Case No: CO/8044/2009

Neutral Citation Number: [2011] EWHC 336 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2011

Before :

LORD JUSTICE RICHARDS
and
MR JUSTICE SWEENEY

- -

Between :

The Queen (on the application of BB)	**Claimant**
- and -	
Special Immigration Appeals Commission	**Defendant**
- and -	
Secretary of State for the Home Department	**Interested Party**

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- -

Hugh Southey QC and **Simon Cox** (instructed by **Fisher Meredith LLP**) for the **Claimant**
Robin Tam QC and **James Strachan** (instructed by **The Treasury Solicitor**) for the **Secretary of State**
The Defendant did not appear and was not represented

Hearing date: 24 January 2011

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Judgment

Lord Justice Richards :

1. This case concerns bail proceedings in the context of appeals to the Special Immigration Appeals Commission ("SIAC") under the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") against decisions to deport persons on grounds of national security. Such proceedings are subject to article 5(4) ECHR and its implicit procedural requirements. In *R (Cart) v Upper Tribunal, R (U) and (XC) v Special Immigration Appeals Commission* [2009] EWHC 3052 (Admin), [2010] 2 WLR 1012 (to which I will refer as "*Cart*") the Divisional Court held that the standard of disclosure thereby required is the same as that laid down by the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 29 for challenges to detention under the Anti-Terrorism, Crime and Security Act 2001. The issue in the present case is whether a different approach applies when SIAC has already reached findings in the deportation appeal that the appellant is a danger to national security. In particular, where those findings are contained in a closed judgment or are based on closed material, is SIAC entitled to rely on them in subsequent bail proceedings without disclosure of the underlying material in accordance with the article 5(4) standard laid down in *A v United Kingdom* and *Cart*?

Factual background

2. The claimant, BB, is an Algerian national who has lived in the United Kingdom since 1995. In 1999 he claimed asylum on grounds of fear of the Algerian state authorities. In September 2005 he was arrested and served with a decision to deport him to Algeria on grounds of national security; and his earlier asylum claim was refused. He appealed to SIAC, on asylum and human rights grounds, against the deportation decision.

3. BB's appeal was one of a number of related cases considered by SIAC and, on further appeal, by the Court of Appeal and the House of Lords. In the reports of the cases BB is sometimes referred to as RB. Other appellants included U and Y (who is also referred to in the reports as MT).

4. On 5 December 2006 SIAC dismissed BB's appeal, concluding *inter alia* that he was a danger to national security and that it would be in the public good for him to be deported. The open judgment on this point stated that the reasons for the conclusion were set out in the closed judgment and could only be discerned from the closed judgment. Appeals in the related cases were also dismissed.

5. On 30 July 2007 the Court of Appeal gave judgment in appeals by BB, U and Y against SIAC's decisions. The judgment is reported under the title *MT (Algeria) v Secretary of State for the Home Department* [2007] EWCA Civ 808, [2008] QB 533. The court upheld the principle of use of closed material by SIAC in a deportation appeal and rejected BB's appeal against SIAC's decision that he was a danger to national security, but remitted the matter on a point of form (relating to the fact that SIAC's open judgment had merely recorded the closed decision without further elaboration) and for reasons given in a closed judgment. The cases of U and Y were also remitted to SIAC.

6. BB and U appealed to the House of Lords against the Court of Appeal's judgment of 30 July 2007 on the issues of principle concerning the use of closed material in

deportation appeals. Those further appeals were dismissed on 18 February 2009, in a judgment reported under the title *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110.

7. In the meantime, SIAC heard BB's appeal as remitted to it by the Court of Appeal. In a judgment of 2 November 2007 it again dismissed the appeal, but opened parts of the previously closed judgment on the national security issue. The opened parts, amounting to some two pages, referred to the fact that BB had been a regular attender at Finsbury Park Mosque and had sided with the faction of worshippers at the mosque of which the leader or figure-head was Abu Hamza; stated that SIAC was satisfied that he had enjoyed ready access to Islamist extremists at times when they were active in the United Kingdom which could not be explained away as unfortunate coincidences; and gave details of material revealed on a search of BB's home which had assisted SIAC to determine the nature of his activities. Among the items recovered were a DHDS stamp (DHDS was listed by the UN in November 2003 as having terrorist links), the most likely explanation for possession of it being that BB himself used it for DHDS purposes or held it for others to use; and a laptop on which certain programs, called the Eraser and History Kill programs, had been installed and deleted almost without trace.

