SPECIAL IMMIGRATION APPEAL COMMISSION

Ref TRS/149/06

Field House,
Breams Buildings
London
EC4A 1WR

Monday, 13th March, 2006

Before:

THE HONOURABLE MR JUSTICE OUSELEY

(The Chairman)

A AND OTHERS

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Mr B EMMERSON QC and MR RAZA HUSAIN (instructed by Messrs Birnberg Peirce & Co) appeared on behalf of the Appellants.
Mr K STARMER QC and MS S HARRISON (instructed by Tyndallwoods) appeared on behalf of the Appellants
Mr R TAM (instructed by the Treasury Solicitor) appeared on behalf of the Respondents
Mr A NICOL QC (instructed by the Treasury Solicitor) appeared as Special Advocate

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J U D G M E N T

(As Approved)

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THE CHAIRMAN:

1. On the 20th October 2005 the Commission directed the Secretary of State to serve his safety on return evidence in the four lead cases by 30th November 2005. Other directions were given. The aim of SIAC was to start, if possible, dealing with the lead cases in mid-March.

2. On the 5th December 2005 the Secretary of State was directed to serve the safety on return evidence by the 24th February 2006 in the four lead cases. Further detailed directions were given and dates for hearings were fixed on the 25th April 2006 and onwards.

3. In the course of the hearings the Commission made various observations about first of all the fact that it was the arrest and detention of the appellants by the Secretary of State which at the time of his choosing triggered the appeal process, and that the timetable for the appeal process would be judicially determined and not set by the pace of diplomatic negotiations.

4. By the 24th February the Secretary of State had not served the full evidence which he would wish to do on safety on return in the three Algerian lead cases, but he has served some material which can be seen as supportive of his case that individuals can be returned to Algeria without breach of Article 3 ECHR. This evidence records the progress of diplomatic negotiations with Algeria more fully and optimistically in closed than in open, and certain assurances have been offered in two out of three lead cases. In this position, however, the Secretary of State seeks an extension of time from the 24th February to the 31st May 2006 in which to serve what he hopes will be his complete safety on return evidence. In effect this would mean that the hearings of the three lead Algerian cases and the case of G would have to be postponed on the Secretary of State's calculations, not for this purpose disputed, but if his evidence was served on the 31st May 2006 related and consequential issues such as disclosure would mean that the 3rd July 2006 case, that of K, would be the earliest hearing possible.

5. Whilst regretting the delay the Secretary of State points to the progress made, the unpredictability of the course and time of diplomatic negotiations, the illness of President Bouteflika which unexpectedly has held matters up, the disadvantage of the duplication of effort if cases were heard on one evidential basis on which the appellants succeeded but were faced shortly thereafter with a further notice of intention to make a deportation order in the light of significant further evidence.

6. The opposition to those applications is based around arguments that the detention of the appellants is now unlawful and indeed always was, because the Secretary of State never had and does not have now a reasonable prospect of success in resisting the appeals of any Algerian and certainly not of the lead three. The cases, it was said, should all be listed for hearing, the hearing should be short, and the appeals should be allowed because there was nothing of substance to be argued by the Secretary of State on safety on return.

7. The applications for an extension of time for the service of evidence on safety on return to the 31st May 2006 is refused. We do not accept in the light of what we have heard that the evidence on safety on return as the Secretary of State would wish it to be would be available by that date for certain. There are issues plainly to be resolved. The paths of diplomatic negotiations is not necessarily always smooth or predictable. The date of 31st May 2006 proffered by the Secretary of State is to some extent arbitrary and there would be in our judgment a real prospect that further extensions would be sought on the basis of the logic which leads the Secretary of State to seek the extension in the first place and so further delay would have achieved nothing.

8. The Secretary of State has in our view also had a reasonable time in which to present evidence on safety on return, and the Commission has always been clear that it, the Commission, would determine the timetables. The Commission's view is that adherence to those timetables properly set is important, and the hoped for but uncertain prospects of progress are no adequate basis for disruption to them. There is also a proper public interest in the resolution of the issues in these cases, as well as an interest which appellants have in the resolution of these cases.

