

Date of Judgment: 28th January 2005

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

The Honourable Mr Justice Ouseley

Dr H H Storey

Mr J Daly

Mahmoud Suliman Ahmed Abu Rideh - APPELLANT

and

Secretary of State for the Home Department - RESPONDENT

For the Appellant: Mr B Emmerson QC

Instructed by: Ms G Peirce, Birnberg Peirce & Partners

Special Advocate: Mr N Blake QC

Instructed by: Mr S Trueman, Treasury Solicitor

For the Respondent: Mr J Eadie, Ms K Stern

Instructed by: Ms S Nasser, Treasury Solicitor

OPEN JUDGMENT

1. Abu Rideh has applied to SIAC for bail under section 24 of the Anti-terrorism, Crime and Security Act 2001. The Secretary of State issued a certificate in respect of Abu Rideh, under the provisions of Part 4 of that Act, as a suspected international terrorist. This led to his arrest and detention on 19 December 2001. He is detained, currently in Broadmoor Special Hospital, following his transfer there from Belmarsh in July 2002, under sections 48 and 49 of the Mental Health Act 1983. His appeal to SIAC was dismissed on 29 October 2003 by a Panel presided

over by Collins J. His certification as a suspected international terrorist has been reviewed and upheld on two subsequent occasions by SIAC, most recently on 15 December 2004. He made no submissions for the purposes of those reviews.

2. This application for bail was lodged on 2 November 2004, following the withdrawal of an earlier application which had sought his transfer to a different hospital. The current application seeks his release to his home on strict conditions, comparable to those in place in the case of G, another certificated suspected international terrorist who was granted bail by SIAC effective from May 2004.
3. It was agreed that the position of Abu Rideh under the Mental Health Act 1983 was no bar to the grant of bail. If SIAC granted bail, the authority of the Secretary of State to detain him would cease as he would no longer be a person detained under Schedule 3 to the Immigration Act 1971, and that was the basis of the power to order his transfer to detention in Broadmoor.
4. The power of SIAC to grant bail to someone whose certificate has been upheld, which was at one time disputed by the Secretary of State, is not now in doubt, at least insofar as it is necessary to do so to prevent a breach of Articles 3 or 8 ECHR; see paragraphs 19 and 20 of the Commission's judgment in G (Collins J, Mr Barnes and Mr Daly), promulgated on 20 May 2004. This sets out the history of the Secretary of State's attempts to appeal against the decision to grant bail to G, and the concessions which the Secretary of State had to make during his arguments.
5. In G, the Commission also held that the power was wider than that. In paragraph 26, it said:
- 6.

"It has at all times been recognised by the respondent that, even if he considers that a person is a suspected international terrorist, he must only detain that person if it is proportionate so to do. That will no doubt usually be a relatively easy decision. But an individual's circumstances may change. Although he remains subject to certification, detention may not be proportionate. In such a case, the need for a provision enabling a release from detention is obvious. Bail is that provision."

7. It continued in paragraphs 28 and 29:
- 8.

"28. Rehman establishes that great weight and perhaps deference should be accorded to the views of the Secretary of State on what activities amount to a danger to national security. He is the primary decision maker in this area and his views will usually prevail. Mr. Emmerson submits that a decision whether it is

necessary or proportionate to keep a person who is a risk to national security in detention is not directly covered by Rehman. There are, he submits, four steps. The first, which will usually be answered in the appeal, is to determine what is the risk. In answering that question, due deference will be given to the views of the respondent. Secondly, the question arises whether, notwithstanding the conditions which may be imposed, the risk remains. Again, there is to be an appropriate deference to the views of the respondent. They must be accorded due weight. Thirdly, the Commission must decide what are the effects of the detention on the detainee. That is a factual decision for the Commission and no deference is appropriate. Fourthly, the answers to the second and third questions must be balanced by the Commission in assessing whether detention remains proportionate. That is, submits Mr. Emmerson, a primary decision for the Commission, having given all due weight to the views of the respondent of the continuing risk occasioned by the detainee.

29. In our judgment, Mr. Emmerson's analysis is correct. Parliament has entrusted the Commission with the task of deciding whether bail should be granted in any particular case notwithstanding that the respondent may object. We do not accept Mr. Burnett's argument that our obligation to give deference to the respondent's views requires us to limit the grant of bail to a case where a breach of the Convention would otherwise occur. But we do recognise, and we always have recognised, that bail will only be granted in the most exceptional circumstances. Thus, in a case such as this, it would in our view only be appropriate to consider granting bail if we were satisfied that a result of not granting it would be an overwhelming likelihood that the detainee's mental or physical condition would deteriorate to such an extent as to render his continued detention a breach of Article 3, because inhuman, or of Article 8, because disproportionate. The imminence and predictability of any such breaches are obvious relevant factors."

9. Although the Commission did not think that Article 3 had yet been breached, it thought that such a breach would occur and it emphasised the exceptional nature of G's condition and the deterioration in his mental health over his time in detention.
10. The Commission's approach in G had been foreshadowed in its "generic" judgment in the first ten detainee appeals heard. In paragraph 27, it said:
- 11.