8. SIAC's decision of 2 November 2007 dismissing BB's remitted appeal was the subject of a further appeal, on limited grounds, to the Court of Appeal, but that appeal was dismissed on 29 July 2010 in a judgment also dealing with several linked cases: see *W (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 898. An application for permission to appeal to the Supreme Court against that decision is pending.

9. In addition, an application has already been lodged with the European Court of Human Rights on a precautionary basis, contending that BB's deportation appeal proceedings have been in breach of the ECHR. That application is stood out pending conclusion of the domestic proceedings.

10. That is the history of the substantive appeal proceedings. I turn to consider BB's bail position. The question of bail has become increasingly important with the lapse of time pending conclusion of the domestic proceedings and the "practical certainty", as SIAC expressed it in one of its bail decisions, that the European Court of Human Rights will thereafter give an indication under Article 39 requesting the United Kingdom not to deport BB until it has determined his application to that Court.

11. BB was held in immigration detention from 15 September 2005 to 22 April 2008. During that period applications for bail were refused on three occasions, in December 2005, February 2007 and August 2007, essentially on grounds of the (undisclosed) national security case against him. In April 2008 the Secretary of State withdrew objections to bail but sought a strict curfew on grounds of the (undisclosed) national security case and the risk of absconding. Bail was granted on the basis of a 20 hour curfew. The period of the curfew was reduced in November 2008 to 18 hours.

12. In March 2009 SIAC heard an application by the Secretary of State to revoke the bail of BB, among others, on the ground that the judgment of the House of Lords in *RB (Algeria)* (see above) led to an increased risk of absconding. In its judgment of 20 March 2009 SIAC held that the Secretary of State was entitled to rely on closed

material for the purposes of the bail proceedings. It refused the Secretary of State's application in relation to BB, holding that as long as legal proceedings remained in being it was unlikely that BB would abscond and that the risk posed by him to national security had not changed. The application was granted in the case of U.

13. U sought judicial review of SIAC's revocation of his bail. In its judgment of 1 December 2009 in *Cart* (see above) the Divisional Court held that bail decisions by SIAC were amenable to judicial review and, for reasons discussed further below, that the procedural requirements of article 5(4) were such that SIAC had erred in basing its decision in respect of U wholly on closed evidence. The revocation of U's bail was quashed.

14. Thereafter, for reasons given in a judgment dated 21 December 2009, SIAC acceded to a fresh application by the Secretary of State for the revocation of U's bail. The reasons referred to SIAC's assessment in an earlier open judgment of the threat to national security posed by U, stating that of all SIAC appellants he was the one who posed the greatest risk to national security if he were to abscond; and there was a real risk in current circumstances that he would abscond if re-admitted to bail. An application for judicial review of that decision was dismissed by the Divisional Court on 27 April 2010: see *R (U) v Special Immigration Appeals Commission* [2010] EWHC 813 (Admin). The court held that SIAC had remained loyal to the judgment in *Cart* and that its decision to revoke bail did not rely on, and was uninfluenced and unaffected by, closed material.

15. Meanwhile, in May 2009, BB applied to SIAC to vary his bail, principally to reduce the curfew from 18 hours to 14 hours a day. In a decision of 24 June 2009 SIAC made minor changes to his bail but maintained the 18 hour curfew, save for a reduction to 16 hours on Saturdays. There has subsequently been some further relaxation of the curfew, in bail conditions imposed on 2 November 2010, but the curfew is still stricter than sought by BB.

16. On 24 July 2009 BB applied for permission to apply for judicial review of SIAC's bail decision of 24 June. The claim was stayed pending the Divisional Court's judgment in *Cart*. In due course directions were given for a "rolled-up" hearing, which was the basis on which the matter came on for hearing before us. At the outset of the hearing we granted permission to apply for judicial review. The hearing therefore became the hearing of the substantive application.

17. Before I explain the issue in the case any further, it will be helpful to turn to the wider legal background concerning the impact of article 5(4) on the use of closed material in proceedings relating to deprivation of liberty.

Legal background

18. In *A v United Kingdom* (cited above) the Grand Chamber of the European Court of Human Rights considered *inter alia* whether the procedure in the domestic courts for challenging the applicants' detention under the Anti-Terrorism, Crime and Security Act 2001 complied with the requirements of article 5(4). A particular issue concerned the procedure on an appeal to SIAC against certification by the Secretary of State that he believed a person's presence in the United Kingdom to be a risk to national security and that he suspected the person of being an international terrorist. The

procedure involved consideration of closed material which could not be seen by the applicants or their legal advisers but was disclosed to a special advocate appointed to act on their behalf.

