Appeal No: SC/2/2002

Bail Application SCB/10

SPECIAL IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 22 April 2004
Date Determination notified: 20 May 2004

Before:

The Hon. Mr Justice Collins

Mr. John Barnes

Mr. J. Daly

G - Appellant

and

Secretary of State for the Home Department - Respondent

For the Appellant: Mr B Emmerson Q.C. & Mr R Husain (instructed by Birnberg Peirce & Partners, Solicitors)

For the Respondent:

Mr I Burnett Q.C.; Mr R Tam & Mr T Eicke (instructed by the Treasury Solicitor)

JUDGMENT

1. Since this application has involved consideration of the jurisdiction of the Commission to grant

bail and has attracted a considerable amount of attention and criticism from the respondent and others, we should explain the reasons for our decision in more detail than would normally be necessary. We gave a short explanation both on 20 January 2004, when we decided that we should in principle grant bail to G, and on 22 April 2004, when we decided that we would not alter that earlier decision. We granted bail on very strict terms which we will set out in due course. We have at all times indicated that what we intended to do (and what we have in fact done) was to substitute for detention house arrest. We have added to the conditions which require the applicant not to leave his home address others which prohibit him from having access to any equipment enabling him to contact any person other than his wife and child. Further, he is not allowed to have any visitors unless advance approval has been given by the Home Office. We recognise, of course, that the conditions we have imposed are not foolproof in the sense that G might be able to contact those with whom he has been involved in the past in activities which led to his certification and detention. Any such contact, however it was achieved, would constitute a breach of his Conditions of Bail and would result in a return to detention. But we have considered that the danger which G constitutes can be properly and adequately dealt with by the conditions which we have imposed. We should add that the grant of bail is for 3 months only and reconsideration based on up to date reports will be given to whether bail should be continued or revoked.

1. We should set out the history of the proceedings so far as material. G was detained on 19 December 2001 following his certification under Section 21 of the Anti-Terrorism, Crime and Security Act 2001 (the 2001 Act). He was certified because, according to the reasons given at the time, he was said to be an active supporter of the GSPC (an Algerian based terrorist group) which had links to Osama Bin Laden's terror network and his activities on behalf of the group and extremist figures in Chechnya included sponsoring young Muslims in the United Kingdom to go to Afghanistan to train for jihad. His appeal was heard in July 2003 but judgment dismissing it was not handed down until 29 October 2003. It was necessary to consider what has been called the generic judgment in a number of appeals which were heard earlier and which were designed to deal with matters which would be likely to be raised in subsequent appeals. That judgment was handed down on the same day as that in G but, as was made clear in the judgment in G, it was considered approved, and applied in G's case.

3. The panel which heard G's appeal contained two members of this panel, namely Collins J and Mr. Daly. No suggestion was made in the course of the appeal that G's mental health had suffered because of his detention nor was there any sign that his mental state was other than normal, having regard to the fact that he had been detained in a high security prison without trial for over 18 months. We now know from sight of his continuous medical record kept in the prison that there were some concerns about his mental health and that he had in May 2002 been prescribed anti-depressants. He described having heard voices and believing himself to be possessed by an evil spirit or djinn. In September 2002, there is reference to evidence of psychosis. The prison service did not see fit to pass any of this information on to G's legal representatives and so they too were unaware of any problems.

4. G put before the Commission a statement in which he denied any sinister association with named extremists or that he had provided any of the support for terrorism alleged against him. He gave innocent explanations for associations with individuals. He chose not to give evidence but to rely on that statement. It must be remembered that he was not aware of the bulk of the evidence relied on against him since it was not disclosed to him and so he was unable to deal with it or to raise any specific defence to it. Certification and so detention depended upon the Secretary of State establishing no more than a reasonable belief that G's presence in the United Kingdom was a risk to national security and a reasonable suspicion that he was a terrorist. A terrorist is defined to include a person who supports or assists an international terrorist group. Section 21(3) defines an international terrorist group as one which is: -

" (a) … subject to the control or influence of persons outside the United Kingdom, and

(b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism".

