Appeal No: SC/15/2005
Hearing Dates: Wednesday 12th &13th November 2008
Date of Judgment: Tuesday 2nd December 2008

IN THE SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE LANE
MR C SMITH

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Mohammad OTHMAN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MR E FITZGERALD QC and MR D FRIEDMAN (instructed by Birnberg Peirce and Partners) appeared on behalf of the Appellant

MR A O'CONNOR (instructed by the Treasury Solicitor) appeared for the Secretary of State

MR A McCULLOUGH (instructed by the Special Advocates' Support Office) appeared as Special Advocate

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OPEN JUDGMENT

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MR JUSTICE MITTING :

Background

1. The appellant arrived in the United Kingdom on 16th September 1993 with his wife and three children on forged United Arab Emirates passports. He claimed asylum on arrival and was granted refugee status on 30th June 1994. He was given four years leave to enter. On 17th January 2001 the Secretary of State certified that he was a risk to national security and issued a notice of intention to deport. The notice was not served at that time, because the appellant went to ground. On 23rd October 2002 he was detained and issued with a certificate under section 21 of the Anti-terrorism, Crime and Security Act 2001 and served with the notice of intention to deport. He appealed against it. His appeal was dismissed by SIAC on 8th March 2004. He was released on immigration bail on 11th March 2005 and on the following day served with a Control Order under the Prevention of Terrorism Act 2005. On 11th August 2005, he was served with a fresh notice of intention to deport on the ground that his presence in the United Kingdom was not conducive to the public good and detained under immigration powers. His appeal against the notice was dismissed by SIAC on 5th March 2007. SIAC found that he was a threat to national security, principally on the ground that he encouraged other extremists to commit acts of terrorism by providing religious sanction for their deeds. He was found to have long standing associations with other terrorist groups, including Al Qaeda. He was also found to have ready access to money and false documents for the purpose facilitating terrorism.

2. In April 2008, his appeal to the Court of Appeal was allowed, on safety on return grounds. He applied for bail. On 8th May 2008 SIAC decided that, in

principle, he should be admitted to bail on stringent terms, including a twenty two hour curfew and a full package of restrictions upon his ability to communicate with others. At that date, the Court of Appeal had refused permission to the Secretary of State to appeal to the House of Lords. An application for permission to the Appellate Committee was outstanding. The Commission accepted that the grounds upon which permission was sought were arguable, but that it could not simply ignore what had happened in the Court of Appeal. The fact that he had succeeded in his appeal was treated as of very great significance. Nevertheless, the Commission accepted that the appellant represented a continuing and significant risk to national security and that there was a current and significant risk of absconding.

3. The appellant was released on 17th June 2008 to live at an address with his family in West London. On the morning of Saturday 8th November 2008, he was detained at his home and taken to Belmarsh Prison. The Secretary of State contends that the Commission should conclude that, if he was re-admitted to bail, he would be "likely to break any condition on which he was released", so that the Commission should direct that he be detained under paragraph 24(3) of Schedule 2 to the Immigration Act 1971.

The legal issues

4. The appellant was detained on 11th August 2005 following a decision to make a deportation order against him on the ground that his deportation is in the interests of national security. Accordingly, pursuant to section 3(1) of the Special Immigration Appeals Commission Act 1997, the Commission alone had the power to grant him bail. The power is found in paragraph 22(1A) of

Schedule 2 to the Immigration Act 1971, as modified by paragraph 1(2) of Schedule 3 to the Special Immigration Appeals Commission Act 1997. It is in general terms:

> "The Special Immigration Appeals Commission may release a person so detained on his entering into a recognisance…conditioned for his appearance before an Immigration officer at a time and place as may in the meantime be notified to him in writing by an Immigration officer".

There is no statutory test for the grant or withholding of bail, but the Commission has consistently held that two factors are of great importance: the risk of absconding and the risk to national security, including the risk posed if an appellant were to abscond. Pursuant to paragraph 3(3) of Schedule 3 to the 1997 Act, the power to revoke bail following arrest under paragraph 24(3) of Schedule 2 to the 1971 Act is, as modified for the purposes of the Commission, that,

> "Where a person is brought before the Special Immigration Appeals Commission by virtue of sub-paragraph (2)(a) above, the Commission –
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> a) if of the opinion that that person has broken or is likely to break any condition on which he was released, may either –
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> i) direct that he be detained under the authority of the person by whom he was arrested; or
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> ii) release him, on his original recognisance or on a new recognisance, with or without sureties…; and
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> b) if not of that opinion, shall release him on his original recognisance or bail."

