Case No. CO/547/2010

Neutral Citation Number: [2010] EWHC 813 (Admin)
IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2010

Before :

LORD JUSTICE LA WS
and
MR JUSTICE McCOMBE

- -

Between :

The Queen on the Application of "U"	**Claimant**
- and -	
The Special Immigration Appeals Commission	**Defendant**
The Secretary of State for Home Department	**Interested Party**

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- -

Ms Charlotte Kilroy (instructed by **Birnberg Peirce and Partners**) for the Claimant
Mr James Strachan (instructed by **Treasury Solicitors**) for the **The Secretary of State for the Home Department**

Hearing date: 11 March 2010

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Judgment

Lord Justice Laws:

INTRODUCTION

1. On 7 December 2009 the Special Immigration Appeals Commission ("SIAC"), presided over by Mitting J, heard and granted the Secretary of State's application to revoke U's bail. They gave reasons in a written judgment dated 21 December 2009. U now applies for judicial review of that decision. Permission was granted by Sales J on 1 February 2010.

2. U's case has a long history. I should first sketch the immediate background to the 7 December decision. On that day U remained held in detention pursuant to an earlier decision of SIAC made on 20 March 2009, also to revoke his bail, which had been arrived wholly on the basis of closed evidence none of which had been revealed to U. On 1 December 2009 in *Cart, U and XC v The Child Maintenance and Enforcement Commission and SIAC* [2009] EWHC 3052 this court (Owen J and myself) held that this amounted to a violation of U's right under Article 5(4) of the European Convention on Human Rights (ECHR) "to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". We considered (paragraphs 112 – 114) that this conclusion was compelled by the decisions of the European Court of Human Rights in *A and Ors v United Kingdom* (Application 3455/05, 19 February 2009) and of the House of Lords in *AF and Ors v Secretary of State* [2009] 3 WLR 74. U was accordingly entitled to an order quashing the revocation of his bail. However (without objection from U's counsel) we withheld that relief for seven days for necessary arrangements to be made in anticipation of U's release. It was recognised also that the Secretary of State would have an opportunity within that time to seek permission from the Court of Appeal to appeal to that court. In fact he did not do so. Instead he applied to SIAC for a further revocation of U's bail, seeing that otherwise the prior revocation would imminently be quashed and U automatically restored to bail on terms which had been fixed much earlier.

3. In granting that application SIAC were of course obliged to be loyal to this court's judgment of 1 December 2009; that is to say, they could not revoke bail wholly in reliance on closed material none of which, not even the gist, had been disclosed to U. SIAC without doubt purported to act free of these legal vices. Miss Kilroy, in her tenacious argument on U's behalf, submits however that in seeking to do so SIAC applied an improper legal test for the application's determination, based on what has been called in the proceedings a "precautionary approach". The questions raised in this judicial review application are (1) whether in fact the precautionary approach played any part in SIAC's determination of 7 December 2009; (2) if it did, whether it is legally objectionable, and the determination therefore flawed. Plainly (2) only falls to be considered if (1) is answered in the affirmative.

4. In order to explain how these issues arise I must turn to the history. What follows is an expanded version of the passage in my judgment in *Cart* in which I described the facts of U's case.

HISTORY

5. U is an Algerian national born on 8 February 1963. He came to the United Kingdom in November 1994 and claimed asylum. At the end of 1996 he travelled to Afghanistan. He returned to the UK in March 1999. On 27 June 2000 his asylum application was refused. In March 2001 he was arrested and remanded in custody on

criminal charges, but they were dropped on 16 May 2001. However he was detained at HMP Belmarsh by the Secretary of State under paragraph 16 of Schedule 2 to the Immigration Act 1971 ("the 1971 Act") on the grounds that he had breached the conditions of his temporary admission. There ensued a lengthy series of events whose upshot is that, save for a period from July 2008 until February 2009 when he was on bail, U has been continuously in custody since March 2001. His confinement has been justified from time to time as a prisoner on remand, or under the administrative powers given by the 1971 Act, or at one stage as a fugitive whose extradition was sought to the United States.