19. In its discussion of general principles the Court stated that the requirement of procedural fairness under article 5(4) "does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances" and that it is not always necessary that an article 5(4) procedure be attended by the same guarantees as those required under article 6 for criminal or civil litigation (para 203). But when it came to applying the principles to the facts the Court held that in the circumstances, and in view of the dramatic impact of the lengthy deprivation of liberty on the applicants' fundamental rights, "art 5(4) must import substantially the same fair trial guarantees as art 6(1) in its criminal aspect" (para 217). It was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others; and where full disclosure was not possible, article 5(4) required that the difficulties this caused were counterbalanced in such a way that each applicant still had the possibility effectively to challenge the allegations against him (para 218). Having referred in this connection to the role of SIAC and of the special advocate, the judgment continued:

> "The Court further considers that the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings. However, *the special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate*. While this question must be decided on a case-by-case basis, the Court observes generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State's belief and suspicions about him …. *Where, however, the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of art 5(4) would not be satisfied*" (para 220, emphasis added).

20. In *Secretary of State for the Home Department v AF (No.3)* [2009] UKHL 28, [2010] 2 AC 269, a case about non-derogating control orders under the Prevention of Terrorism Act 2005, the House of Lords held that the same approach must be applied to the procedure for determining under s.3(10) of that Act whether the Secretary of State had reasonable grounds for suspicion that the controlee was or had been involved in a terrorism-related activity. Lord Phillips of Worth Matravers, giving the leading judgment with which the other members of the House agreed, stated at para 59:

> "… I am satisfied that the essence of the Grand Chamber's decision lies in para 220 and, in particular, in the last sentence of that paragraph. This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. …"

Lord Hope referred to this as "the bottom line, or the core irreducible minimum" (para 81).

21. Lord Brown of Eaton-under-Heywood, at para 113, emphasised the difference between, on the one hand, the regimes under consideration in that case and in *A v United Kingdom* and, on the other hand, the appeal jurisdiction exercised by SIAC under the 1997 Act, which was beyond the reach of article 6 and where the House had recently rejected an attack on the use of closed material, in *RB (Algeria)* (see above).

22. It should be noted, however, that *RB (Algeria)* was not concerned with issues of detention or bail under the 1997 Act. The importance of that was emphasised by Lord Phillips in *RB (Algeria)* itself. He observed at para 75 that issues such as bail engage different articles of the Convention which may carry with them differing requirements as to procedural fairness, but that no issue in relation to the refusal of bail arose in the present appeals. At para 90 he stated:

> "In the proceedings before SIAC neither of the appellants made an independent challenge of his detention as opposed to the decision to deport him. For this reason I do not consider that the procedural requirements of article 5(4) applied to those proceedings. For the same reason there is no merit in the argument that the appellants' right to liberty was in issue and that, in consequence, article 6 was engaged."

23. The approach to be adopted in bail proceedings under the 1997 Act in the light of *A v United Kingdom* was considered by SIAC in its judgment of 20 March 2009 on the Secretary of State's applications to revoke the bail of BB, U and others, to which I have referred above. In that judgment, especially at para 15, Mitting J put forward various points of distinction from *A v United Kingdom* in reaching the conclusion that reliance could be placed on closed material even if it was determinative of the outcome.

24. His analysis did not commend itself to the Divisional Court in *Cart*, where it was found that SIAC had acted in breach of article 5(4) in relying wholly on closed evidence for the revocation or refusal of bail. Laws LJ, with whom Owen J agreed, examined the judgments in *A v United Kingdom* and in *Secretary of State for the Home Department v AF (No.3)*, set out a central part of the reasoning in para 15 of Mitting J's judgment of 20 March 2009, rejected arguments for the Secretary of State that the context required a less stringent procedural standard than in *A v United Kingdom*, and concluded at para 112:

> "In the result it is, in my judgment, impossible to find a legally viable route, somehow navigating between *A* and *AF*, by which to conclude that in bail cases a less stringent procedural

> standard is required than that vouchsafed in *A*. In my view *AF* obliges us to hold that the selfsame standard applies, and Mitting J's points of distinction set out at para 15 of his judgment in *U* must be regarded as erroneous."