"If the Commission were of the view that an appellant fell within the scope of section 25(2)(A) and that at the date of certification there were no reasons why he should not have been certified but that for some other reason he should now be released, the bail provisions would provide the mechanism. The appeal is against

certification rather than against detention as such. It would be possible for the appeal to be dismissed, and yet for the disproportionate nature of the detention in all the circumstances to be redressed. This would, of course, be the subject of submission by both sides, in particular as to the conditions which might be very stringent."

12. This application is expressly made on the basis of the particular circumstances of this Applicant and it was not based on the recent House of Lords decision on the derogation issue; [2004] UKHL 56, 16 December 2004. The implications of that decision were agreed to be for later determination. There were, however, a few references to passages in the speeches on proportionality which were considered to be relevant to this limited approach.
13. In its open judgment on the Applicant's certification appeal, the Commission pointed out that much of the material upon which the Secretary of State relied in his case was presented in closed session. However, the main points which the closed material supports relate to the allegations, albeit general, of which the Applicant was aware. The Commission summarised the position as follows:
 14.

"The central allegation is that he has been involved in fund raising and distribution of those funds for terrorist grounds with links to Al Qa'eda. It is also said that he has procured false documents and helped facilitate the movement of jihad volunteers to training camps in Afghanistan. He is said to be closely involved with senior extremists and associates of Osama Bin Laden both in the United Kingdom and overseas. His case is and has always been that he is concerned and concerned only with welfare projects, in particular a school in Afghanistan for the children of Arab speakers there and projects such as construction of well sand provision of food to communities in Afghanistan. He has also raised money for refugees from Chechnya. Any contact with so-called extremists has been in that context and he had no reason to believe that they were terrorists or were interested in terrorism."
15. The Commission was aware of the Applicant's mental state as at the time of its hearing. It commented that imprisonment in Belmarsh had seriously affected his mental health, but that it was also "clear that he is capable of giving the sort of assistance" to terrorist groups which he had been alleged to have given "and that his mental condition will not affect that capability".
16. The Commission was satisfied that, making all allowances for his mental state, the Applicant was often evasive and vague, and admittedly told lies in relation to his movements in the 1990s. His case was difficult to follow or to accept in relation to his distribution of funds raised and he was vague about what happened to them. His explanations of who were the well known terrorists whose children were at the school which he supported were vague. His views about Jews and the

danger they posed and the attempts by the West to destroy Muslims were said to be delusional, but as the Commission pointed out, these were delusions shared by other extremist radical Islamists. They are, in reality, part of their motivational force.

17. The appeal was dismissed and the certification was upheld then and on the two reviews.
18. The basis of the application was the effect which detention first in Belmarsh and later in Broadmoor had had on the Applicant, the longer term effect which continued detention would have on his ability to function independently of a hospital institution the longer he remained there, the impact of his detention on his future ability to carry out what he was alleged to have done and the control which strict conditions of bail would bring to any resumption of those activities.
19. Bail was opposed because it was thought that the Applicant would resume at least some of his former extremist activities and that conditions of bail could not prevent the risk which the Commission had concluded he posed from being incurred. It would not practically be possible to prevent him from absconding; there was a significant risk that he could resume his activities from home and be provided with communications and computer equipment which the authorities would not always be able to locate.
20. We heard evidence from Dr Payne, a Consultant Forensic Psychiatrist at Broadmoor, in addition to reading his various reports of which the latest was dated 4 October 2004. He had been involved with the Applicant from the first point at which the Applicant's transfer there had been suggested and was his RMO at Broadmoor. The Report describes the history of family mental illness and his mental problems as a young man in Palestine. Since his arrival in the United Kingdom in 1995, he had received psychiatric treatment as an outpatient. His episodic outbreaks of anger, shouting, damaging property, tearing his clothes and harming himself had led to his referral; a variety of medications had been prescribed but he had not taken them as he should and he often failed to attend the outpatients' clinic. He was diagnosed, in part on the basis of what happened to him in Palestine, as suffering from PTSD. His wife had described him as sitting in the dark and rarely going out. Certain news items connected to the Middle East generated a state of hyper-arousal. One incident had led to him being considered for sectioning but he had not been assessed as suffering from mental illness.
21. The report described his rapid deterioration after his detention in Belmarsh. He became aggressive, confrontational, refused medication and began to refuse food and liquids. Dr Payne, to whom he was referred, concluded that although he was suffering from a mental illness in the form of PTSD, it was not of a degree which warranted his being detained in Broadmoor. The Applicant's mental problems continued and his condition worsened. Dr Payne diagnosed him as having a personality disorder with features of histrionic, emotionally unstable and dependent types. His difficulties were certainly exacerbated by his incarceration, but as he was not suffering from a psychopathic disorder within the Act, his transfer was not recommended; instead Dr

Payne though that he should be released on bail to receive either outpatient treatment or treatment as a voluntary patient at a local psychiatric hospital.

