, which is whether or not you think it is appropriate to hear submissions in respect of the consequences for the wife which are, we would submit, relevant; Article 8 considerations.

MR JUSTICE MITTING: I accept that they are relevant. I have no doubt that they are dire; I have had to consider her position before. I am well aware of what it is. The conclusion that I have reached is one which, if you had asked me two months ago about it I would have been surprised by. I suspect that the best thing for everybody to do, or at any rate on your side to do, is to take a little time to reflect. But I will of course hear submissions if you want to make them now, but I am afraid that the rupture of trust is such as to make it very unlikely that I would be willing to set that aside.

MR BLAXLAND: I understand that. Would you give me one moment?

MR JUSTICE MITTING: Yes.

MR BLAXLAND: (**After taking instructions**): No; thank you very much.