25. The principle in *Secretary of State for the Home Department v AF (No.3)* has since been applied in other contexts too: see *Tariq v Home Office* [2010] EWCA Civ 462, [2010] ICR 1034 (an issue of disclosure in a claim of discrimination on the ground of race and religious belief) and *Bank Mellat v Her Majesty's Treasury* [2010] EWCA Civ 483, [2010] 3 WLR 1090 (the standard of disclosure required in an application to set aside a decision to make a direction imposing financial restrictions under the Counter-Terrorism Act 2008).

The issue in the present case

26. It might be thought that the judgment in *Cart* left little scope for argument about the use of closed material in bail proceedings before SIAC. But the parties accept that there is an unresolved issue. It arises in this way. In para 15 of SIAC's judgment of 20 March 2009 Mitting J stated:

> "We are determining whether an appellant who has been found to pose a risk to national security should, in the light of current circumstances, have his bail revoked. We are entitled to decide that issue by relying on our findings in the main appeal and to do so without giving the appellant the opportunity of challenging those findings, by reference to material which was properly withheld from him in the main hearing."

In other words, SIAC considered that in bail proceedings post-dating its substantive decision in the deportation appeal it was entitled to rely on the findings contained in the substantive decision notwithstanding that those findings were based on closed material which the appellant had not had an opportunity to challenge.

27. SIAC adhered to that view even after the judgment in *Cart*. In its judgment of 21 December 2009 on the fresh application for the revocation of U's bail, it indicated at para 9 that it would adopt a precautionary approach to any application for bail by an appellant in relation to whom a deportation order had been signed; but this was subject to two provisos, the first of which was that -

> "it will not be necessary to revisit the grounds for finding that he posed a risk to national security, whether those grounds were open or closed or both. Nothing in the judgment of the Divisional Court in [*Cart*] undermines that premise."

28. Accordingly, in the present judicial review proceedings SIAC refused to consent to an order quashing the bail decision under challenge, stating that *Cart* did not determine the only question relevant to SIAC's approach to BB's bail application: "was SIAC entitled to rely on its (undisclosed) findings in its Judgment on his appeal against the notice of intention to deport him, in setting his bail conditions?"

29. The Secretary of State has picked up the point and run with it. It is not conceded that reliance was in fact placed or would have to be placed on the closed judgment in BB's bail proceedings: the part of the closed judgment opened up by SIAC in November 2007 might be sufficient, and it also shows that there was disclosure of some of the national security case against BB in the prior appeal proceedings. But it is accepted that the remaining part of the closed judgment or matters underlying it may be relevant to the outcome and that a decision on the point raised by SIAC is desirable.

The parties' submissions

30. Mr Southey QC submits that the core minimum standard of disclosure applicable to bail proceedings pursuant to the requirements of article 5(4), as vouchsafed in *Cart*, cannot be avoided by carving out a narrow exception in respect of SIAC's judgment on the substantive deportation appeal. An appellant must be given sufficient information to enable him to give instructions with regard to the key allegations relied on for the revocation or refusal of bail or the imposition of conditions. He may wish to challenge those allegations or to make submissions as to the weight that should be placed on them or to argue that circumstances have changed, but he cannot do any of this without knowing the gist of the allegations. Article 5(4) is violated where a decision involving restrictions on liberty is based on a case in respect of which the core minimum standard of disclosure has not been given, or is based on findings made in proceedings to which that standard did not apply. It is therefore not open to SIAC to rely in the bail proceedings on a closed judgment in the deportation appeal, or on findings made in the deportation appeal on the basis of closed material, without giving the appellant sufficient disclosure in accordance with the article 5(4) standard for the purpose of the bail proceedings.

31. For the Secretary of State, Mr Tam QC submits, in effect, that a substantive judgment in the deportation appeal can be relied on without the need for disclosure, in accordance with the article 5(4) standard laid down in *A v United Kingdom* and *Cart*, of closed reasons or of closed material underlying the court's findings. The judgment is a final decision of a court of competent jurisdiction in proceedings which were themselves fully compliant with domestic law and the requirements of the ECHR. The judgment is binding in those proceedings, and it cannot be right for the issue of bail to be used as a back-door means of undermining findings properly made in the substantive appeal. It must be open to SIAC to take account of the judgment when subsequently considering the issue of bail. And this must be the case irrespective of whether the substantive appeal proceedings would have complied with article 6 if, hypothetically, that article had applied to them.

