

SPECIAL IMMIGRATION APPEALS COMMISSION

Field House
Breams Buildings
London

Monday, 6th February 2012

BEFORE :

THE HONOURABLE MR JUSTICE MITTING

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OTHMAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MR E FITZGERALD QC & MR D FRIEDMAN (Instructed by Birnberg Peirce) appeared on behalf of the Appellant.

MR T EICKE QC (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

MR A McCULLOUGH QC (instructed by the Special Advocates' Support Office) appeared as special advocate.

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BAIL HEARING

JUDGMENT

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Transcript of
of Harry Counsell
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MR JUSTICE MITTING:

1. In determining whether or not to grant bail to the appellant, I must have in mind the domestic or *Hardial Singh* test and the test applied by Strasbourg under article 5. The *Hardial Singh* test was summarised by Lord Dyson in *I -v- Secretary of State for the Home Department* [2002] EWCA Sib 888 at paragraph 46, and approved by him in *Lumba -v- Secretary of State for the Home Department* [2011] UKSC 23 and by fellow Supreme Court judges, and is as follows:

"1. The Secretary of State must intend to deport the person and can only use the power to detain for that purpose.

2. The deportee may only be detained for a period that is reasonable in all the circumstances.

3. If before the expiry of the reasonable period it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention.

4. The Secretary of State should act with the reasonable diligence and expedition to effect removal."

In paragraph 48 of the same judgment, he identified, in a non-exhaustive list, some of the factors which go to justify detention for a particular period.

2. The Strasbourg test is less precise and is founded on article 5(1)(f). It does not expressly require consideration of the length of the period of detention, but it does require that detention should only be for the purpose identified in 5(1)(f): removal or deportation, and that the authorities should exercise reasonable diligence and expedition to effect that purpose and that it should not be arbitrary. But the notion of arbitrariness includes, by necessary implication, both the length of detention and the proportionality of detention. If the national security considerations that led the Secretary of State to detain Chahal were irrelevant to the question of lawfulness of detention under article 5, it is difficult to see why the Strasbourg Court would have required the decision of the Secretary of State to be subject to scrutiny and review by an independent body. Hence, its observation in paragraph 127:

"The review should, however, be wide enough to bear on those conditions which are essential for the 'lawful' detention of a person according to article 5, paragraph 1".

If national security had been, simply, the starting point and all other considerations of article 5(1)(f) satisfied, then it is difficult to see what relevance scrutiny of the national security issue had at all.

3 I respectfully acknowledge Lord Brown's observations in *SK Zimbabwe -v- Home Secretary* [2011] UKSE 23, in which he noted that in some respects the domestic *Hardial Singh* principles were more favourable to detainees than Strasbourg's requirements (see paragraph 94 of his judgment). But I do have to bear in mind that that was a

dissenting judgment and that in the case which immediately preceded it, *Lumba*, the court expressed itself in different terms. At paragraph 119 of his judgment, Lord Dyson observed:

"There is a close analogy between the *Hardial Singh* principles and the article 5 requirement that detention for the purposes of deportation must not be of excessive duration."

That seems to me to more accurately encapsulate the common thread of principle between the two propositions than the apparent distinctions.

4. I cannot conceive of circumstances, in practice, arising in a SIAC case in which detention might be unlawful on *Hardial Singh* principles, but deprivation of liberty permissible under article 5. It seems to me that, in practice, the two stand or fall together.

5. I turn, therefore, to address the circumstances, first of all, by reference to *Hardial Singh* principles, but on the understanding that they are not materially different from those obtaining under article 5.

6. Mr Fitzgerald submits that principles 2 and 3 must lead inextricably to the conclusion that detention is no longer lawful. On any view, the appellant has been detained for a very long period of time. His period in actual detention is a little over six years. The total period during which he has been either detained or deprived of liberty is about six and a half years. That is comparable to the period of actual detention of Chahal and it is a period which gave the Strasbourg Court cause for concern. That period causes me

concern, but, in the light of the threat to national security, found by SIAC to have been posed by the appellant, in its open judgment, when it dismissed his appeal and, in particular its findings at paragraphs 78 to 84 inclusive, I accept the Secretary of State's view that an unusually long period of detention is capable of being justified. I do not, therefore, find that, as of today, the period of detention has been so long that it has now become unlawful.