As will be apparent, the threshold is the relatively low one of reasonable suspicion. The detention is indeterminate, subject only to s.29(7) which provides that ss.21 to 23 of the Act shall cease to have effect on 10 November 2006. But detainees might well believe that unless there was by then a real change, it was likely that the power to detain would be extended.

5. In December 2003 there was a serious relapse in G's mental condition. The medical records and reports show that he was suffering from a depressive illness with psychotic symptoms including auditory hallucinations. He had expressed a belief that he was possessed of evil spirits and that MI5 was breaking into his cell and trying to kill him. He had shouted about having sex with his mother; this was a gross affront to his religion. Some of his fellow inmates had expressed real concerns about what was happening to him. His symptoms could be controlled by appropriate medication, provided that he took the medication. His condition was likely to deteriorate so long as he remained in detention with no hope of release and release on bail would be likely to improve his condition.

6. This portrait of a very sick man whose illness was being caused and exacerbated by his continued detention without trial and his at least partial ignorance of what was being relied on to detain him was derived from the evidence of the medical experts who had examined and reported on him. There was no issue between the experts which it was necessary for the Commission to resolve; the material conclusions were agreed. Professor Robbins, consultant clinical psychologist, and Director of the Traumatic Stress Service at St. George's Hospital in London, saw G in early December 2003 at the request of his solicitors, who had by then been informed of the apparent mental problems being displayed by G. He concluded his report thus: -

"It is my opinion that unless there is a significant change in his circumstances G will continue to deteriorate mentally and physically and that there is a serious risk of long term adverse consequences.

Indeed given his level of suicidal ideation there may be a serious threat to his continued survival".

7. Dr. Ratnam, a Consultant Forensic Psychiatrist, examined G on 18 December 2003. She found him to be expressing clear paranoid delusions and to be suffering from a depressive episode with psychotic symptoms (although schizophrenia could not be ruled out). She noted that his symptomatology had evolved whilst in detention and there was no doubt that his current experiences perpetuated those symptoms. He was not taking his medication as he should but was, as she put it, praying excessively. The prognosis was extremely poor.

8. Dr. Payne, a Consultant Forensic Psychologist and Clinical Director at Broadmoor Hospital, examined G because he had been informed by the Head of Casework in the Mental Health Unit at the Home Office that "his admission to Broadmoor Hospital was likely to be directed by the Home Office in early January 2004". That, incidentally, is itself a significant pointer to the extent of his mental disorder at that time. Dr. Payne's view was that G's condition could be managed in a psychiatric hospital or in the Health Care Centre at Belmarsh and he should be persuaded to take his medication. He was not a high escape risk because of physical disabilities. Dr. Payne stated 'his continued detention in a Category A prison, indefinitely and without trial is clearly detrimental to his mental health. Although his mental disorder would constitute a mental illness for the purposes of the Mental Health Act 1983 it is not of a nature or degree which would make it appropriate for him to receive medical treatment in hospital'. Dr. Payne, in an addendum to his report, stated that G's mental health would be likely to improve if he were allowed home albeit with strict monitoring, subject to arrangements being made for him to be seen by a doctor whilst at home.

9. Dr. Parrott, another Consultant Forensic Psychiatrist, was instructed by the Home Office Mental Health Unit. She discussed G's situation with Professor Robbins and the other psychiatrists who had reported on him. When she saw G, he had begun to take anti-depressant medication and she was more optimistic that he was developing a better relationship with the Health Care staff. She concluded: -

"I have been asked to comment on how much of G's condition is due to his discontinuing anti-depressant medication. I am of the view that discontinuing medication was a precipitating factor in his deterioration. However, given G's vulnerability to depressive episodes, his mental health may remain impaired within the prison environment. I have also been asked to comment on the likely effect on his mental health if he were released from prison to reside at home with conditions, which would include electronic tagging, regular reporting and ready access by the police. The prison environment is usually deleterious to mental health and improvement can be expected in an appropriate home environment".