5. The Secretary of State does not rely on any allegation of breach, by the appellant, of his bail conditions. Her contention is that the Commission should form the opinion that it is likely that he will break his bail conditions, by absconding. It is common ground that Article 5(4) ECHR applies to this hearing. It gives rise to critical legal issues:

   i) What is the meaning of "likely to break any condition on which he was released"?

   ii) What procedural safeguards for the appellant apply to this hearing?

   The first issue has not arisen in any previous SIAC hearing. The second has, but, it has not, up to now, been necessary to determine it, for a variety of reasons. Determination of both issues is now unavoidable.

"Likely to break any condition on which he was released"

6. Mr O'Connor for the Secretary of State contends that "is likely to" means "might well". He is content to accept any of the other formulations to like or similar effect: "there is a real risk that", "there is a serious possibility that" or that there are "reasonable" or "substantial" grounds to believe that". Mr Fitzgerald QC submits that the words mean "more likely than not".

7. It is common ground that the starting point is the observation of Lord Nicholls in *Cream Holdings Ltd v Banerjee* [2005} 1AC 253, paragraph 12

> "As with most ordinary English words "likely" has several different shades of meaning. Its meaning depends upon the context in which it is being used. Even when read in context its meaning is not always precise. It is capable of encompassing different degrees of likelihood, varying from "more likely than not" to "may well"."

Unsurprisingly, the Courts have interpreted the word in a different sense in different contexts. When deciding whether or not to make a care order under section 31(2) of the Children Act 1989, the threshold is "a real possibility", not "more likely than not", because Parliament cannot be taken to have intended to have drawn the boundary line at a point which the House of Lords considered "altogether inapposite": re ***H*** [1996] AC 563 p.585C-D, per Lord Nicholls. In the context of aircraft safety, it has a similar meaning: a person is guilty of an offence contrary to Article 55 of the Air Navigation (Number 2) Order 1995 by recklessly or negligently acting in a manner "likely to endanger an aircraft or any person therein" if there is a real risk, which should not be ignored, that his conduct will have that effect: ***R v Whitehouse*** Times Law Reports 10th December 1999. In the context of pre-trial injunctions restraining publication of allegedly defamatory statements, the test for determining whether a claimant is "likely" to establish at trial that publication should not be allowed under section 12(3) of the Human Rights Act 1998 is flexible and does not mean, in all circumstances, "more likely than not": ***Cream Holdings Ltd v Banerjee*** [2005] 1AC 253. By contrast, when determining, for the purposes of section 1(1) of the Crime and Disorder Act 1998, whether a person has acted in an anti-social manner, i.e. "in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons…", "likely" means "more probable than not": ***The Chief Constable of Lancashire v Potter*** [2003] EWHC 2272 (Admin) p.32. Mr Fitzgerald relies on the reasoning of the Court in reaching this conclusion: "breach of such an order is a serious matter and can lead to a substantial term of imprisonment or a fine". He makes the valid point that liberty is directly in issue here, as it was, indirectly, in that case.

But, there are two reasons why *Potter* is not determinative of, or even persuasive as to, the outcome of the construction issue in this case: first, it applied to the determination of a past fact – had the respondent acted in such a manner as was likely to have caused harassment etc. – not, as here, to the assessment of a future risk. Secondly, the fact that liberty is involved does not require "likely" to be interpreted as meaning "more likely than not": *R v Parole Board Ex parte Bradley* [1991] 1WLR 134. Once a life sentence has lawfully been imposed, it justifies the prisoner's continued detention "even though the risk as ultimately perceived is substantially less than an actual probability of his seriously re-offending upon release": paragraph 146b per Stuart-Smith LJ.

8. There is, in our view, a close analogy between the circumstances in which the Commission is required to consider the future risk of absconding in breach of bail conditions, and the task routinely performed by criminal Courts when deciding whether or not grant bail in criminal proceedings. The presumption in favour of the grant of bail pending trial, is displaced under paragraph 2(1) of Schedule 1 to the Bail Act 1976 if "there are substantial grounds for believing that the defendant, if released on bail… would –

a) fail to surrender to custody…".