32. Mr Tam also points to the practical difficulty or impossibility of determining after the event whether the substantive appeal proceedings would have complied with article 6 or of carrying out a subsequent article 5(4) exercise on the final judgment in those proceedings. The judgment contains a single, composite conclusion as to the risk to national security, with open and closed reasons. It may be difficult or impossible to identify precisely how much in the closed reasons has been relied on for the conclusion. Where reliance has been placed on closed material, it may be difficult or impossible to determine whether there was sufficient disclosure of the underlying allegations for compliance with article 6 (had it applied) or what precise degree of further disclosure would have been necessary for such compliance. In practice, therefore, SIAC would not know which parts of its final judgment could be relied on

in subsequent bail proceedings without further disclosure for article 5(4) purposes. In those circumstances the bail proceedings would end up as a re-run of the substantive appeal but with further disclosure of the underlying evidence or allegations, effectively requiring SIAC to disregard its judgment on the substantive appeal and the conclusion it had already reached in that judgment. This would be highly artificial and anomalous. There is no reason why matters underlying a legitimately closed judgment should become disclosable merely because the appellant has applied to vary the terms of his bail pending deportation.

33. Thus it is said that the fact of the judgment places the case in a separate category. That the requirements of article 5(4) can vary according to context is well established (see e.g. *A v United Kingdom*, para 203). The context here is different from that in *A v United Kingdom* and justifies a different approach to disclosure.

34. A further element in Mr Tam's submissions is that appellants would actually be *disadvantaged* if SIAC were unable to take its closed findings into account. To justify detention in the present context, article 5(1)(f) ECHR requires only that action is being taken with a view to deportation. In its pre-*Cart* judgment of 20 March 2009, at para 11, SIAC explained that it had nevertheless approached the matter in practice on the basis that an appellant should have the opportunity of contending that the risk posed by him to national security or the risk of him absconding was not such as to require him to be detained throughout the proceedings; but that affording him that right came at a price, namely that to evaluate either risk it would almost always be necessary for SIAC to receive closed evidence and information. In its post-*Cart* judgment of 21 December 2009 in relation to U, SIAC acknowledged that that "vital tool" was no longer available to it and, whilst indicating a reluctance to abandon altogether the attempt to assess the two risks in an individual case, said that a "precautionary approach" would be adopted. It is unnecessary to set out how SIAC envisaged that such an approach would operate in various different situations. In relation to a person in the position of BB, however, I have referred already to the proviso, which lies at the heart of the present proceedings, that "it will not be necessary to revisit the grounds for finding that he posed a risk to national security, whether those grounds were open or closed or both". Mr Tam submits that if that proviso cannot lawfully be applied the practical result will be that appellants are more likely to be kept in detention pending deportation (subject always to the separate principle laid down in *R v Governor of Durham Prison, ex p. Hardial Singh* [1984] 1 WLR 704 that an appellant cannot lawfully be detained for longer than is reasonably necessary for the purpose of deportation being effected).

Discussion

35. In my judgment, the article 5(4) procedural standard laid down in *A v United Kingdom* and held in *Cart* to apply to bail proceedings under the 1997 Act applies equally after SIAC has given judgment in the substantive appeal as it does at an earlier stage in the appeal proceedings. Although the particular issue now before us did not arise for decision in *Cart*, the thrust of the Divisional Court's reasoning in that case – rejecting a number of arguments by Mr Tam that bear a marked resemblance to some of those advanced before us – points strongly towards a uniform approach. I do not accept that a judgment in the substantive appeal proceedings falls into a special category. The post-judgment context remains essentially the same as the pre-

judgment context and is certainly not sufficiently different to warrant a fundamentally different approach to the application of article 5(4).

36. The article 5(4) requirement that a person must be given sufficient information about the allegations against him to enable him to give effective instructions has been described as "the bottom line, or the core irreducible minimum" (per Lord Hope in *Secretary of State for the Home Department v AF (No.3)*, para 20 above). There can be no justification for dropping below that minimum standard in a case concerning detention, at whatever stage of the proceedings the issue of detention may arise.