10. Before the hearing on 20 January 2004, the doctors and Professor Robbins had been asked by the Commission to liaise with one another and see whether there was common ground. Dr, Ratnam produced a report the contents of which were not in dispute. She noted that all the Consultants had concluded, following the episodes during which G displayed florid symptoms suggestive of mental

disorder in December 2003, that he had developed a further episode of depressive illness along with psychotic features. Dr. Payne had one minor qualification, namely that when he saw G he felt that anxiety symptoms were more prevalent than psychotic symptoms. All believed that G's period in detention was likely to have been and to continue to be a contributory factor to the state of his mental health. This was because of the nature of indeterminate detention which, in contrast to prison sentences, had no clear tariffs or goals towards which the prisoner would work or aim. Along with this would be associated feelings of helplessness and hopelessness. G had previously been detained (not in the United Kingdom) and tortured which would increase his vulnerability to episodes of depression. If G took medication and heeded appropriate advice, his condition would be likely to improve, but it was impossible to know how long this would be sustained. There was no certainty about what would result if he were granted bail, but it was desirable and probably essential that mental health professionals had access to him and his mental health was kept under review.

11. The evidence persuaded us on 20 January 2004 that bail should in principle be granted. We were satisfied that we had jurisdiction to grant bail subject to conditions which would amount in effect to house arrest. In our judgment given then, we said this: -

" … there is no doubt on the evidence … and it is accepted by those representing the Secretary of State, that detention has had a damaging effect upon [G's] mental health".

We described the December episodes of aberrant behaviour and the need for him to continue to take his medication. We regarded that as a most important factor and continued: -

" … we have here someone whose detention [has created] a mental illness, and [is] prolonging a mental illness that has been created by it. That is … a most important consideration because it is not the desire, certainly of any civilised system, that detention should have that sort of effect. If it is having that sort of effect, one must look to see whether there are any sensible alternatives to detention which can sufficiently reduce the risk which detention is designed to [avoid], but to remove the effects of such detention. That is the balance that we have to try to achieve. We have to look to see whether, in our judgment, the risk, were he to be released on bail subject to the strongest conditions …. is too great and so detention must be continued albeit, it is having a continuing effect upon his health".

12. We reminded ourselves that G was in the view of the Commission a dangerous man whose continuing presence in the United Kingdom was a risk to national security. The Commission was satisfied that there was a reasonable suspicion that he was an international terrorist. The Commission had had no doubt that he had been involved in the production of false documentation, had facilitated young Muslims to travel to Afghanistan to train for jihad, and had actively assisted terrorists who had links with Al Qaida and he had actively assisted the GSPC. Of course, all those certified and detained under the 2001 Act are believed to be dangerous; they would not otherwise have been detained. But we recognise that there are degrees of dangerousness and that G was more dangerous than some. We decided in principle that the balance which we had to strike came down in favour of bail with the conditions which constituted house arrest and a bar on communicating with anyone other than approved

persons.

13. The respondent attempted to appeal against our decision. On 12 February 2004 the Court of Appeal gave an interim decision in which by a majority they concluded they had no jurisdiction to entertain an appeal. This was because the only right of appeal to the Court of Appeal in relation to a decision of the Commission is that conferred by s.7 of the Special Immigration Appeals Commission Act 1997. That is limited to a case where the Commission 'has made a final determination of an appeal'. A decision whether or not to grant bail cannot fall within those words. But the Court of Appeal offered to reconstitute itself as a Divisional Court to consider whether, notwithstanding that the Commission is a superior court of record (see s.35 of the 2001 Act), judicial review might lie. This was in the context of the submission by the respondent that (contrary to the view taken at the hearing on 20 January 2004) the Commission had no jurisdiction to grant bail in circumstances where it was not ancillary to pending proceedings before the Commission. However, the respondent changed his mind about that submission and decided not to seek judicial review. On 31 March 2004 the application for permission to appeal was formally dismissed with costs.

14. Before we considered the matter again, we suggested that there should be up to date medical evidence. We were provided with a fresh report from Professor Robbins and copies of the Continuous Medical Record from the prison up to and including 19 April 2004. By then it was noted that G was 'settled in now' and 'compliant with regime' and was assessed not to be at risk of self harm, was well mobile with crutches and was on medication for pain relief. A few days previously, it was noted that he said he "had not thought of self harming but that sometimes the 'demon' visits but he doesn't know when".