The test is universally understood in criminal Courts to set a lower threshold than satisfaction on the balance of probabilities. If, because of perceived ambiguity, reference to parliamentary materials was permissible, this interpretation would be vindicated: the form of words chosen was proposed by the House of Lords and accepted by the House of Commons, which had

initially proposed a balance of probabilities test (see the Introductory Notes to the Bail Act 1976 in Current Law Statutes 1976). Mr Fitzgerald submits that a higher threshold is imposed under section 7(5) of the Bail Act 1976 which provides that a Justice of the Peace may remand in custody a person arrested by a constable on suspicion that he is not likely to surrender to custody, "if of the opinion that that person – (a) is not likely to surrender to custody". We do not accept that submission. In each case, the Court is concerned with the same question: what is the risk that the person will not surrender to custody? The answer cannot depend upon whether the person is being admitted, for the first time, to bail or re-admitted to bail. In our view, the test of likelihood in section 7(5) is no more stringent than the test of substantial grounds for belief in paragraph 2 of Schedule 1. Both amount to a test of serious risk or real possibility. The test of substantial grounds for belief requires the Court to examine evidence and information relevant to the risk. It is theoretically possible that an unqualified likelihood test does not require such examination, but we have no reason to believe that Justices of the Peace apply a different or lower threshold on that account. We have no reason to think that they apply a higher threshold.

9. In the great majority of cases, paragraph 24(3) of Schedule 2 to the 1971 Act will be applied in circumstances in which national security is not at risk. The last guidance given to those who administer paragraph 24(3), then Adjudicators, by the then Chief Adjudicator in May 2003 was in these terms:

> "2.5.3 There is no precise test laid down as to the standard of proof required in bail cases. Useful guidance is available in the Bail Act 1976. A defendant need not be granted bail if the Court is satisfied "there are substantial grounds for believing

> that the defendant, if released on bail (whether subject to conditions or not), would fail to surrender to custody". It is suggested that you adopt the "substantial grounds for believing" test which would be higher than the balance of probabilities but less than the criminal standard of proof". (our emphasis)

We agree that the "substantial grounds" test is appropriate, but not with the gloss put upon it by the underlined words which do not, in our view, represent the intention of Parliament in the Bail Act.

10. The only observations in any reported case which we have been able to find which are directly in point are those of Mummery LJ in *R(I) v Secretary of State for the Home Department* [2002] EWCA Civ. 888, in which the continued detention of a failed asylum seeker who refused voluntarily to depart the United Kingdom was held to be unlawful. Mummery LJ dissented as to the outcome of the appeal, but said that,

> "There are in my judgment reasonable grounds for believing that, given the chance, he will probably seek to frustrate attempts to remove him under the deportation order before it is possible to carry it into effect. So, there is a real risk that, if he is now released from his present detention under paragraph 2(3) of Schedule 3 to the Immigration Act 1971, he will probably abscond and never return to Afghanistan": paragraph 43.

Dyson LJ did not believe that the refusal of voluntary repatriation "adds materially to the evidence that such risk (i.e. of absconding) is present in the instant case".

Both, it seems to us, were applying a "real risk" or "reasonable grounds for believing" test to the likelihood of absconding.

11. Both the balance of authority and the nature of the task to be performed by the Commission persuade us that the words "is likely to break any condition"

mean there is a real risk or serious possibility, not that it is more likely than not. We do not discern any practical difference between that test and the "substantial grounds for believing" test in paragraph 2 of Schedule 1 to the Bail Act, a test which, usefully, draws to the attention of the Commission (and AIT) that the conclusion that there is a real risk or serious possibility must be based on credible evidence or information. We have applied that test to our determination.

12. Mr Fitzgerald and Mr McCullough, Special Advocate, submit that where a conclusion as to future risk is based upon evidence or information about past events, those events must be proved to have occurred on balance of probabilities. We do not accept that submission. Our task is the management of future risk during the period pending (i.e. until) deportation. In the assessment of risk, in ordinary life, factors are taken into account which the person making the assessment may not be satisfied are more likely to have occurred than not. We can see no good reason why, when assessing future risk to a lower standard than the balance of probabilities, we are required to disregard evidence and information about past events unless satisfied, to that standard, that they occurred.

Procedural fairness

13. It is now common ground that the Secretary of State's open case would not justify the revocation of bail. It relies on three events which have occurred since 17th June 2008: the publication of a message on a jihadist website on 11th July 2008 by Abu Yahya, a senior Al Qaeda figure, identifying the need for religious scholars on the jihadist battlefield, addressed to an unidentified

cleric; the grant of permission by the House of Lords to the Secretary of State to appeal and the hearing of the appeal in October 2008; and the seizure, at the appellant's home, on 17th October 2008 of electronic storage media, memory cards, sim cards, MP3 players and computer discs and three video tapes. The first is unspecific and adds little to the long standing assessment of the Security Service that the appellant is a senior religious extremist with Al Qaeda links whose services would be of value to them. The second is a material change. It is common ground that the outcome of the appeal to the House of Lords is uncertain, so that the appellant's current expectation of the end result of domestic litigation may be less optimistic than it was. The third factor is of no weight: if the electronic storage media and video tapes had recorded on them information or statements which inculpated the appellant, there has been ample opportunity to establish that they do since they were seized. The Secretary of State relies on information contained in the closed case to justify the revocation of bail. The only indication of that case which has been given to the appellant is the first sentence in paragraph 13 of the amended open statement: "The Security Service therefore assesses that the risk of Abu Qatada absconding has increased since his release in June 2008."