7. Mr Fitzgerald goes on to submit that the third *Hardial Singh* principle is also engaged. Because The Fourth Section of the Strasbourg Court has upheld the appellant's application on the basis that, if he is returned to Jordan, and retried, he faces a real risk of being convicted on evidence that has been procured by torture, a risk which would infringe his rights under article 6 and would put the United Kingdom in breach of its obligations to him under article 6. Mr Fitzgerald submits that that finding, precludes deportation to Jordan. If it stands and if the circumstances do not alter, clearly, it does. Unless the United Kingdom Government is prepared to accept the political and reputational cost of defying a judgment of the Strasbourg Court, deportation would not be possible.

8. Mr Layden, the former diplomat retained by the Secretary of State to conduct negotiations with foreign countries to whom she wishes to deport those believed by her to pose a risk to national security, in a recent statement states that negotiations have already begun with the Jordanian authorities, to see if the factors which the Strasbourg Court considered objectionable can in some way be removed. I do not know precisely what the Secretary of State has in mind. Indeed, the negotiations are only at the earliest of stages. I cannot predict how long they will take nor what

their outcome might be. All I can do is to observe that the position of the appellant would present very great problems for the Jordanian authorities if he were to be returned there and if he could not be retried for offences which could result in a lengthy term of imprisonment, if he were to be convicted. All of that is speculative. What can I do, on the basis of the material presented to SIAC in this case and in two other cases where Jordanian appellants' circumstances have been considered, is to note that which the Strasbourg Court also noted, that there is a very long history of good relations between the United Kingdom and Jordan, such that, as the Strasbourg Court accepted, solemn assurances given at the highest levels of the Jordanian Government can safely be accepted by the British Government.

9. Accordingly, there remains a possibility that negotiations might result in the deportation of the appellant to Jordan in circumstances that would not attract disapproval by domestic or Strasbourg courts. There is a further possibility that the Grand Chamber might reverse the decision of its sectional court on the article 6 issue. It would not, I think, be right for me to express the view which I privately hold about that possibility: that would be disrespectful to the court and would be speculating on something about which I cannot have any greater insight than anyone else.

10. Those factors mean, in my judgment, that, as of today, it is not apparent that the Secretary of State will be unable to effect deportation within a reasonable period. The chances of her doing so are clearly slimmer than they were before the Fourth Section delivered its judgment, but they are not negligible.

11. Accordingly, applying *Hardial Singh* principles, in my judgment, all four of the propositions required to be established to justify continued detention exist. It also follows that, under article 5, because to all intents and purposes the conditions are the same, the continued deprivation of liberty remains lawful. That does not, however, end my task.

12. Very similar considerations applied in May 2008, when a panel of SIAC admitted the appellant to highly restrictive bail. The risks to national security and of absconding are not as of today, in my view, significantly changed from those which obtained in May 2008. The decision of the Fourth Section of the Strasbourg Court is a new and highly significant factor in the equation. Unless reversed by the Grand Chamber, it will require, at a minimum, the renegotiation of assurances with the Government of Jordan before the appellant could be deported. The time will arrive quite soon when continued detention or deprivation of liberty could not be justified under either domestic or article 5 principles. The time has now arrived at which I should take the same decision as the panel did in May 2008 and readmit the appellant to bail on highly restrictive terms. I will set out those terms in a moment. They will obtain for approximately the next three months. If by the end of that time the Secretary of State is not able to put before me evidence of demonstrable progress in negotiating satisfactory assurances with the Government of Jordan, which satisfy the reservations of the Fourth Section, then it is very likely that I would conclude that continued deprivation of liberty would no longer be justifiable.

13. I make it expressly clear that I am not shutting out from consideration any circumstance of the kind that I

cannot now foresee that might arise to change that view. That is, simply, the view that I state as of now.

14. Accordingly, I will order, in principle, that the appellant is admitted to bail on essentially the same terms as those imposed upon him in May 2008. I am told that it will take between a few days and about a week for the bail address proposed to be checked out by the Security Service. I do not know what that address is. I direct that it is not included in the open version of the bail order, but that it is supplied confidentially to the Commission as it has been already to the Secretary of State.