15. There was no doubt, as Professor Robbins stated, that G's condition had improved. There had been occasions when that was not so, notably in late February. G had hopes that at last he might achieve release and this was buoying him up. He described that he still heard voices, had suicidal thoughts and difficulty in sleeping. Professor Robbins concluded that he was still suffering from a major depressive disorder. Self harm remained a significant risk and he was "especially vulnerable to the impact of a negative decision in the legal process". That meant in Professor Robbins' view that he would deteriorate if his hope of bail and so release from detention was dashed. The fluctuations in his mental state appeared to be closely related to the rise and fall of hope consequent on legal decisions. If he remained detained, his mental state would deteriorate. If released even on the very strict conditions he could continue to improve.

16. The respondent chose not to put any further reports before us. When the improvements recorded in the Medical Record were put to him, Professor Robbins indicated that it was necessary to treat what was in it with some caution since the entries would consist of what the particular author chose to include and he or she might not see the whole picture. In any event, G was highly vulnerable, as his past behaviour had shown, and there was no question but that the mental disorder remained. We saw no reason to doubt Professor Robbins' views. They had not been challenged and were consistent with what we had been told by all the experts in January.

17. In giving our short extempore reasons for deciding to grant bail, we said this: -

"We are entirely satisfied that Professor Robbins' report is to be accepted and indicates quite clearly that there is a real risk and a danger that if the situation is to remain as it is and if G is to remain in custody there will be a substantial deterioration and his symptoms will, reach the level that they did [in] December".

We saw no reason to change the views we had expressed in January.

18. We must now deal with the issue of our jurisdiction to grant bail, particularly in a case such as this where the applicant's appeal against certification has been dismissed. In January, the respondent accepted that the Commission had jurisdiction to grant bail but submitted that, since after an appeal had been dismissed there was no appearance which the applicant should attend (the reviews which the Commission has to hold after 6 months and then every 3 months did not necessarily involve appearances by the applicant), there was no power to impose any conditions. Thus bail could only be granted unconditionally and it was obvious that that would rarely if ever be appropriate. It was also submitted that the house arrest conditions were nothing to do with the purpose of bail but were intended to provide a wholly different regime to detention. Thus they could not lawfully be imposed. It was further submitted that G's medical condition was not such as would justify the grant of bail.

19. In the Court of Appeal, the respondent sought to argue that the Commission had no power to grant bail at all when it was not currently seized of the case. There must be an obligation if bail were granted to surrender at a specific place and time in the future. It was also submitted that there had been a failure to pay requisite deference to the views of the respondent on the requirements of national security. This submission was supported by reference to Secretary of State for the Home Department v Rehman [2003] 1 A.C.153. In argument, counsel for the respondent resiled from his submission that there was no power to grant bail at all to one that such power was limited to cases where otherwise there would be a breach of Article 3 of the European Convention on Human Rights. Lord Phillips, M.R., said of this submission; -

"We found this limited concession lacking in logic and would be reluctant to base any findings on it".

We note that on 31 March, Lord Phillips said that the lack of logic related to the concession not extending to Article 8 but being limited to Article 3.

20. Before us, the Secretary of State (now represented by Mr. Burnett Q.C. in place of Mr Wyn Williams Q.C. following the latter's appointment to the circuit bench), accepted that the Commission did have jurisdiction to grant bail. Thus the point which led the Court of Appeal to suggest a possible judicial review, and which appeared to it not to be at all clear cut, was conceded. Further, it was accepted that the Commission was entitled to impose the sort of conditions which it had indicated seemed to it to be necessary. The submission was that the exercise by the Commission of its powers to grant bail should be limited to avoiding what would otherwise amount to a breach of Articles 3 or 8 of

the E.C.H.R. Further, Mr. Burnett submitted that the Commission had not hitherto and certainly had not adequately considered what proportionality meant in this bail jurisdiction and how it should be judged. If the respondent regarded a person's detention as necessary for the protection of national security, the Commission should afford the greatest weight to that view and should give it the deference identified by the House of Lords, in particular by Lord Hoffmann, in Secretary of State for the Home Department v Rehman (supra).