9. For these purposes no distinction, I should emphasise, was drawn by any party between the position of U and the other two lead Algerian cases.

10. That deals with the position in relation to the extension of time.

11. The appellants contend that the appeals should be summarily allowed. If summary disposal of

appeals exceeds SIAC's powers, as the Secretary of State contends it would, we have no doubt but that SIAC can arrange for hearings to be listed quickly which focus on the issue of safety on return and could deal with it very quickly indeed if the arguments for the appellants were as clear-cut in their favour as the submission they make require them to be.

12. There is also before me as a Judge of the Administrative Court rather than as Chairman of SIAC, as an enabling procedural device an application for habeas corpus, lest the lack of a power to deal with the lawfulness of detention in SIAC deprived the appellants of the opportunity which was their due. The appellants rely on the situation in their cases as revealed by a combination of past Secretary of State statements, a lack of intention to deny the thrust of NGO reports on Algeria under Article 3 and a lack of completion of that which they contend the Secretary of State thought essential for safe return of the appellants. It is not necessary to enter the debate as to whether those arguments characterise the Secretary of State's position with precise accuracy; that may be a matter for later contention.

13. As to lawfulness of detention this point is really a consequence of the contentions as to the time in detention and prospects of success which we have had addressed to us. We shall deal first with the prospects of success, and in the light of the views which we have come to it is right that I should be brief.

14. Although the picture in open evidence is distinctly truncated by comparison with the closed evidence it cannot in our view now be said that the Secretary of State has no realistic or reasonable prospects of showing that there is no real risk to these three appellants if they were returned to Algeria through a breach of Article 3; or, putting it the other way round, the three appellants cannot show that they are certain to succeed on Article 3 and that the Secretary of State has no arguable case in that respect. Whatever the position was when the hearings and the timetable where fixed, to which I shall return, it is plain that the Secretary of State has a proper case to be heard. It cannot simply be dismissed as obviously hopeless. There are obvious problems in his way but their resolution is a matter for argument in at least the three lead cases. They will accordingly proceed to hearing on the timetable fixed. Again I emphasise that it is relevant that the cases raise other issues which in the interests of the public and the appellants should be resolved. Those relate to risk to national security and non-Article 3 ECHR issues.

15. What the position is in consequence of SIAC's decisions on those three cases can only be considered when decisions have been reached and in the light of the situation then arising. We do not propose to make Rule 40 rulings in respect of further safety on return evidence from the Secretary of State. It will be for him to seek any extensions of time if he wishes to put more in and it will be for SIAC to decide

what to do, and in particular it will be for the relevant constitutions of SIAC to decide what to do if material arrives close on or during the hearing, or indeed before judgment.

16. As to lawfulness of detention looking at the exercise of the power rather than the existence of the power - although that does really matter in the result - the position in our judgment is as follows.

17. For the reasons we have given we consider that the detention and hence the imposition of bail terms, is not unlawful by reference to the prospects of removal. The question is not the same as, though it may be allied to, the question of prospects of success for the appellants in the appeal. But seen simply in terms of prospects, the negotiations have progressed over time in a manner favourable to the Secretary of State's case and there is a clear political will to continue them in a way in which the Secretary of State considers appropriate. They have not stalled or run into the sand. It is clear, taking the open and closed evidence in the round, and taking the case of Yusef as an example of what constitutes reasonable prospects, the position is considerably more advanced and favourable to the Secretary of State here, and is at least comparable to that prevailing when Mr Justice Sullivan and Mr Justice Collins held that the detention there was lawful, and it is not at all comparable to that at the end when Mr Justice Field held detention had become unlawful.

18. I should add that when examining the lawfulness of detention from the start that I see nothing to say that the Secretary of State did not then have reasonable prospects of removal, even if had an appeal then been called on and heard straightaway, he might well have been hard placed successfully to contest it. But that latter observation does not detract from the correctness and significance of the former proposition.

