

Appeal no: SC/77/81/82/83/2009
Hearing Date: 12th May 2009
Date of Judgment: 21st May 2009

SPECIAL IMMIGRATION APPEALS COMMISSION

OPEN BAIL JUDGMENT

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE G WARR
MR J DALY

(XC), Shoaib KHAN, Abdul Waham KHAN and Tariq Ur REHMAN

APPELLANTS

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellants: Ms S Harrison – (XC)
Instructed by Birnberg Peirce & Partners Sols
Mr J Nicholson – (Shoaib Khan)
Mr S Kadri QC & Mr R Ahmed – (Abdul Wahab Khan)
Mr G Brown – (Tariq Ur Rehman)
Instructed by Amjad Malik Sols

For the Respondent: Mr R Tam QC & Mr A O'Connor
Instructed by the Treasury Solicitor for the Secretary of
State

Special Advocate: Mr C Cory-Wright QC
Instructed by the Special Advocates Support Office

MR JUSTICE MITTING :

1. All four Appellants are citizens of Pakistan. They were arrested, together with eight others, on 8th April 2009 in Manchester or Liverpool on suspicion of having committed an offence under the Terrorism Act 2006. All were released without charge on 21st April 2009. Each was served with a notice of intention to deport on conducive grounds founded on national security. Each has exercised his right of appeal to SIAC. All four are detained under immigration powers and have applied to SIAC for bail. After hearing open submissions by Mr Tam QC for the Secretary of State and Counsel for the four Appellants and closed submissions by Mr Tam QC and Mr Cory-Wright QC, special advocate, we announced on 12th May 2009 that the applications for bail were refused. These are the open reasons for that decision.
2. We have applied the tests for the grant or withholding of bail explained in U, Y, Z, BB and VV v Secretary of State for the Home Department as qualified in pre-hearing applications in LO v Secretary of State for the Home Department. We have taken into account significant closed material which has not been gisted to the Appellants in reaching our decision. While any Appellant has the right to apply for bail at any time, our decision is intended to be determinative until the hearing, which we have fixed, for consideration of renewed bail applications between 27th and 31st July 2009. By that date, the Secretary of State will have served her first open and closed statements on the issues of national security and safety on return (by 6th July 2009) and each Appellant will have had an opportunity to respond in such detail as he chooses to that statement. Our intention is subject to a significant qualification. It is possible that there will be significant developments on one or more issues central to the appeals. Mr Tam has stated that the Secretary of State will notify the Commission of any such change, if it were to occur, between now and 27th July. If, in the view of the Commission, that change was capable of leading to the prior release on bail of any Appellant, a further bail hearing would be immediately convened.
3. The circumstances which give rise to the appeals are, in the history of SIAC litigation, unprecedented. The Secretary of State's case is that all Appellants belong to a UK based network linked to Al Qaeda and were, when arrested on 8th April 2009, involved in attack planning in the UK. The Secretary of State maintains that view, notwithstanding the release of the Appellants without charge by the police. The foundation for that view is set out in the closed material which we have considered. Examination of items seized by the police is not, as yet, complete. Negotiations with the government of Pakistan to secure assurances about the treatment of the Appellants on return to their home country have only just begun. The Commission is accordingly dealing with an evolving situation at an early stage. If the Secretary of State is right, the risk posed to the national security by the Appellants was, and remains, high. Because the situation is evolving and because, if the assessment of the Secretary of State's security advisers is right, the threat posed by the Appellants to the national security of the United Kingdom is grave, the approach which we adopt to that assessment is that, unless it is clearly wrong, we must, at this stage, accept it. We are not satisfied that it is clearly wrong. It follows that, unless there is some other ground to justify the grant of bail, it must be refused.
4. Mr Tam also submitted that the risk of absconding was high. Each Appellant is a single man, with no close family ties in the United Kingdom. But for the risk to national security, we would not have accepted this submission without careful

analysis of the individual circumstances of each Appellant. If our provisional view about the former issue changes in the case of any Appellant, it is unlikely that we would regard the fact that he is a single man with no close family ties in the United Kingdom as demonstrating, by itself, that he posed a serious risk of absconding.

5. Various submissions were made to us by Counsel for the Appellants, which we deal with, shortly, below.

Mr Kadri's submissions, for Abdul Wahab Khan

- i) The risk to national security must be established to a high standard. We do not agree. We have set out the standard which we have applied above.
- ii) The service of notice of intention to deport on conducive grounds was designed to cover up government and/or security service embarrassment about an unsuccessful police/security service operation. We have no reason to believe that this is the case.

Miss Harrison's submissions for XC

- iii) SIAC cannot exclude political expediency as a factor in the decision of the Secretary of State to issue notices of intention to deport. This is, in essence, the same point as (ii) and receives the same answer.
- iv) Mr Manley, the Foreign and Commonwealth Office official who has provided a statement about the need for, and likelihood of obtaining, assurances from the government of Pakistan cannot say that it will offer them. Accordingly, the principles identified by Woolf J in *R v Governor of Durham Prison ex parte Hardial Singh* [1984] 1WLR 704 & 706 B-F are not satisfied: without assurances, the Appellants could not lawfully be deported to Pakistan. Consequently, they are not being detained pending the making of a deportation order, but for a different purpose: to see whether or not they can lawfully be deported. We accept that Hardial Singh principles apply, but conclude that they are satisfied. The making of a deportation order (by the Secretary of State) will depend upon the outcome of the appeal, which will depend upon the Commission's conclusions about the two principal issues – national security and safety on return. Unless and until it upholds the Secretary of State's case on those issues, a deportation order cannot be signed. The fact that the Secretary of State has not yet received assurances from the government of Pakistan, and may not do so, does not mean that the Appellants are not being detained pending the making of a deportation order. If the effect of any delay in obtaining assurances is that the Secretary of State would not be able to operate the machinery for removing the Appellants within a reasonable period, the Hardial Singh requirements would not then be satisfied; but that point has not yet been approached, let alone reached.
- v) The power to detain cannot be used for the purpose of completing police investigations. We agree, but are satisfied that that is not the purpose for which the power has been exercised.

The submissions of Mr Nicholson for Shoaib Khan

- vi) There is nothing in the open material or in the questions put by the police to Shoaib Khan in interview to suggest wrongdoing on his part. Although we have not been provided with any detailed information about the interview tapes, we are prepared to accept that nothing was put to Shoaib Khan by the police which materially expands upon the general allegations made by the Secretary of State in her open statement. We are nevertheless satisfied that the view of the Secretary of State's security advisers that Shoaib Khan poses a threat to national security is not clearly wrong.

Mr Brown's submissions for Tariq Ur Rehman

- vii) He answered fully all questions asked of him by the police about his associates, computers and workplaces. We are prepared to accept that he did, but our conclusion in his case is the same as that stated at (vi) above.
6. It is submitted on behalf of all Appellants that they come from respectable families in Pakistan and are of good character. In addition, in the case of XC, respectable sureties are offered. We have no reason to doubt any of these propositions, but they are, for the time being, outweighed by the assessment of the threat to national security referred to above.

MR JUSTICE MITTING