22. However, the transfer was made because of two contrary opinions from Dr Cumming and Dr Parrott. They thought that he was suffering from a mental illness which made it appropriate for the Applicant to be detained in Broadmoor. Once in Broadmoor, there were a number of incidents of agitated and disturbed behaviour, including attempts at harming himself; he has frequently required seclusion. Over time his relations with staff and other patients improved, although there are still outbursts as a result of news items and what he feels are racist policies toward Muslims. He is having therapy to deal with his anger. A risk assessment concluded in 2003:

23.

"His history was indicative of long-standing severe behavioural disturbance, which included self-harm, some less serious interpersonal aggression and emotional distress in those who were witness to his behaviour. It was considered likely that such behaviour would continue to be a significant aspect to his presentation although there was some evidence that consistent management could have a positive impact. There were a number of positive factors that would reduce the risk of future violent offending; his strong family ties and the lack of a history of substance misuse. It was concluded that in clinical terms he would not be considered a high-risk patient in relation to violent offending."

24. In January 2004, the Mental Health Review Tribunal concluded, having heard the conflicting opinions of Dr Parrott and Dr Payne, that the Applicant was suffering from a mental illness which made his detention in a mental hospital appropriate. It is not necessary for the Commission to become involved in the correctness of the different opinions. We note the comment of the MHRT:

25.

"While the patient could, if he were not a prisoner, probably receive the treatment he requires without being detained in a hospital, the fact is that no such regime can at the present time be implemented. If he were discharged he would be returned to prison where, we are satisfied, his mental and physical health would rapidly and seriously deteriorate. Accordingly the Tribunal is satisfied that it is necessary for the patient's health and safety that he should receive such treatment (as a detainee in a hospital).

26. A social circumstance report, prepared for the MHRT, spoke of the Applicant becoming rather institutionalised in his behaviour. At that time, he preferred to stay in a hospital as an in-patient

before returning to live with his family. He was in regular telephone contact with his wife and she, sometimes with the children, visited him in hospital. His wife was a trained teacher who spoke fluent English; they have five children aged between three and nine years.

27. Dr Payne's Report recounted the various case conferences which had been held in Broadmoor to consider this patient, and an interview at which the Applicant had become more ready to acknowledge that his problems included anger, distress and impulsiveness, behaviour which had distressed his children.

28.

"As an adult, particularly since arriving in the UK in 1995, he has shown features of a personality disorder characterised by emotional instability, episodes of self-harm, poor impulse control, a low tolerance to frustration, egocentricity, an exaggerated expression of emotions, a tendency to be easily influenced by circumstances, persistent and pervasive feelings of tension and apprehension, a restriction in his lifestyle because of the need for physical security, avoidance of social and occupational activities and marked proneness to blame others for his behaviour. His personality disorder has features particularly of emotionally unstable, histrionic and anxious (avoidant) types. Whilst in the community his personality disorder was not associated with any seriously irresponsible or abnormally aggressive behaviour"

29. He did not have a psychopathic disorder as statutorily defined. His generalised difficulties as a child, his traumatic experiences in the Middle East and his treatment by the mental health services in the Middle East did not warrant a diagnosis of mental illness.

30. In a passage to which Mr Eadie attached importance, Dr Payne rejected part of the thinking which underlay the contrary opinions of Dr Parrott and others for this reason:

31.

"Despite the opinions of others, particularly Dr Parrott and Professor Mawgoud, I do not believe that he has a psychotic illness, such as schizophrenia or schizoaffective disorder. This diagnosis has been based on his report at interview of auditory hallucinations, persecutory ideas and passivity phenomena, and should be seen in the context of his wish to remain in psychiatric hospital rather than return to HMP Belmarsh."

32. Dr Payne repeated his view and that of the clinical team at Broadmoor that he was not detainable under the Mental Health Act. His physical and mental health had improved since his transfer, but he continued to experience significant psychological difficulties there; suspicion and a lack of

trust of staff, low mood and episodes of self harm. There were also episodes of suicidal thoughts, anger, damage to property and occasionally to staff. The report continued:

33.

"These difficulties are perpetuated by the institutional regime. His level of suspiciousness means that it is difficult to engage him in psychological therapy to address his difficulties while he is detained and, in addition, his tendency to externalise blame for his psychological difficulties has been exacerbated and he often states that he feels his anger is something that he is unable to control. The longer he remains in psychiatric hospital the more likely he is to become more dependent and institutionalised. His psychological difficulties are, in my opinion, worsened by both his continued indefinite detention without trial and his placement in a locked institution. I would therefore support his release on bail with the appropriate safeguards in relation to the concerns about national security. Although any restrictive bail conditions would be likely to also have a detrimental effect on his mental health it is my opinion that these effects would be less than those he currently experiences in Broadmoor Hospital. In addition, it would mean that he would have to take more responsibility for managing his psychological difficulties and he would be provided with care and treatment in the community under the provisions of the Care Programme Approach (CPA) and the requirement to provide after-care under Section 117 of the Mental Health Act 1983."