21. Mr. Emmerson Q.C. submitted that the respondent should not be permitted to raise new arguments to try to persuade us that we should not grant bail in accordance with our decision in January 2004, save for any argument based on a change of circumstances since then. Mr. Emmerson submitted that the question of whether or when the Commission could grant bail was res judicata, alternatively it would be an abuse of process for it to be reargued. The authorities relied on derive from the importance of requiring a party to raise all his points in one hearing and not to institute subsequent proceedings based on points which could and should have been dealt with before. But these are the same proceedings and we were being asked as a matter of discretion to permit a further argument to be raised. Thus the authorities and the principle relied on by Mr. Emmerson are not, at least directly, applicable. We should say in fairness to Mr. Emmerson, that he did not press the argument with any vigour and we permitted Mr. Burnett to argue his fresh points.

22. S.24 of the 2001 Act deals with bail. S.24(1) provides: -

"A suspected international terrorist who is detained under a provision of the Immigration Act 1971 may be released on bail".

The reason why there is reference to the 1971 Act is because by s.23 detention of a suspected international terrorist (i.e. a person properly certified under s.21) under Paragraph 16 of Schedule 2 or Paragraph 2 of Schedule 3 to the 1971 Act is permitted if removal cannot be achieved. This is because the scheme of the Act is to permit a suspected international terrorist to be made the subject of a decision to make or the making of a deportation order or removal directions notwithstanding that he cannot be removed from the United Kingdom. Thus the detention is immigration detention. Paragraph 2 of Schedule 3 to the 1971 Act permits detention pending deportation and Paragraph 16 of Schedule 2 to the 1971 Act permits detention pending removal.

S.24(2) of the 2001 Act reads: -

"For the purposes of subsection (1) the following provisions of Schedule 2 to the [1971 Act](Control on Entry) shall apply with the qualifications specified in Schedule 3 to the Special immigration Appeals Commission Act 1997 (bail to be determined by [SIAC]) and with any other necessary modifications-

(a) Paragraph 22(1A) (2) and (3)(release)

(c) Paragraph 24 (arrest), and

(d) Paragraph 30(1) (requirement of Secretary of State's consent)."

Paragraph 22(1A), as modified, permits SIAC to release a person detained pending deportation or removal on bail.

In its modified form, it reads: -

"[SIAC] may release a person so [viz under Paragraph 16] detained on entering into a recognizance … conditional for his appearance before an immigration officer at a time and place named in the recognizance … or at such other time and place as may in the meantime be notified to him in writing by an immigration officer".

Paragraph 22(2) provides: -

"The conditions of a recognizance … taken under this paragraph may include conditions appearing to [SIAC] to be likely to result in the appearance of the person bailed at the required time and place …"

Those paragraphs of the 1971 Act do not apply to bail pending appeal. Bail pending appeal in ordinary cases is dealt with under Paragraph 29 of Schedule 2 to the 1971 Act. In appeals to the Commission in cases other than those dealt with under the 2001 Act, Paragraph 29 is amended to give SIAC the power to grant bail conditional on an appellant's appearance before the Commission to pursue his appeal: see 1997 Act s.3 (1) and Schedule 3 Paragraph 4.

23. Parliament chose not to apply Paragraph 29 in relation to cases under the 2001 Act. The only sensible reason for this must be that it recognised that the Commission would retain an interest in a case for the purpose of reviews if an appeal was dismissed and so a more general bail power was needed. Paragraph 22(1A) and (2) provides the most general power but only if some necessary modifications are incorporated. Those must include the power to release conditional on an appearance before the Commission (otherwise bail pending appeal could only be granted conditional on appearance before an immigration officer for the purpose of being brought before the Commission, an unnecessarily cumbersome exercise).

