SPECIAL IMMIGRATION APPEAL COMMISSION

Field House, Breams Buildings
London
Monday, 28th May 2012

BEFORE:

THE HONOURABLE MR JUSTICE MITTING

BETWEEN:

MOHAMMED OTHMAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MR E FITZGERALD QC and MR D FRIEDMAN (instructed by Birnberg Peirce and Partners) appeared on behalf of the Appellant.

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

MR A McCULLOUGH QC and MR M CHAMBERLAIN (Instructed by Treasury Solicitor Support Office) appeared as Special Advocate.

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APPLICATION FOR BAIL
JUDGMENT

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MR JUSTICE MITTING:

1. Since I decided that the appellant should be readmitted to bail on 6th February much has occurred. On 17th April, the Secretary of State, in the exercise of immigration powers, detained the appellant. She also served him with the deportation order, which had already been made. She announced to Parliament her intention to deport him and served notice upon him that it was her intention to do so by about 30th April. That then triggered an opportunity for him to challenge that decision by applying to her to revoke the deportation order, which he did promptly on 20th April.

2. There was then a debate, of which much was made in the media, about the timing of any reference or appeal to the Grand Chamber in Strasbourg. As it happens, the Grand Chamber put an end to that promptly on 9th May by refusing to entertain an appeal by the appellant, the Secretary of State having meanwhile announced her intention not to appeal the judgment of the Fourth Section.

3. On 18th May, the Secretary of State refused to revoke the deportation order, but did not certify the application as clearly ill founded. Accordingly, the appellant had a right of appeal to SIAC, which, on 25th May, within time, he exercised by giving notice of appeal. He applied for bail. At my suggestion, the application for bail was put off until today, 28th May, by which time the events that I have recited had occurred.

4. A hearing has now been fixed for the fortnight beginning 8th October. A decision either way will be handed down by SIAC within one month of the conclusion of the hearing. By then the appellant will have achieved a lamentable record. He will have been deprived of liberty, for the most part actually detained, without charge for some seven years and three months.

5. A degree of clarity has now been achieved which was not present in February. It was not then known whether the Secretary of State would invite the Grand Chamber to hear an appeal; it was not then known whether the United Kingdom would be able to negotiate further assurances with, or to obtain further evidence about the assurances in, the Kingdom of Jordan. That, I am assured, has now been done. Mr Fitzgerald, for the appellant, submits that what has been done is less than meets the eye, that some of it, in any event, is not prompted by discussions between the British Government and the Kingdom of Jordan, but by the independent actions of the Kingdom of Jordan itself, such as, the amendment of the Constitution and the release of the two critical witnesses against the appellant at his trial in absentia. Furthermore, Mr Fitzgerald submits that, in one respect at least, the information put before SIAC by the Secretary of State is erroneous. One of the two witnesses said to be at liberty and wholly unrestrained is said by Mr Fitzgerald, upon the basis of apparently reliable information, to be in detention, possibly even in GID detention. It is impossible for me at this stage to prejudge these issues. All that I can and do assume is that the Secretary of State would not have undertaken the course which she has unless convinced that she was in possession of material which could support her resistance to the appellant's appeal and which could satisfy the cogently expressed reservations of the Strasbourg Court about the fairness of the retrial which the appellant would face in Jordan.

6. Two principal consequences flow from those developments. First, the end of the litigation is at last in sight. What SIAC has to do is to exercise its judgment, principally, though, perhaps, not entirely, on the issue of whether or not any trial that the appellant would face in Jordan would be flagrantly unfair. The question would have to be a little more precisely posed to meet Strasbourg jurisprudence. Would there be a real risk that his trial would be flagrantly unfair and, if such a risk exists, has the British Government in Strasbourg language "removed all doubts about it"? It is self-evident that SIAC's judgment on that issue is unlikely to involve disputed questions of law. A right of appeal exists from a judgment of SIAC only on a question of law. However broadly that may be interpreted by our domestic appellate courts, it seems to me to be unlikely that, if SIAC does its job properly, its decision will be open to effective challenge domestically. There remains the possibility that, if SIAC's judgment were adverse to the appellant, he would apply again to the Strasbourg Court. Having read the judgment of the Court in his case, it is apparent that it has given considerable weight to the findings of the United Kingdom domestic courts. Indeed, its own decision, on the material, which it considered, that the appellant would face a real risk of a flagrantly unfair trial was based upon (and accepted) the reasoning of our own Court of Appeal.

7. There is, therefore, a real possibility, I cannot put it higher than that or more precisely than that, that the decision of this Commission will actually and finally put an end to this litigation within, at most, a very short time of being handed down.