34. In oral evidence, Dr Payne agreed that it was his assessment that the Applicant was not telling the truth about some of his symptoms and said that the untruths were told so that the Applicant would not have to go back to prison. It was the significance of the symptoms about which Dr Payne thought that he was telling lies which underlay the difference in medical opinion. These were the claims to hear voices. Dr Payne also said that there had been auditory hallucinations when the Applicant had refused food in Belmarsh and had become seriously underweight.
35. Dr Payne said that Belmarsh had been severely damaging and that in Broadmoor the Applicant's condition had been affected by the fact of indefinite detention without trial, subject to the regime of a high security hospital. He was always prone to low mood, episodes of self harm, agitation and anger. The Applicant attributed his problems to the detention rather than to the other problems which he had and that affected the effectiveness of psychotherapy.
36. The longer the Applicant was detained, the more dependant and institutionalised he became, and "de-skilled" in coping in the community. The Applicant was now expressing concern about his ability to cope in the community and whether he would be better going home as opposed to another hospital.
37. The Applicant would find that the conditions of house arrest were difficult to cope with, and

there were similarities to the restrictions faced in detention. But the differences between the regime in Broadmoor and house arrest would still be significant for his mental health and day-to-day functioning. The regime at Broadmoor was designed to deal with those with serious mental illnesses, and those who had committed serious offences; home would be better for his day-to-day functioning than that. But with the family, and the need to function on a day-to-day basis, he could cope; although if Dr Parrott's diagnosis were correct, he would find it more difficult. Although there were no guarantees that he would comply with the conditions, there was a reasonable chance that he would, in spite of his impulsiveness. Overall, his mental health would improve, and would do so even if Dr Parrott's diagnosis were correct, in view of the changes which could be seen particularly over the last six months in Broadmoor. Incidents with the staff had reduced. This suggested that he had the ability to cope with restrictions and his family would help. His condition had improved considerably in Broadmoor, but was still worse probably than it had been before he went into Belmarsh.

38. He would continue to need medical treatment through care from the local mental health team, monitoring, medication and home visits. These would be once a week or fortnight. It was not possible to predict whether he might require voluntary or involuntary admission at some stage. He would lack the twenty-four hour care he received at present, and he continued to require a lot of support but he had ambivalent relations with the staff anyway. Dr Payne thought that the Applicant would comply with the requirements for treatment because he did so at present. He would be able to control compliance with treatment so as to stay out of Broadmoor.
39. Dr Parrott produced a report dated 29 November 2004. She too is a Consultant Forensic Psychiatrist. She had interviewed the Applicant on a number of occasions, the most recent being in October 2004. She had also visited his wife at home on three occasions recently. She had discussed the case with those responsible for the Applicant at Broadmoor and had had access to the multi-disciplinary file.
40. The history which she provides is different in detail from that provided by Dr Payne, but not in its essential features. In particular, what she describes is the rapid and significant deterioration in his condition in Belmarsh. She records specifically his sense of hopelessness there at his separation from his family. He also refused to accept the help offered to him in Belmarsh by the small group of prisoners who had been attempting to support him. She concluded about his condition in Belmarsh:

41.

"I was of the opinion that Mr. Abu-Rideh had a depressive illness and noted that periods of agitation and abnormal experiences might relate to this mood disorder, post traumatic stress disorder or longer standing psychotic illness and that further assessment was required. I considered him at risk of suicide and physical deterioration and to be in urgent need of treatment as an inpatient. In view of this, I

made a recommendation for transfer under Section 48 of the Mental Health Act on the 4th July 2002."

42. By December 2003, she reports that the Applicant was telling her that he felt "ok for sustained periods". He appeared stable in mood although he said that he could still become angry. He was eating and sleeping better. He had improved considerably physically, because his refusal of food and liquids had caused a dramatic weight loss in Belmarsh. His wife told Dr Parrott that she felt that he had gradually improved at Broadmoor, and that improvement was associated with his taking medication. His wife's most recent view was that that improvement had not been sustained and that he had not returned to the person he was before his detention. He felt a sense of hopelessness. She needed him at home and understood what made him difficult.
43. At the latest interview, Dr Parrott said that he had appeared pleasant, stable although saying that he was at times despondent and angry. He was eating well. He was fearful of the Government believing that it was trying to kill him or that Zionists were. He continued to experience voices, as he had done for many years. He had unescorted parole in the grounds but did not like to use it because something told him to stay in his room.
44. She remained of the view that the Applicant had a primary diagnosis of schizo-affective disorder, depressive type, which was a major mental illness which usually responded to appropriate treatment. Dr Payne's option was a legitimate alternative view and it was not uncommon for a diagnosis of personality disorder and mental illness of this sort to be made. He appeared also to suffer from PTSD.

45.

"It is clear that Mr. Abu-Rideh behaves in a seriously challenging and melodramatic manner when faced with frustrations and that this occurs at home as well as in prison and hospital. This form of reaction can develop as a form of secondary handicap associated with mental illness or as an aspect of abnormal personality."

46. Like Dr Payne, she agreed that he would deteriorate if he were remitted to prison, where the available treatment could not mitigate the impact of the prison environment. She concluded:

47.