6. Part of the history concerns deportation proceedings relating to U. On 11 August 2005 the Secretary of State served him with a notice of intention to deport under s.3(5) of the 1971 Act on the ground that his deportation would be conducive to the public good for reasons of national security. Appeal proceedings followed. On 7 November 2006, allegedly because of delays in the SIAC appeal process into which it is unnecessary to travel, U waived his right to pursue his appeal against the Secretary of State's decision that he was a risk to national security while making it clear that he did not accept the truth of that finding. A consequence was that when SIAC came to hand down its decision dismissing U's substantive appeal, it was unnecessary to give a closed judgment. The open judgment on the national security issue given by SIAC on 14 May 2007 was in the following terms:

> "3. It is the Secretary of State's case that from 1996 until February 2001, U was a leading organiser and facilitator of terrorist activity aimed mainly at overseas targets. To that end, it is claimed that he formed and led a terrorist group bearing one of the names which he had assumed in Afghanistan. Several of its members have been the subject of appeals to SIAC, against decisions by the Secretary of State to deport them on national security grounds. Claimed membership of the group formed part of the Secretary of State's case against each of them.
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> 4. On 23 March 2006, FCO officials handed over to the Algerian Embassy a note which summarised the security service's view of U in the following terms:
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> > 'Senior position in Mujahedin training camp in Afghanistan. Direct links to UBL (Usama Bin Laden) and other senior AQ (Al Qaeda) figures. Involved in supporting terrorists including those involved in the planned attack on the Strasbourg Christmas Market in 2000, and an earlier plan to attack Los Angeles Airport. US sought his extradition but withdrew request August 2005 … DETAINED'.
>
> There are credible grounds for believing each of these assertions.
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> 5. In an unsigned witness statement dated January 2006, the appellant admits that, while in Afghanistan, he attended Khalden Camp (paragraph 16), at which individuals received training for 'resistance' in their own countries (paragraph 16). He stated that he 'was obliged, or felt obliged, to have some

form of rudimentary military training' (paragraph 15). He admits attending the guest house in Jalalabad, at which others, suspected of terrorist activity, claimed to have met him (paragraph 26).

6. Some of the information about U's specific contacts and activities at both places was provided by Ahmed Ressam, who was arrested on 14 December 1999, in Port Angeles, Washington State, driving a van laden with explosives, which he said were destined for Los Angeles Airport. On 6 April 2001, Ressam was convicted of engaging in an act of terrorism and placing an explosive in proximity to a terminal and other offences, for which he was sentenced on 27 July 2005 to twenty-two years imprisonment – a substantial reduction on the sixty-five years minimum required by sentencing guidelines. He received that discount because he had provided information judged by the United States authorities to be true about others, including, in particular U. He said that he had received training in weapons handling and bomb making in Afghanistan, as part of a cell which included U as leader or trainer. Plans to bomb US targets were discussed at the training camps. Ressam understood that U's responsibilities included facilitating travel to and from the countries in which operations were to be carried out. (See paragraph 8 of the long form sealed complaint against U by the United States of America dated 2 July 2001.)

7. Ressam also stated that the proposed bombing of Los Angeles Airport was discussed with U in Afghanistan (paragraph 9) and that, as the date of the operation approached, U arranged that he would meet him in London when he had left the United States and assist him with travel to Algeria (Paragraph 11).

8. On the basis of Ressam's statements, the United States of America sought U's extradition from the United Kingdom. The application was withdrawn after, in April 2003, Ressam refused to testify against U. At a minimum, this calls into question the reliability of Ressam's statements about U.

What cannot be gainsaid, however, is that Ressam was engaged in a serious attempt to commit a major act of terrorism in the North West of the United States; and what is uncontradicted by the appellant is that a telephone number attributed to him – 7714620952 – was noted on a business card in Ressam's possession. Further, the appellant admits that he met Ressam at the guest house in Jalalabad (paragraph 26 of his statement of January 2006). At a minimum, a significant connection between a man caught in the act of furthering a major terrorist operation and U is established, with its origin in Afghanistan. Other information demonstrates that this was not just an unfortunate coincidence.

> 9. The appellant states that the 'sole purpose for returning to the United Kingdom was to mobilise support in this country for the Chechen people' (Paragraph 30 of his statement). He admits 'accessing' false documents to this end. Significantly, if euphemistically, he states that 'this related to the arranging of volunteers for Chechnya to go to Afghanistan to acquire some basic training' (Paragraph 36). The training was clearly military. Further, there is clear and credible evidence that, between March 2000 and February 2001, a group of three Algerians, led by him, purchased 230,000 pounds worth of high frequency radios, satellite telephones and airtime. (See the undated witness statement of Stuart Castell, Technical Manager of Integrated Communications Solutions Ltd.) This activity is wholly consistent with the role which Ressam said that U played at the camps in Afghanistan and in connection with his own operation.
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> 10. On 10 March 2003, the High Court in Frankfurt convicted four Algerian men of planning an attack on the Christmas Market in Strasbourg in December 2000. The court stated 'connections to the Al Qaeda network could not be proven. However it was not contested that all four in the years 1999 and 2000 had received military training in Afghanistan. In the opinion of the court encouragement to carry out the attack, if not the actual direct order, came from fellow muslims surrounding (U).' This finding of the German Court, after a trial, deserves considerable weight; and is, again, consistent with the information about U's activities already referred to.
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> 11. All of this material, taken together, satisfies us, on balance of probabilities, that the appellant has been involved in facilitating terrorist activity overseas; and, so, in consequence poses a significant risk to national security. We agree with the assessment of the Security Service, summarised in the note given to the Algerian Embassy on 23 March 2006. Further, despite the fact that the appellant has been detained continuously for six years, we share the Security Service's assessment that he remains a risk to national security. He has shown no sign of disavowing his former beliefs or associates. Indeed, his most recent witness statement dated January 2006 maintains that the accusations against him are false and that his purposes and actions were wholly benign. Only a credible and radical change in outlook could demonstrate that the risk has been eliminated or reduced to an acceptably low level. There has been none."