8. The second consequence is that the risk of absconding has increased, if the appellant judges that he would not avoid deportation to Jordan by litigation in and from the United Kingdom. I

cannot read his mind on that, but the expressed determination of the Secretary of State to deport him must have had and must have some impact upon his assessment of his chances. Further, and this is a factor which I took into account when refusing to admit him to bail on 17th April, others who claim to champion his cause, but who are themselves sinister players in global affairs, have expressed themselves vehemently in such a manner as to give rise to the concern, which I have, that they may lend him effective support to abscond. I need not refer to the threats that have been made in detail. I referred to one of them on the last occasion that was said to have come from Al Qaeda Central Command. Since then there have been other threats and blandishments from other Al Qaeda franchises, Al Qaeda of the Islamic Magreb and Al Qaeda of East Africa. The appellant, himself, of course, cannot be blamed for these outpourings, but I cannot ignore them as facts.

9. I turn now to the first and basic question of whether the continued detention of the appellant would be lawful. Mr Fitzgerald does not submit that he is not being detained and would not be detained for the purpose of effecting his deportation from the United Kingdom, nor does he submit that the Secretary of State has not behaved with due diligence. His basic submission is that, by reason of the length of time to which I have referred, his continued detention would no longer be lawful; by parity of reasoning, his continued deprivation of liberty under Article 5 would no longer be lawful. It would, in Strasbourg language, have become arbitrary.

10. I accept, as of course I must, that the length of time during which he has been detained is extraordinary. Viewed in hindsight, it is hardly, if at all, acceptable. But the reasons for the duration of detention cannot be ignored. They are, principally, that our own domestic courts and

the Strasbourg court have taken a remarkably long time to deal with his case. In those circumstances, I rest my decision on lawfulness, as on proportionality and necessity, principally, on the time between now and the handing down of SIAC's judgment; in other words, the factor that I take, principally, into account today is the future. I have already observed, and repeat, that, provided that SIAC does its job properly, the outcome of this litigation will be determined within, at the most, just under six months, subject only to what I regard as an unlikely prospect of further challenge by either the Secretary of State or the appellant. Even if the appellant is admitted to bail, it will be on terms that deprive him of liberty. I accept, of course, that there is all the difference in the world between house arrest at home, even literally house arrest, around the clock, and detention in a category A prison.

11. The third and final factor that I take into account and which weighs heavily with me is that which Mr Tam QC stated in the open proceedings after the closed hearing, which took place when Mr Fitzgerald had concluded his opening submissions. The Security Service and the police have limits on their resources. During the period of preparation for the Olympics, which is already underway, and the Olympics and the Paralympics, there will be a high level of demand on those resources. Their objective is to protect the United Kingdom and its inhabitants and visitors. If the appellant were to abscond, then either the resources which should be devoted to those ends would have to be diverted to finding him or finding him would be afforded a lower priority than should be the case. In those circumstances, I am satisfied that managing the risk posed by the appellant outside a category A prison during that exceptional time would be exceptionally problematic. That time, occupies almost all the time between now and the hearing date. In my judgment, I am not required to take that risk; and it would be wrong for me to do so,

so, notwithstanding that the period of detention has been and will, by the conclusion of these proceedings, be of exceptional length, I am satisfied that it is both lawful and that continued detention is both necessary and proportionate. Accordingly, and for those reasons, I refuse this renewed application.

MR FITZGERALD: Just one matter, short but important, could you confirm that your ruling on jurisdiction stands?

MR JUSTICE MITTING: Yes, it does.

MR FITZGERALD: That is to say that I would not want to be taken as to have acquiesced in that earlier ruling without making submissions to you.

MR JUSTICE MITTING: I quite understand that. If you wish me, for the purpose of setting time limits running afresh, to reiterate that my earlier ruling on jurisdiction stands, I will gladly do so.

MR FITZGERALD: Out of an abundance of caution, I would invite you to do that. It may be that it is implicit, but just to be clear.

MR JUSTICE MITTING: The only problem is that I have been doing so wearing my hat as President of SIAC, there being no extant proceedings before the High Court. But I would strongly doubt that you would either receive opposition from the Secretary of State to a belated appeal based on my decision

wearing my hat as a High Court Judge or, I suppose, alternatively, a challenge by judicial review to the decision that I have just made.

MR FITZGERALD: I am obliged.

MR JUSTICE MITTING: She will challenge it on the merits, I am sure, but with regard timing I doubt it.

MR FITZGERALD: That was the only issue that we had. Thank you.

MR JUSTICE MITTING: Does that conclude the proceedings?

MR TAM: I believe so.

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