37. If reliance can be placed on a closed judgment or on findings based on closed material, without any further disclosure, there will be no assurance that the minimum article 5(4) standard has been met. The appeal proceedings themselves do not have to comply with article 6 (which for this purpose imposes materially the same standard as article 5(4)). In relation to a closed judgment or to findings based on closed material there must be a good chance that the procedure did not comply with article 6; but in any event, as Mr Tam submitted, nobody needed to address that question at the time and it may be difficult or impossible to determine it after the event. As a matter of principle, it cannot be right for reliance to be placed in bail proceedings on a judgment or findings arrived at through a procedure that did not comply or cannot be shown to have complied with the minimum standard applicable to the bail proceedings. Mr Southey gave the analogy of reliance in criminal proceedings on a judgment reached in civil proceedings where a different standard of proof applies. The analogy, though not precise, is a helpful illustration of why bare reliance on the substantive judgment for the purposes of bail proceedings where more rigorous procedural standards apply is objectionable in principle. Some assistance may also be gained from what was said in para 207 of the judgment in *A v United Kingdom* about the case of *Luca v Italy* (2003) 36 EHRR 46, in which the court "emphasised … that where a conviction was based solely or to a decisive degree on depositions that had been made by a person whom the accused had had no opportunity to examine or to have examined, whether during the investigation or at trial, the rights of the defence would be restricted to an extent incompatible with the guarantees provided by art 6".

38. There are two answers to Mr Tam's further concerns about the practical difficulties of requiring the same approach to be taken to bail proceedings post-judgment as pre-judgment. First, if the application of the minimum standard gives rise to practical difficulties, that is not a valid reason for lowering the standard. The difficulties will simply have to be coped with as best they can. In *Secretary of State for the Home Department v AF (No.3)* their Lordships were concerned about the practical consequences of adopting the approach in *A v United Kingdom*, which according to Lord Hoffmann "may well destroy the system of control orders" (para 70), but they accepted that this was the minimum standard required by article 5(4) and that it therefore had to be applied.

39. Secondly, I do not think that the practical difficulties are likely to be as great as suggested by Mr Tam. If the Secretary of State opposes bail or seeks stringent conditions in bail proceedings brought prior to a judgment in the substantive appeal, the Secretary of State will have to put forward a reasoned case identifying the material relied on, and SIAC will have to determine what is required by way of disclosure of the allegations or of their gist in order to achieve compliance with article 5(4). In the post-judgment situation, if the same article 5(4) standard applies, again it will be

necessary for the Secretary of State to put forward a reasoned case identifying the material relied on (in this case pointing as appropriate to relevant parts of SIAC's judgment and to any additional material relied on), and SIAC will again have to determine what is required by way of disclosure of the allegations or their gist in order to achieve compliance with article 5(4). The essential exercise will not be materially different or more difficult.

40. Disclosure of the relevant allegations or of their gist will enable an appellant to decide whether he wishes to take issue with SIAC's findings in the substantive appeal or, for example to argue that they should be given less weight or that matters have moved on. It will not necessarily lead to wholesale re-litigation of matters already determined by SIAC in the substantive appeal. But I acknowledge the existence of that possibility. It is an unattractive but inevitable consequence of applying the minimum article 5(4) standard to the bail proceedings when it did not apply to the substantive appeal. Very importantly, however, there is no question of re-opening the actual judgment in the substantive appeal. That remains a final judgment and cannot be altered by what subsequently takes place in relation to bail. Any findings made in the bail proceedings will be made for the purposes of those proceedings alone, though I should also mention suggestions made in the course of argument that they might then feed into a fresh claim or be relied on in the course of an appeal against the judgment in the substantive appeal.

41. I am not swayed by Mr Tam's argument that the application of the same article 5(4) standard to post-judgment as to pre-judgment bail proceedings would be disadvantageous to appellants by reducing the likelihood of their being granted bail. The concern here is with fair procedures, not with outcomes, and the procedural standard required by article 5(4) cannot depend on whether the ultimate outcome in terms of detention or bail is likely to more favourable or less favourable to appellants. I need go no further than that. The Divisional Court in *R (U) v SIAC* [2010] EWHC 813 (Admin) found it unnecessary, on the particular facts, to rule on the legality or otherwise of the precautionary approach set out in SIAC's judgment of 21 December 2009 and did not think it appropriate to give *obiter* guidance on the point. The same is true in this case.

Conclusion

42. For those reasons I consider that bail proceedings under the 1997 Act are subject to the same article 5(4) procedural standard, namely the standard laid down in *A v United Kingdom* and *Cart*, whether they take place before or after the judgment in the substantive appeal. The approach taken by SIAC in its decision of 24 June 2009 was therefore erroneous and I would allow BB's application for judicial review. Subject to the views of counsel, I doubt whether it is necessary formally to quash SIAC's decision or to remit the matter to SIAC. The position concerning BB's bail has moved on in any event since the decision. A further application for bail can now be made and will fall to be considered in accordance with this court's judgment.

Mr Justice Sweeney :

43. I agree.