Transcript Reference TRS/240/2011

SPECIAL IMMIGRATION APPEAL COMMISSION

Field House, Breams Buildings
London
Monday, 28th February 2011

BEFORE:

THE HONOURABLE MR JUSTICE MITTING

BETWEEN:

M1

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

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MS S HARRISON (instructed by Birnberg Peirce and Partners) appeared on behalf of the appellant.

MR N SHELDON (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State

MR BIRNBAUM QC (instructed by the Treasury Solicitor Support Office) appeared as Special Advocate.-

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JUDGMENT

MR JUSTICE MITTING:

1. SIAC's bail jurisdiction is in a state of flux. our traditional approach was to assess the risks alleged to be posed to national security and the risk of absconding by an individual appellant on the basis of open and closed material, the closed material being assessed with the aid of special advocates.

2. As a result of decisions of the Divisional Court in *Cart v the Upper Tribunal, U v SIAC* [EWHC] 3052 Admin and *BB v SIAC* [2011] EWHC 336 Admin, it is now clear that, if SIAC is to undertake those tasks, it must ensure that an individual appellant has sufficient information about the Secretary of State's case on those issues to be able to provide effective instructions to the special advocates about them. That is so whether the issues are considered before or after the main hearing.

3. In response to the changes introduced by *Cart and U*, SIAC attempted to set out the approach that it would adopt in the remitted cases of *U* and *XC* on 21st December 2009, an approach to which we gave the shorthand term a "precautionary approach". In the light of the observations of the Divisional Court in *BB*, it now seems that even that approach may not be lawful.

4. Further, and in any event, it may well be that a precautionary approach is not necessary when, as here, a good deal is known by me about the circumstances which surround this appellant's appeal, including findings which I have made or which a Commission presided over by me has made about others who have, in the past, associated with the appellant.

5. For the time being, therefore, and until there is either a definitive judgment of a superior court, or SIAC, in the light of considered argument, reaches a considered determination upon the principles which it should apply, it seems to me that I must approach the issues of bail without much in the way of guiding principles.

6. In a pre-hearing case, the following points of principle or practice seem to me to be clearly established.

First, it is wrong, in principle, to form or to express a firm view about the material, which will be relied upon by either side at the final hearing. To do so would either demonstrate, or give the impression of demonstrating a mind made up. That is plainly wrong in a case such as this in which I both hear the application for bail and will preside over the final hearing.

Secondly, if the Secretary of State relies on specific grounds to resist bail, she must provide sufficient information to permit the appellant and his open representatives to give effective instructions to the special advocates about those grounds.

Thirdly, as is the case in all appeals involving immigration decisions and children, where children are involved their best interests must be treated as a primary consideration.

Fourthly, when, as here and in many other cases, the interests of a family are involved, respect must be shown to the rights of the family under Article 8.

Fifthly, if the decision is to detain and, possibly, even to impose bail conditions which deprive of liberty for the purposes of Article 5, the decision must be lawful on

Hardial Singh principles, which are, in effect, identical to those expressed by the Strasbourg Court in *Chahal*.

Sixthly, and I express this view tentatively*, because I invited no submission on it, and have heard no argument upon it, there is no presumption either for or against the grant of bail.

7. I turn now to the facts and circumstances of this case.

8. The Secretary of State's case against the appellant is that he is a part of a loose network of extremists, many of whom have been subjected to control orders or, in one case, prosecuted or, in one case, excluded from the United Kingdom. All of them went to Pakistan in 2008 and in various proceedings it has been assessed or determined, on balance of probabilities, that they went to train or to fight. It is common ground that the appellant went to Pakistan in 2008 at a time which overlapped their visit. There are, of course, flatly contradictory cases about the purpose of the appellant's visit, which, for the reasons that I have indicated, I cannot determine today. It is also common ground that the appellant planned to go to Pakistan in 2009 but did not, in fact, do so. He says that he went for personal proposes. The Secretary of State's case is that he planned to go with some of those who had been to Pakistan in 2008 and only cancelled his plans when they did so. Again, it would be quite wrong for me to express any opinion about the outcome of those issues at this stage.

9. It is also common ground that the appellant and another man, Smith, against whom no measure, as far as I know, has been taken, travelled to Turkey. It is the Secretary of State's case that the purpose of the journey, at least in the case of Smith, was to go to Iran and then onwards to train or fight in areas where coalition forces were

active. It is the Secretary of State's case that the appellant was in some way associated with that plan.

10. The appellant's case is that he travelled to Italy and on to Turkey for entirely innocent purposes. Again, it would be wrong for me to express, even if I had formed one, which I have not, any view about the likely outcome of that issue.

