

SPECIAL IMMIGRATION APPEAL COMMISSION
Field House,
Breams Buildings
London
EC4A 1WR

Thursday, 8th May 2008

BEFORE:

MR JUSTICE MITTING
SENIOR IMMIGRATION JUDGE ALLEN
MR S PARKER

BETWEEN:

OTHMAN MOHAMMED (O)
AKA ABU QATADA
SC/15/2005

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

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MR E FITZGERALD QC and MR D FRIEDMAN (instructed by Messrs
Birnberg Pierce & Partners) appeared on behalf of the
Appellant.

MR ANDREW O'CONNOR (instructed by the Treasury Solicitor)
appeared on behalf of the Respondents.

MR ANGUS MCCULLOCH (instructed by Special Advocates' Support
Office) appeared as Special Advocate.

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RULING
(Approved)

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MR JUSTICE MITTING:

1. In a decision promulgated in February 2007, this appellant was adjudged by the Commission to pose a continuing and serious risk to national security and to be at risk of absconding for reasons set out in a very detailed judgment.
2. Last month his appeal to the Court of Appeal was allowed on the basis that the Commission had, on its findings of fact, misapplied developing law on the issue of safety on return.
3. In its judgment, in paragraphs 45 and 51, the Court of Appeal recorded in summary form the Commission's findings on the issue of whether or not he faced a real risk of being retried on evidence which had been obtained by, as the Court of Appeal put it, torture or, as the Commission put it, ill treatment, which would be contrary to Article 3 in a Convention country.
4. Counsel for the Secretary of State made a concession which is the subject of some dispute as to its precise terms, but, as recorded by the Court of Appeal in paragraph 45, it is that, if it was clear that a trial would take place

on the basis of evidence obtained under torture, that would involve a flagrant denial of justice.

5. On that basis, the Court of Appeal allowed the appeal and observed in these terms, "Therefore ... SIAC's decision dismissing his appeal against the deportation order must be quashed and an order allowing his appeal be substituted for it".
6. The Secretary of State applied for permission to appeal from the Court of Appeal on grounds which we have seen and read, but the Court of Appeal has refused permission to appeal. There is a petition to be lodged tomorrow to the House of Lords for permission to appeal.
7. When we read the judgment of the Court of Appeal and, in particular, the concession made by counsel for the Secretary of State, our initial view was that the prospects of petitioning the House of Lords successfully and, if succeeding in the petition, of appealing were very poor, but, having read the Secretary of State's grounds and heard submissions from Mr O'Connor, we now accept that the Secretary of State has at least got arguable grounds upon which to petition and, if permission is given, to argue an appeal to the House of Lords.

8. The legal position is as follows. Sub-paragraph (2) of paragraph 2 of Schedule 3 to the Immigration Act 1971 provides: "Where notice has been given to a person in accordance with regulations under section 105 of the Nationality Immigration and Asylum Act 2002, notice of decision, of a decision to make a deportation order against him and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order". "Pending" means "until". Thus, the existence of a notice of a decision to make a deportation order against an appellant provides the legal foundation for the exercise of the power to detain. Despite the fact that the Court of Appeal has allowed his appeal against the Commission's decision, the notice of the decision to make a deportation order has not been quashed. It remains in existence, therefore, there is the legal power to detain.

9. That has two consequences. First, notwithstanding the success of his appeal, it is still legally permissible for the Commission to refuse the application for bail and to order the continued detention of the appellant. Secondly, if the Commission does decide to admit him to bail, it is

not, as a matter of law or by close analogy with legal provision, required to admit him to bail on terms that do not deprive him of liberty under Article 5. We are not, in other words, constrained by the restrictions upon a non-derogating control order.

10. Those considerations do not mean that the Commission can simply ignore what has happened in the Court of Appeal. The fact is that, as of now, the appellant has succeeded in his appeal, subject only to the possibility that the House of Lords may grant permission on the Secretary of State's petition and may allow an appeal. He has won and would be entitled to be released from immigration detention. If there were no appeal and the Secretary of State did not withdraw the notice of intention to deport, then proceedings for judicial review of her decision to withdraw the notice could be brought and would be unanswerable. Accordingly, the fact that the appellant has succeeded in his appeal is of very great significance. We do not repeat the phrase adopted in the Libyan cases of observing that this appellant's continued detention is on the cusp of legality, but it is not far off it.

11. For reasons which it is not necessary for us to set out extensively, we are satisfied that the Commission's

conclusion reached in February 2007, that the appellant represents a continuing and significant risk to national security and that there is a risk of absconding, requires to be revisited. We accept it. We accept that the risks on both counts are current and significant.

12. In the light of the history of the litigation, the next question which we must address is whether or not it remains a proper response to order the continued detention in prison of the appellant. We have reached a conclusion that it is not necessary, nor would it be right, that he should remain in prison. For the reasons which we have given we do not regard ourselves as fettered by Article 5 considerations in setting the terms of bail. Given the risks that he poses, which are, as we have observed, continuing and significant, the terms upon which we are prepared to admit him to bail are stringent. There will be a 22-hour curfew and there will be a full package of restrictions upon his ability to communicate with the outer world and, in particular, upon those with whom he may meet and converse. We will entertain submissions as to whether or not the two hours of liberty permitted should be taken in one go or divided into two periods of one hour. These and all other matters of detail we will deal with at or shortly after two o'clock on the week

after next if there are matters of concern to the Security Service which need to be investigated before detailed terms are set.

MR O'CONNOR: Perhaps I could just indicate that there certainly are such concerns and practical considerations. With the best will in the world, it seems unlikely that we would be able to put before the Commission a proper response this afternoon.

MR JUSTICE MITTING: There may be some matters like whether the period of liberty should be broken up upon which it is possible to make submissions. Can I just indicate that we will adjourn any further consideration of this matter today until after I have dealt with the other matter, but I anticipate that the setting of detailed terms and conditions will have to wait the elapse of several days at least.