19. As to the duration of detention, the reference in Hardial Singh, that is The Queen -v- Governor of Durham Prison ex parte Singh [1984] 1 WLR 704 at 706D to detention for the purposes of carrying out the mechanics of deportation, it is clear that Mr Justice Woolf did not intend to confine the lawful period of detention to mere mechanics, as the subsequent decision in The Queen (on the Application of I) -v- Secretary of State for the Home Department [2002] EWCA Civ 888, [2003] INLR 196 shows. The Secretary of State in our judgment is using all reasonable expedition in the circumstances. Those circumstances include both the national security element, and the progress of diplomatic negotiations; the concept of relevant circumstances is, as the case of I shows, very wide, though it includes the period spent in detention already, but with a focus, we judge, on immigration detention.

20. It is not possible to judge what is a reasonable period simply by reference to what has been held to be lawful or unlawful in other cases. As the case of I makes clear all of that depends on the circumstances. Six months might be excessive in one case, but three-and-a-half years reasonable in another case. A very much more prolonged period than experienced here, for example, was held in Chahal by the European Court of Human Rights not to breach Article 5.1 of ECHR.

21. Of particular importance is the fact of these appeals. The appellants pointed to the case of I to say that the fact of an asylum appeal was irrelevant there as justifying detention, but that was because whether the asylum appeal was allowed or not I could not be removed. The appellants say that there is a similar position here. But that submission is necessarily predicated on the assertion that the Secretary of State has no prospects of success in the appellants' appeals and is bound to lose. But that very assertion is itself an issue and can only be resolved in our judgment by a full merits hearing. We have not seen anything which suggests, no doubt subject to some regard being had to the way in which judicial proceedings are managed, that the period during which removal is legitimately proposed and legitimately contested in judicial proceedings can show that the limitations on the exercise of the power to detain, as expounded in Singh and the case of I, are being exceeded. Indeed, the case of I at paragraph 35 suggests quite otherwise. Nothing in the material before us persuades is additionally to revisit our existing bail decisions in principle. There are various specific matters however which we will consider, but not here.

22. So far as V is concerned that will be listed for a further bail hearing in the light of the further statements.

23. In the light of the Secretary of State's response which I seek to the representations in Sihali that bail variation will be considered and I will consider variations in the case of T.

24. Accordingly I reject the contention that habeas corpus should be granted and we reject the argument that cases should be called on by whatever means for rapid hearing and disposal by allowing the appeals.

25. we have today been asked to consider an Associated Press report and to view a recording of an

interview broadcast on Channel 4 television on Friday. The interview was between a Channel 4 reporter, Mr Blake, and Mr Toubal, a communications liaison or press officer at the Algerian Embassy in London, in which he comments on his understanding of the progress and timing of negotiations over a memorandum of understanding and monitoring. We do not propose to comment on the accuracy of the way in which the comments have been characterised in argument, nor on the completeness or precision of what Mr Toubal had to say, still less upon the weight which should be accorded to it. Much of what it relates to is in closed, but nothing in it has caused us to reach a different view on the extension of time or the merits of the cases or the lawfulness of detention; although not all of it is perhaps as supportive of the appellants' case as they suppose it to be.

26. What it has done is to reinforce the conclusion which we had already arrived at that we are right not to grant an extension of time, right to bring the cases on as timetabled and right to hear full argument on them.

27. I should add that the question of disclosure and Rule 38 issues may be influenced, but we do not know, by that interview, and in any event there may be questions that arise in respect of the evidence of Mr Oakden. To that end a transcript ought to be prepared by the parties - I see no reason why the television company should be required to do so - of that interview.

28. Accordingly those applications are in their varying ways all dismissed.

29. As indicated that leaves a certain amount of ancillary business in relation to directions, which I would now wish to turn to, if possible, in relation to those cases listed for hearing before the end of July.

30. So far as I can see the directions are complete in the case of I, U and Y. Further directions need to be considered in the case of G, A, B, H and K.