24. It must, however, be borne in mind that bail under Paragraph 22 is, in the circumstances of this case, pending removal. It may well be that in some ordinary cases removal cannot immediately take place, for example because, as was the case in relation to the Kurdish Autonomous Area in Northern Iraq, there were no means for the time being of achieving such a removal. Here the detention is, in theory at least, pending deportation or removal. That may at some time be achievable, perhaps even at G's request to a country other than Algeria which might accept him. Such a removal would require surrender to an immigration officer and so there is nothing incongruous in bail being granted conditional on attendance for removal at a time and place to be notified if removal can ever be achieved.

25. We had and have no doubt that the Commission has jurisdiction to grant bail to a person detained pursuant to s.23 of the 2001 act whether or not his appeal has been dealt with. The reviews of certification required by s.26 of the 2001 Act mean that the Commission remains concerned with the cases and there is no reason to modify the clear words of the Act. Indeed, if there were no power to release, there might be an incompatibility with the Human Rights Convention since there might be no power (given the ouster provisions in s.1 (4) of the 1997 Act) to order release if a breach of an Article of the Convention was being caused by continued detention. That consideration has, as we understand the position, moved the respondent to abandon his contention that there is no power to grant bail and to submit that the power should only be exercised to avoid a breach of an Article of the Human Rights Convention. It is further and entirely understandably accepted that, if there is power to grant bail, there must be a power to impose conditions which are designed to ensure so far as possible that the person on bail cannot act in any way which is a danger to national security. That acceptance is in our view entirely correct since it is clear that we are dealing with a situation where conditions to ensure attendance are not all that are needed and conditions to seek to avoid any further activities damaging the security of the State are required.

26. 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.

27. We of course give great weight to the opinion of the respondent. But we have to form our own judgment on the facts as presented to or found by us whether detention remains proportionate and so whether bail can be granted. Mr. Burnett has relied on Secretary of State for the Home Department v Rehman. The issue in that case was whether Rehman's deportation was properly considered necessary in the interest of national security. He was, it was said, involved in promoting terrorism in Kashmir. The Commission was not persuaded that this was sufficient to show that it would be conducive to the public good that he be deported on national security grounds. In paragraph 53 in [2003] 1 A.C. at p. 192 Lord Hoffmann said: -

"Accordingly it seems to me that the Commission is not entitled to differ from the opinion of the Secretary of State on the question whether, for example, the promotion of terrorism in a foreign country by a United Kingdom resident would be contrary to the interests of national security".

This is because that issue was linked with foreign policy which was not within the purview of the courts. And Lord Hoffmann's observations in Paragraph 57 at [2003] 1 A.C. at p.194 that the Commission is not the primary decision maker and should in effect defer to the Secretary of State's opinion and only act if persuaded it was unreasonable were made in the same context. It is to be noted that Lord Steyn did not go as far as Lord Hoffmann: see paragraph 31 at [2003] 1 W.L.R. at p. 187 where he talks of national courts having to give great weight to the views of the executive on matters of national security. Lord Slynn (Paragraph 26) speaks of "giving due weight to the assessment of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy and

the means at his disposal of being informed of and understanding the problems involved". Lord Clyde agreed with Lord Hoffmann (Paragraph 63) and Lord Hutton agreed with the three who gave reasoned speeches that the appeals should be dismissed because prevention of terrorism abroad did amount in the circumstances to a danger to national security and it was not necessary to show that Rehman had committed any specific act of terrorism.

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.

30. There is a difficulty in limiting bail as Mr. Burnett submits we should. However it may be defined, bail presupposes an underlying lawful detention since otherwise a breach could not properly result in the removal of bail and further detention. If detention is a breach of an Article of the E.C.H.R., it will not be lawful. Accordingly, if the power to release on bail is limited to circumstances where detention is a breach of the E.C.H.R. and so unlawful, bail is inappropriate. This problem stems from the manner in which Parliament has chosen to deal with the power to detain under the 2001 Act. It seems to us that we must in the circumstances give a very purposive construction to the term and regard bail as no more than a release on conditions. If those are broken, it can hardly lie in the detainee's mouth to complain that his human rights are breached by further detention since he has brought that situation on himself and, in a case such as this, there are means of ensuring that he receives proper attention to his mental health. He

can, for example, be transferred to a special hospital.