"Mr. Abu-Rideh is agreeable to psychiatric treatment and if he were bailed to his home address I am currently of the view that he would engage with an appropriate community treatment programme. I understand Dr. Payne will be discussing this further with his community counterpart in the West London Mental Health Trust."

48. Dr Parrott agreed in general with Dr Payne on many issues. First, the detention in Belmarsh had led to an extremely serious mental health condition for the Applicant, which had significantly improved since his transfer to Broadmoor.
49. Second, she accepted that indefinite detention in a high security hospital creates considerable problems and although there was not much research evidence she thought it reasonable to defer to what Dr Payne said about the effect of indefinite detention on the Applicant. She thought the problem arose, although there were many in Broadmoor who were detained indefinitely, from the removal of goals towards which the detainee could work. There were other areas where the indefinite nature of the detention would remove an important part of the care planning process, such as hope and improved behaviour. However, people did improve in hospital when there indefinitely but it was difficult to isolate the effect of detention from the effect of the illness. He did have a history of mental illness outside the United Kingdom.
50. Third, the Applicant's mental health would be improved outside Broadmoor at home where his wife had proved an effective carer and devised mechanisms for coping with his outbursts. He would need treatment which could be daily and include assertive outreach.
51. Fourth, although if Dr Payne were right about his personality disorder it would be less likely that he would comply with the bail conditions, she thought that he would more probably than not comply.
52. There were two other reports to which reference can briefly be made. Dr Abou-El Fadl, an Arabic speaking consultant psychiatrist, consulted by Dr Payne concluded in October 2003 that the Applicant suffered from recurring depressive symptoms with an underlying histrionic and dependent personality whose case could be managed in a normal psychiatric unit. Professor Mawgoud, another consultant psychiatrist, consulted by the Home Office, concluded in June 2003 that Dr Parrott's analysis was correct and like her that the Applicant would be better off outside Broadmoor in a medium secure unit; a high security hospital did not provide the right environment and he was disadvantaged by the mixing of different types of offenders.
53. Mr Emmerson, followed by Ms Peirce, submitted that every passing day made detention less proportionate and more disproportionate. Any remaining risks could be ameliorated sufficiently within the confines of the bail conditions. He drew support from comments in the speeches in the House of Lords, and in particular from what Lord Bingham said at paragraph 35:
- 54.

"The fifth step in the appellants' argument permits of little elaboration. But it seems reasonable to assume that those suspected international terrorists who are UK nationals are not simply ignored by the authorities. When G, one of the appellants, was released from prison by SIAC on bail ... it was on condition [along

the lines proposed here] ... The appellants suggested that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so."

55. This was echoed by Lord Scott at paragraph 155:

56.

"He [Secretary of State] should, at the least, in my opinion have to show that monitoring arrangements or movement restrictions less severe than incarceration in prison would not suffice."

57. The Applicant, argued Ms Peirce, was a vulnerable individual who had declined dramatically in Belmarsh before recovering to some extent in Broadmoor, but had had there an extremely disturbed history. He was making a powerful effort not to give in to hopelessness caused by his detention. He was becoming increasingly dependant on the medical staff there. He was needed at home for his wife and five children. It was agreed that she was an important component in his stability, who would be in charge of him, a burden which she took seriously. He had never had the experience of being questioned or warned about his conduct before his detention, unlike at least some other detainees and so had never had the opportunity of modifying it so as to avoid detention. There was no evidence that he had had any interest while in detention in pursuing any harmful activities or interests. His children and his family life suffered even with the visits because there always had to be an interpreter present.
58. He would live in the four bedroomed council house with his family; his mother from Jordan was sometimes there as a visitor. There would be an immediate alarm if he broke the tag. House arrest was not an easy option. He would know of the risks as would his wife if he broke the conditions. He had never sought to conceal his activities, which he had thought were legitimate. Some of those with whom he had contact were in custody or dispersed and he would not wish to have contact with them anyway. If necessary an imam could visit him at home. He was capable of grappling with his problems. It was time on any view, with his improvement and his growing dependency, for a better form of detention.
59. Mr Blake QC, the Special Advocate, made open submissions as well as closed submissions. The latter were particularly helpful, directed to the issues of continuing risk and the effectiveness of conditions in dealing with the risks. He pursued proportionality issues.
60. We are aware that the role of the Special Advocate is seen by some, including those who are or have been Special Advocates in these particular cases, as lending support to a system of hearing or detention which they regard as unfair. We can only say that the submissions of the Special Advocate were necessary and persuasive in this case. We point out that in the absence of wholly exceptional circumstances, and regardless of any wider impact of the decision of the House of

Lords, any application for bail will involve, as part of the proportionality test which SIAC has always considered necessary, an assessment of the risks posed and the effectiveness of conditions in dealing with the risk assessed. That will probably always require closed material to be considered, and considered on a case by case basis.