11. What I can and should do, however, is to ask myself whether the Secretary of State's case has been shown by the evidence of the appellant and his witnesses, who include his wife, and/or by the submissions of Ms Harrison on his behalf, to be obviously erroneous. I am not satisfied that the Secretary of State's case is obviously erroneous. If the Secretary of State's case is made out, then it is likely that the Commission will conclude that the appellant has posed and continues to pose a significant threat to the national security of the United Kingdom. The Secretary of State's case goes further than that. More recently she has alleged that he poses a threat to public security in the United Kingdom. That is an allegation that requires to be tested and explored at a final hearing. Again, I cannot reach, and it would be wrong for me to attempt to reach, any concluded or even firm provisional view about that.

12. Ms Harrison does not submit that the Secretary of State's case is obviously bad. She submits that, in the light of the experience of SIAC and the experience of the Administrative Court dealing with British citizens who are not subject to immigration control, the imposition of strict conditions, up to and including a 24-hour curfew, can guard against the risks feared by the Secretary of State if the appellant is to be admitted to bail in the United Kingdom. That, it seems to me, is the critical question which I have to determine.

13. I have already determined that, if he were willing to accept bail on condition that he went to Italy and spent the time between now and the hearing in Italy, that I would admit the appellant to bail. I reached that decision because it seemed to me to meet the Secretary of State's case about the risks, which he posed - her intention in resisting this appeal is, after all, to uphold a decision to deport him to Italy - and also his own conditional enjoyment of liberty, with an opportunity for him to do so with his family. I have received skeleton arguments about whether or not I had the power to grant bail on those terms, the issue not having been fully debated on the last occasion. I need express no conclusion or even view about that at this stage, because I accept, as a result of what the appellant's wife has said in a second witness statement, and as a result of what the appellant's relatives in Italy have said, that that is not a practicable short-term solution. Accordingly, I come back to the critical question in the case: should he be admitted to bail on stringent terms in the United Kingdom?

14. In answering that question, I am helped by the fact that, as it happens on the particular facts of this case, sufficient disclosure has been given to him of the matters upon which the Secretary of State relies to permit him to give effective instructions about them, so that Article 5.4 requirements have been met in respect of that aspect of the Secretary of State's case.

15. My conclusion is that I am not satisfied that the risks identified by the Secretary of State can securely be met by bail conditions in the United Kingdom, if her case on the principal issues is ultimately made out. If the Secretary of State's case is right, the appellant is an active and well connected extremist who has demonstrated a

persistent wish to participate in training or other terrorist-related activity abroad and may pose a risk to public security in the United Kingdom: I emphasise "if the Secretary of State's case is right", those conclusions may follow.

16. Other examples of individuals who were loosely part of the group with which the appellant is said to be associated provide a cautionary reminder. The two Adam brothers were the subject of early version control orders, less restrictive than those which were imposed on others who were part of the group, but they absconded within the United Kingdom and lay low for a year before finally leaving, with the aid of other members of the group, to go to Pakistan, then to Waziristan, there to fight, as their own letters home demonstrated. Two others, who are said by the Secretary of State to be associated with or even in contact with two members of the group, Jabar and Azmir, were subject to Treasury asset- freezing orders. Those orders appear to have prompted them to flee, thereby frustrating the orders. If, therefore, four people said to be part of the group to which, on the Secretary of State's case, the appellant is attached or with whom he is associated, have absconded and, in the case of the Adam brothers, absconded to fight, the conclusion which I reach is that the balance of risks requires me to refuse to admit this appellant to bail, notwithstanding the compelling family circumstances which point the other way and notwithstanding the fact, of which I am satisfied, that the best interests of his children would otherwise require him to share a house with them and to play a part in the forthcoming weeks in their upbringing.

17. I am satisfied that, on those premises, detention is lawful. Deportation is a realistic prospect. The Secretary of State is conscientiously pursuing proceedings to achieve that. His appeal will be heard in the week

beginning 11th April. Subject to any legal challenge, if his appeal were to fail, then he will be deported within a reasonable time. Even if, therefore, and contrary to one view of the law, the time spent pending appeals counts when assessing the reasonableness of the period of detention for the purpose of assessing its lawfulness, detention would be lawful on *Hardial Singh* and *Chahal* principles.

18. For those reasons, I refuse this application for bail.

Is there any other matter that any of you want me to deal with as part of a judgment on the bail issue?

MR SHELDON: No, thank you, sir.

MS HARRISON: No, thank you.

MR JUSTICE MITTING: The appellant's wife was able to speak to him, I hope, for rather longer than the ten minutes that ...

MS HARRISON: Yes, she was. They took full opportunity of that. We are grateful for that facility.

MR JUSTICE MITTING: Does she want further opportunity to do so?

MS HARRISON: If that were possible, if only to say their goodbyes. I have indicated to the prison officers that I would like to speak to my client after the hearing. That is obviously acceptable and they are aware of that, but, if there were five minutes or so, that would be helpful.

MR JUSTICE MITTING: Would you, as before, allow the appellant's wife to speak to him before you take him back into the cells for about five minutes in this courtroom?

OFFICER: Yes, sir.

MR JUSTICE MITTING; Thank you.

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