31. We do not think that the threshold has been crossed so that there is a breach of G's human rights. The jurisprudence of the ECtHR emphasises the high threshold which must be crossed and that detention is unlikely to be regarded as disproportionate unless it at least verges on treatment which would constitute a breach of Article 3. But we are satisfied that, if he were not released, there would be such a breach. To permit someone to reach a state whereby he requires treatment in a special hospital or continuous care and attention to ensure he does not harm himself can constitute a breach of Article 8, unless perhaps there is no possible alternative to detention, and probably of Article 3. As we have said, we do not have to wait until that situation exists. Provided that we are persuaded, as we are, that the conditions we impose are sufficient to minimise the risk to the security of the State if G is released, we can act as we have.

32. We must emphasis that the grant of bail is most exceptional. We are only doing so because the medical evidence is all one way and the detention has caused the mental illness which will get worse. Any detention is thoroughly unpleasant and we do not doubt that this sort of detention is likely to bear very harshly upon the detainee. But it must not be thought that this case is a precedent which will enable anyone who can present with symptoms which may be regarded as indicative of mental problems to receive bail. The circumstances must be extreme.

23. We annex a copy of the conditions we have imposed.

Re G.

Bail Conditions

1. Before release from custody to permit himself to be fitted with an electronic monitoring tag by Premier monitoring services ("Premier Monitoring") and thereafter wear the same at all times.

2. Subject to paragraph 3 below, upon release from custody to go and thereafter to remain at all times at [his premises].

3. Not to depart from the court room, or to travel to the said address, or to travel from the said address to the court at the end of the period of bail granted to him, at any time or in any manner other than whilst being escorted by officers of the Metropolitan Police who have been specifically tasked with the duty of so escorting him.

4. To report to Premier Monitoring by telephone five times each day at 7.00 a.m., 11.00 a.m., 3.00 p. m., 7.00 p.m., and 11.00 p.m. and to comply with any voice identification procedure specified on behalf of Premier monitoring for that purpose.

5. To permit entry by police officers and/or the immigration service at any time for the purpose of

identifying G's presence or monitoring compliance with any condition of bail.

6. To permit access to Premier Monitoring for the purpose of installing, inspecting, checking, maintaining, repairing and (if and when removal becomes appropriate) removing equipment at the premises to enable or facilitate electronic monitoring carried out by Premier monitoring and/or any voice identification procedure specified by Premier Monitoring.

7. To limit entry to the [identified] premises to [A] (his wife),[B] infant, Gareth Pierce, [and such health professionals as are necessary for G's continued treatment and as approved by the Home Office by prior appointment] or such other person as is approved by the Home Office by prior appointment.

8. Not to contact whether directly or indirectly any other person than those mentioned at condition 7 above.

9. Not to allow to be brought onto or remain on the premises any computer equipment, mobile telephone or other electronic communications device or to use or permit the use of the same therein.

10. To cause the existing telephone link to the premises to be cancelled and to permit a new dedicated telephone link to be installed, so that it may make and receive contact only with Premier Monitoring and no other party.

11. To obtain surety of £500 by [A].

12. By each of the times hereafter mentioned, to file with the Special Immigration Appeals Commission and to serve on the Secretary of State a medical report stating the Appellant's current diagnosis, condition and prognosis, the effect on him of the current bail and bail conditions and the likely effect (in the author's opinion) of a resumption of detention under the Anti-Terrorism, Crime and Security Act 2001; the times being:-

(a) 4.00pm on Friday 9 July 2004

(b) 4.00pm on each date mentioned in Rule 24(2) of the Special Immigration Appeals Commission (Procedure) Rules 2003, which specifies the date by which the Appellant must file and serve evidence and submissions which he wishes the Special Immigration Appeals Commission to take into account in a review pursuant to section 26 of the Anti-Terrorism, Crime and security Act 2001;

(c) any other time which the Special Immigration Appeals Commission may notify the Appellant.

13. By 4.00pm on Thursday 29 April 2004 to file with the Special immigration Appeals Commission and to serve on the Secretary of State a written report setting out full details of the regime of medical attendance and treatment to be provided to the Appellant whilst he remains on the bail granted by this Order.