14. It is also common ground that Article 5(4) ECHR applies to these proceedings. It provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful".

On a literal reading, no live issue arises under Article 5(4). The appellant's detention is authorised by pargraph 2(2) of Schedule 3 to the Immigration Act

1971, because notice has been given to him of a decision to make a deportation order against him: "He may be detained under the authority of the Secretary of State pending the making of the deportation order". "Pending" means "until": *R(Khadir) v Secretary of State for the Home Department* [2006] 1AC 207. Nevertheless, in domestic law, the apparently unfettered power to detain pending deportation is subject to the limits identified in *R v The Governor of Durham Prison Ex parte Hardial Singh* [1984] 1AER 983. One of the limits is that the power to detain can only lawfully be exercised during the period reasonably necessary to achieve its purpose: deportation. Strasbourg jurisprudence complements that limit: "Any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5(1)(f).": *Chahal v United Kingdom* 23EHRR 413 at paragraph 113. It was, thus, necessary to determine whether the duration of the deportation proceedings – just over three and a half years –was excessive. In view of the "extremely long period" during which the applicant was detained, it was necessary to consider "whether there existed sufficient guarantees against arbitrariness": paragraph 119. The Court concluded that, given the exceptional circumstances of the case, the fact that national authorities had acted with due diligence throughout the deportation proceedings and that there were sufficient guarantees against arbitrary deprivation of liberty, detention complied with the requirements of Article 5(1)(f): paragraph 123. Domestic jurisprudence has followed *Chahal* in excluding from consideration (when it is asserted that the length of detention pending deportation makes it unlawful) detention while

appeal rights are exhausted: are (*R v Secretary of State for the Home Department* [2002] EWCA Civ.888, per Simon Brown LJ, paragraph 36:

> "What *Chahal* illustrates is that a detained asylum seeker cannot invoke the delay necessarily occasioned by his own asylum claim (and any subsequent appeals) to contend that his removal is clearly "not going to be possible within a reasonable time" so that he must be released."

15. Nevertheless, we – and we anticipate the Strasbourg Court – would not find it acceptable that an appellant, appealing to the Commission against a notice to deport on conducive grounds, based on national security considerations, should be detained until the proceedings are finally concluded, without consideration being given to admitting him to bail. These proceedings have already lasted three and a quarter years. The outcome of the appeal to the House of Lords may result in the final determination of his appeal; but even if it does and the Secretary of State's is allowed it is highly likely that he will make an application to the Strasbourg Court and possible that it will give an interim indication under Article 39. It is far from inconceivable that it will require more than five years from the date of the appellant's detention until the final determination of the proceedings. In such circumstances, the Commission must have the opportunity to determine whether to admit an appellant to bail, even though his appeal (or reference to Strasbourg) is pending.

16. The requirement of the Strasbourg Court is that "The detained person is entitled to a review of his detention in the light not only of the requirements of domestic law but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5(1)":

Chahal paragraph 127. The Court identified the nature and extent of the review required by Article 5(4) in a case in which detention was for the purpose identified in Article 5(1)(f). It emphasised that the scope of the obligations under Article 5(4) "is not identical for every kind of deprivation of liberty": paragraph 127. In the case of detention for the purpose identified in Article 5(1)(c) (for the purpose of criminal proceedings) the Court determines the grant or withholding of bail on the merits, after adversarial proceedings, with full rights of disclosure attached: *Garcia Alava v Germany* 23541/94 and *Rheinprecht v Austria* 67175/01. But, in the case of detention under Article 5(1)(f) the requirement is different: a review, "wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5(1)": *Chahal* paragraph 127. A procedure, such as that which obtained when *Chahal's* case was considered in the United Kingdom, which did not empower a Court to review the material relied upon to justify his detention and to make a decision on its lawfulness, fell below that minimum standard: paragraphs 130 and 132.

17. In a case involving national security, the Court recognised "that the use of confidential material may be unavoidable": paragraph 131. It spoke with apparent approval of what is understood to be the Canadian system for dealing with information which could not, for reasons of national security, be disclosed to an appellant or his open representatives namely, the use of specially cleared advocates, to represent the interests of the detained person. Mr Fitzgerald submits that *Chahal* was only the beginning of the development of Strasbourg jurisprudence in this area and that the Court would now require more in the way of disclosure than it then contemplated. We do not agree. It

is true that the Court has not approved SIAC procedures, but it has been careful not to depart from the cautious approach first stated in *Chahal*. Its latest judgment on the precise topic (the review of detention pending deportation on national security grounds) is *Al-Nashif v Bulgaria* 36 EHRR 37 at p. 684 paragraphs 123 – 124:

> "123 Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information.
>
> 124 The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary."