61. Mr Blake, in his open submission, drew attention to the views expressed by a number of bodies about the psychological effects of indefinite detention. These were the Joint Parliamentary Human Rights Committee, the Mental Health Act Commission and the British Psychological Society. This did not help much because it was almost all confined to expressions of concern rather than evidence about the effect. We have evidence both from Dr Payne and Dr Parrott. The British Psychological Society did point out that the 2001 Act detainees had committed no offence and had not been detained because of any recognised mental health problem. It was, however, wrong to imply that there was no system of review whereas there was one for mental patients. Reviews are provided for in the 2001 Act and have so far passed without any attempt by any detainee to say anything relevant to their certification. Bail applications have been rare, but there is no statutory restriction on when they can be made.
62. The open objections to bail were that, either through absconding or at home, the Applicant would resume the activities which had led him to be detained in the first place. The conditions would not be effective. A tag could be removed and in the time for response the Applicant could use the good road and rail communications in the area where he lived to make his getaway. Continuous surveillance at both front and back of the house was impracticable and too extensive for police resources to provide. No surety would be adequate; he had had access in the past to considerable funds and to false documentation. He had been deceitful in the past about his movements and activities, as SIAC had found.
63. There was a significant risk that he could resume his activities at home without detection; he could not practically be prevented from bringing into the house communications or computer equipment, which could be concealed from effective search. Thus equipped the Applicant could resume his former activities with those of his former contacts who were still at large; he had had a wide range of extremist contacts. He had not lost his experience of providing logistic support. His wife did not really know much about what he had done because her description of his sitting in the house did not tally with what was known and accepted about his extensive activities outside the house.
64. No witness was called on behalf of the Secretary of State in the open or, initially, in the closed session. We concluded that an analysis of the continuing risks and the effectiveness of conditions in dealing with those risks required a further closed session in order that questions raised by SIAC could properly be answered. At the end of it, we pointed out that such material as we were then provided with should form a part of every response to a bail application. Likewise, we would normally expect to hear from the Applicant who seeks bail, about his current circumstances.

65. Mr Eadie for the Secretary of State submitted that, as in its decision in the bail application of G, SIAC should look for the most exceptional circumstances, identifying circumstances as restrictively as those which were present in that case and giving due weight to the views of the executive in assessing risk. This was not a case about the best clinical outcome for the Applicant but a risk assessment.
66. The open judgment of SIAC on the appeal against certification, showed that the Applicant's mental condition had not impaired his ability to engage in the activities which had caused SIAC to uphold the certificate. He was in a worse state when that finding was made than he is now.
67. He had been very successful at the activities which SIAC had found he had engaged in. The Applicant's mental state did not affect his ability to abscond although it was accepted that the more significant risk, particularly because of the pull factor of his family, was that he would resume his activities from home. His experience of false documents was relevant. He was prepared to lie to cover his terrorist tracks as SIAC had found, and had lied to Dr Payne, according to Dr Payne. This meant that there was no scope for trust as to his co-operation in abiding by the conditions proposed for bail, or in any statements which he might make about his willingness to abide by them. Resources for the complete surveillance necessary was relevant and Mr Emmerson was wrong to treat that as irrelevant or matched by savings of resources at Broadmoor.
68. The current mental condition of the Applicant was a long way below that which would engage Articles 3 or 8; and it was recognised that there were some problems inherent in lawful detention which could not engage Article 3; Kudla v Poland ECtHR 30210/96, 26 October 2000. There was no overwhelming likelihood that the Applicant's mental health would deteriorate, let alone imminently, to such an extent that Article 3 would be breached. This was not a case comparable to G's. That and not the scope for improvement at home was the test. The differences between Broadmoor and home were not so severe that humanitarian release was required. The continuing dependency and institutionalisation were relatively light compared with the imminent and severe problems facing G. The Applicant would continue to receive twenty-four hour nursing care. There were expressions of opinion about the effect of indefinite detention but little analytical support and it was agreed that in such conditions the Applicant's health had improved since his transfer to Broadmoor.

Conclusions

55. We accept that the Applicant's state of mental health was close to that of G before he was transferred to Broadmoor; but he is not now in or close to such a condition. He has improved significantly since his transfer, though it is unlikely that he is back to the condition he was in before his detention. There is no imminent prospect of suicide or of a breach of Article 3.
56. We also accept that in this Applicant's case, there has been and continues to be a detriment to his

mental health from the indefinite nature of his detention as he sees it. There is plainly a real difficulty in assessing how general a problem this is, given the lack of analytical or research based material; though the general point made by Dr Parrott as to the lack of a goal and the associated lack of hope, or sentence or release planning, is an obvious general point which others have echoed. We accept that the Applicant genuinely feels a sense of hopelessness, and that he is in a growing state of dependency and institutionalisation which is likely to make him rather less able to cope with life outside when he is released, the later that is.