18. Mr Fitzgerald submits that Article 6(1) applies to bail proceedings or, alternatively, that the requirements of Article 6(1) and of Article 5(4) are identical. Accordingly, he submits that the reasoning of the majority in the House of Lords in *MB v Secretary of State for the Home Department* [2008] 1AC 440, as understood by the Court of Appeal in *AF v Secretary of State for the Home Department* [2008] EWCA Civ. 1148 applies to this hearing. We do not agree. A decision to revoke bail is not a determination of the appellant's civil rights and obligations. Nor is it decisive for them. The issue is to be considered, and only considered, under Article 5(4); and when detention under Article 5(1)(f) is reviewed for the purposes of Article 5(4), it is subject only to the requirements identified in *Chahal* and *Al-Nashif*.

19. Mr Fitzgerald developed an extended argument based on ***Roberts v The Parole Board*** [2005] 2AC 738. Two observations of Lord Bingham demonstrate why the decision and reasoning in ***Roberts*** are of no direct relevance to this case: in paragraph 14 he accepted as "undoubtedly so" the proposition that the requirement of procedural fairness under Article 5(4) "does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumtances."; and that it was not suggested that ***Roberts*** was a case in which there was any threat to national security: paragraph 3. Mr Fitzgerald also submitted, correctly in our view, that the information on which the Secretary of State relies relates to events in a short time compass – since 17th June 2008. But for the fact that national security considerations properly require that information to be kept secret from the appellant and his open advocates, that would be a powerful argument requiring disclosure to them and not just to the Special Advocate. But, as we have sought to demonstrate, Article 5(4) does not require the disclosure of any such information to an appellant detained under Article 5(1)(f) whose detention is justified on national security grounds. The possibility that an appellant might be able to respond constructively to information about a limited number of matters (as opposed to, as Mr Fitzgerald puts it, a review of his entire adult life) does not affect the principle.

20. Practical considerations also support the disclosure to Special Advocates alone of secret material in a case in which the revocation of bail is advocated by the Secretary of State. A decision on the grant of bail is taken by the Commission after balancing the risk of absconding and the risk to national security posed by an appellant against his own claim to freedom and to the enjoyment of family life. Paragraph 22(1A) of Schedule 2 to the Immigration Act 1971

imposes no constraint upon the Commission in performing that task. When it decides to release an appellant on bail, it does so in the knowledge that compliance with bail conditions will be monitored by a variety of means; and that information about a future serious breach of bail conditions, in particular of absconding, is likely to come from covert sources. If the Secretary of State is not entitled to withhold such information from the appellant and his open representatives, management of the risk, both of absconding and to national security, posed by an appellant on bail, will prove deeply problematic. The removal of a vital tool for controlling the risk would be likely to lead the Commission to adopt an even more cautious approach to the grant of bail in the first instance than it now adopts – for the simple reason that the risks could not effectively be managed while an appellant was on bail.

21. For the reasons given, we do not accept that the Convention requires the disclosure to the appellant and his open representatives of information which could not be disclosed without infringing Rule 4 of the Procedure Rules. We are satisfied that all material which can be disclosed without infringing Rule 4 has been disclosed. On that premise, we are satisfied that the procedural requirements of Article 5(4) have been met. If, contrary to our view, disclosure of the gist of the essentials of the factors upon which the Secretary of State has relied is required, we have set out our conclusions in the closed Judgment.

Decision

22. For the reasons set out in the closed Judgment, we have decided that the appellant's bail should be revoked and that he should be detained.

23. In reaching that decision, we have accepted as true his declared wish to depart lawfully to a state or territory other than Jordan if the authorities of that state or territory can be persuaded to accept him. We do not regard as at all significant the fact that no formal application has been made to the Home Office to that end. If the appellant identifies a state or territory willing to receive him, and seeks to put into effect his declared wish to go there, he will be fulfilling the obligation imposed upon him by the deportation order to depart the United Kingdom. These are deportation, not extradition proceedings. We also accept as true, and not as signifying a willingness to breach bail conditions, his declared interest in renouncing his Jordanian citizenship and seeking to live in the territory of his birth, Palestine. We do not, however, see any realistic prospect that either of these two possibilities will be open to him in the near or medium term.