57. The relevant statutory provisions are due to expire in November 2006, however, and the 2001 Act itself contains no provision for renewal. We point out that the statutory provisions, if properly characterised as permitting indefinite detention, do not contemplate perpetual detention as if he had been convicted of the most serious offences. It is therefore inconceivable that he would not be released at some point anyway, and that would be by November 2006 if there were no statutory replacement of these detention provisions. That is relevant at least to the consideration of how far it is right to allow the degree of institutionalisation to grow so that on release he is unable or markedly less able to function as an ordinary human being in the outside world. He also faces the particular problem that recovery from mental illness, as diagnosed by Dr Parrott, risks his return to Belmarsh where his condition would deteriorate again; and this perversely provides an incentive to remain ill.
58. We accept that his mental health condition could be treated and treated better were he at home, although there is a distinct possibility that he might require treatment in a hospital at some future date. Treatment, through support visits, may be daily or weekly or fortnightly. It would include medication. It would be expected that he would further improve. The restrictions which he would face at home, although they have some resemblance to those in force at a high security hospital such as Broadmoor, are different in effect because of the presence of family, the absence of the other patients with the serious illnesses which they have compared to the Applicant, and the privacy and comfort of home.
59. However, we also accept the Secretary of State's submissions that it is not the object of the power to grant bail under this Act simply to achieve the best clinical outcome for the Applicant which we can. The Applicant was and remains rightly certified under the Act as a suspected international terrorist who is on sound grounds believed to be a risk to national security. The Applicant's mental health condition is not of itself sufficient, either as it is or as it might be at home or whilst further detained in Broadmoor, to warrant his release. It is plainly not at the level referred to in the case of G, namely one in which a breach of the ECHR is imminent and predictable, which therefore by itself provided for the most exceptional circumstances so as to warrant release on strict conditions of bail.
60. That is not and cannot be the end of the matter, however confined the basis upon which the bail application was put in open. The closed submissions are relevant. The proportionality of detention in the particular circumstances of a particular applicant has to be considered, making due allowance for the Secretary of State's assessment that risks to national security continue and

of their degree with bail conditions imposed. Proportionality is not confined to breaches of Articles 3 and 8, but in the context of this Act and detention without trial, also looks to the continued proportionality of detention as a response to the risk, with bail conditions. The effect of the mental health condition of this Applicant is relevant to that analysis, even if not by itself sufficiently compelling. It is necessary to consider the effect of his mental health condition on the risk which he continues to pose and on the effectiveness of conditions of bail in controlling the risks sufficiently to justify the grant of conditional bail. In so doing, the effect of his experiences in detention on his will and ability to carry on his former activities is material.

61. The first concern of the Secretary of State is that the Applicant will abscond; in reality the fear is that he will abscond and covertly resume his activities, his whereabouts unknown. Even if he left the country, he would retain a familiarity with false documentation and sufficient contacts to enable him to return surreptitiously and remain under cover. However, the Secretary of State through Mr Eadie recognised that this was the lesser fear for a variety of reasons; the greater fear was of a resumption of activities from home.
62. We regard there as being only a very limited basis for this concern. The Applicant is plainly aware of his need for medical treatment which includes medication. He wants to be with his family and they with him; his children are or soon will be at school. It was not contended that they would all disappear together and it was accepted that both his desire to be with them and their desire to have the father and husband at home would constitute a powerful restraining factor, discouraging any planned or impulsive absconding. His mental condition, particularly if untreated, would reduce his ability to remain hidden with the restrictions, tensions, patience, self-denial and self-control which that would demand. His past activities did not require that of him and he did not demonstrate those qualities to any marked extent. He would also know that were he to abscond and later come to the notice of the authorities, he would be returned to Belmarsh or Broadmoor. We do not consider that the risk of absconding successfully to resume activities is sufficient to warrant continued detention.
63. The real concern is that he would at some stage, perhaps immediately and sooner rather than later, resume at home some of the activities which he undertook before his detention. In particular, concern was expressed about what he could do with communications equipment and computers which it might be difficult to locate in the house. These could be smuggled in, in breach of the bail conditions.
64. We should add that we have had the advantage of seeing open and closed evidence in relation to this and to other issues, which the House of Lords did not have or at least apparently consider, which makes it easier to see the substance and justification for the Secretary of State's concern that impressive looking conditions of bail may not always be as readily enforced as the House of Lords seems to have supposed.
65. The Applicant was and remains in our view committed to the extremist views, delusions even,

which motivated at least some of what he did before his detention. We continue to accept that his mental state does not of itself inhibit his capacity to resume those activities and note that, even with his pre-existing and long-standing condition, others were willing to work with him. However, we take the view that his will to engage in those activities will have been affected to some extent by the time in detention, and his experiences there, aware to some extent as he is of the deterioration in his condition which that caused. His knowledge of his needs, his desire to avoid a return will all affect how he would behave if released on conditional bail. We derive this from the psychiatrists' description of his behaviour and attitudes over his time in detention. There is some force, but not as much as she would attribute to it, in Ms Peirce's point that he was not the subject of disruptive interviewing or warning about his activities before he was detained. Had he known what risks he was running and the seriousness with which what he did was viewed by the authorities, he might have modified what he did so as to reduce his activities, rather than simply to make them more covert.

66. His wife and family are important too in this. It is not suggested that his wife was a participant, knowingly or unwittingly, in his activities; but she does not appear to have followed closely what he did, because her picture of his life as one commonly alone in the dark without a network of associates is inconsistent with other evidence, which SIAC accepted, about him. We accept, however, that she has a particularly strong interest in what he might do at home, not just because of his mental health condition, but because she needs him at home to be with her and the five children as they grow up. Her intervention in the event of his breaching a condition, not necessarily by way of telling the authorities but by way of taking action herself to stop it, is of considerable importance here. She would have a real interest, if forbidden equipment were brought in or used, in trying to stop it. That is not to say that he would not try to conceal or disguise what he was doing from her, but rather to acknowledge that there would be someone in the house who would seek to stop it and now would know to ask what he was up to. It also reduces the risk of her or the children being used knowingly or unknowingly to bring in forbidden equipment.
67. We conclude that for those reasons there would probably not be a rapid resumption of such activities as could be resumed, that the desire to do so would be resisted for at least a while and that the Applicant would receive support in trying to fill his time in legitimate ways. We cannot say that the Applicant would not be driven by his own views at some point to seek to make contact with extremists to offer what he might or might not think was legitimate help. We cannot say that messages of encouragement to do so could not be passed to him. The certificate remains correctly in force. But there would be, we believe, some time before that happened if it were to happen and that his wife would play a large part in reducing its likelihood.
68. The significance of that happening, were it to do so, is reduced by further considerations. Certain activities depended on face to face meetings, outside the house, including fund-raising at mosques. Those would be fairly readily prevented by the bail conditions. Others, including procurement with false documents, would in large part require outside physical contact which the bail conditions could prevent. If there were a reasonable suspicion that his wife had assisted or in

future might assist in that, the risk would be much greater; but that is not how we judge matters at present.

69. We do accept that there are some activities which would only require equipment that could be smuggled in for him to resume them and that there might be difficulties in locating it. We regard it, as we have said, as unlikely that his wife or children would knowingly assist in this respect. Again much depends upon the willingness of his wife to resist those activities, which she can only do if she is aware of them. This has not been obvious in the past. We accept that there is a risk there, but we take the view that that is now reduced because his wife does know what is prohibited and what the price for breach of bail conditions can be. We accept that she is more likely to be on the look out than she was; she may not have been aware that there was anything to look out for in the past.
70. There is a perfectly understandable concern that his knowledge, expertise and contacts for his logistical support activities can be passed on or revived with communications equipment, were he to obtain some and use it covertly or with the connivance of his wife. He could also alter the focus of his activities, by type or area or contact. In assessing the risk which might be run with such equipment, we take into account that the Applicant now knows both what views the authorities take of certain activities and contacts, and what the consequences can be. This may well itself have some inhibiting effect on the degree of risks which the Applicant may run. His operational effectiveness will have been reduced to some extent also by the fact that some of those with whom he was in contact are now out of contact for a variety of reasons, others would face difficulties in making contact and, because of his detention and the knowledge which the authorities have of him, others may well be reluctant to make contact, so as to prevent their own exposure. His contacts and activities may now be undertaken by others who have had to step into the breach created by his own detention. Some of his expertise may now be to some extent redundant, overtaken by events.
71. It would be foolish to imagine that the risk posed by the Applicant would be eliminated by the bail conditions. But we conclude that the risk would be inhibited to a significant degree, even if he were minded to breach bail conditions of the sort which were imposed on G. The risk now has to be considered in the light of the passage of time since his detention, his experiences there for just over three years, his knowledge of how what he did was viewed and how the state responded to it; he will also know the effect on him and his family, as will his wife, of a breach of condition. We take his mental health condition into account not just for its practical implications but also for the humanitarian considerations which, whilst not decisive here, assist his case. It is not irrelevant to note that he has been in detention for what would be the near equivalent of a five year sentence had he been convicted of an offence. Had he been convicted of a serious offence, he would still have been released eventually, short of a whole life sentence.
72. In the case of G, humanitarian considerations derived from the gravity of his mental health condition, compelled the conclusion that he should be released on bail. Those same considerations are not present to the same degree here. But each case has to be dealt with on its

merits. Taking the particular features of this case, balancing the diminished risks which would continue, the effect of the constraints imposed by the bail conditions and the further detention which he would face for a breach, against the effect on the Applicant of past and continued detention, we have come to the conclusion that the time has come for this Applicant to be granted bail. His bail will be reviewed every three months from the date of release so that a picture of how he is behaving can be presented to SIAC. Continued detention for this particular detainee is becoming a disproportionate response to the risk in view of other methods of control which can be put in place.

73. A further hearing of this application will be necessary for the bail conditions to be finally determined. These will need to address how medical treatment can be provided for, which will require some thought and we would hope agreement between the parties. We would wish for sureties to be taken from the adult occupants of the house in order to mark their responsibilities for the Applicant's behaviour. We use this phrase so as to include his mother, if she is there. For this purpose and so that the Commission can make its position as to their responsibilities clear to them, they should attend that next hearing, as should the Applicant.
74. This judgment should be read with the closed judgment.

MR JUSTICE OUSELEY

CHAIRMAN