7. U first applied for bail in July 2007. His application was heard in SIAC on 23 August 2007 and was rejected on the basis that the length of time for which he had been detained pending deportation was not yet excessive. However on 27 February 2008 in the course of a bail application made by another Algerian who was also detained pending deportation, SIAC heard argument as to the reasonableness of continued detention given the likely future period of detention if, *inter alia*, the House of Lords granted U's petition for leave to appeal which was outstanding at that time. (A

principal issue in the prospective appeal was as to the effect of assurances given by a foreign sovereign State as to the treatment of one or more of its nationals upon his or their deportation home from the United Kingdom.) SIAC rejected the application for bail but stated:

> "If the House of Lords grants permission on the two identified grounds then we would consider it wholly reasonable for any Algerian appellant in detention to make a fresh application for bail which the Commission would attempt to determine at the earliest possible opportunity."

The House of Lords granted leave to appeal to U on 11 March 2008. Together with other Algerians detained pending deportation on national security grounds he applied for bail. The Secretary of State did not oppose the application but sought U's admission to bail at an address in Liverpool on a 22 hour curfew. U proposed an address in Brighton. For reasons not disclosed at the time the Secretary of State objected to the Brighton address. On 30 April 2008 SIAC ordered that U be released on bail to the Brighton address subject to stringent conditions including a 24 hour curfew. On 15 January 2009 a minor relaxation was allowed, permitting U to take twice-weekly accompanied walks of one hour.

8. On 18 February 2009 the House of Lords dismissed U's appeal ([2009] UKHL 10). On the same day the Secretary of State, on notice to U, applied to SIAC to revoke U's bail on the basis of "an increased risk of absconding due to the terms of the judgment". At length the application came before SIAC on 26 February 2009. The Secretary of State indicated that she might be relying on closed material in support of her application. SIAC ruled that if the Secretary of State wished to rely on closed material in relation to any individual she had to disclose to that individual whether it was being relied on. No decision was then made on the application to revoke bail; SIAC adjourned the matter (at U's instance, and that of other bail applicants) to 5 March 2009. The Secretary of State applied for bail to be revoked pending the resumed hearing on that date, but that was refused.

9. After the hearing on 26 February U left the hearing centre at approximately 5.30 pm under escort by immigration officers. But he then disappeared. His solicitors were at first unable to establish what had happened to him. At a hearing the following day, 27 February 2009 (arranged as I understand it on behalf of another Algerian detainee), it became clear that U had been arrested and detained at HMP Belmarsh. Accordingly, together with the other four appellants detained overnight, U sought his immediate release and made an urgent application for judicial review of the decision to detain him on the grounds that his detention amounted to an abuse of power. A closed hearing ensued at which the Secretary of State submitted closed evidence. Thereafter U was informed by SIAC that closed evidence had been adduced in relation to him but not the other appellants. The other four were immediately released pending the adjourned hearing of the application to revoke their bail. However SIAC then and there revoked U's bail on a temporary basis (pending the adjourned hearing) on the ground that the closed material indicated an increased risk to national security and of U's absconding. Mitting J, sitting in his capacity as a High Court judge, refused U's application for judicial review.

10. On 4 and 5 March 2009 SIAC heard full argument on the Secretary of State's application for revocation of U's bail, including submissions as to the effect of the judgment of the European Court of Human Rights in *A and others v United Kingdom*

(the judgment was cited in *Cart*; I need not cite it here for present purposes). In reliance on that decision it was submitted for U that sufficient details of any closed material sought to be relied on by the Secretary of State should be disclosed so that effective instructions might be given to U's special advocate. On 5 March 2009 SIAC rejected that submission without at that stage giving reasons, and proceeded to hear closed evidence adduced by the Secretary of State.

11. On 20 March 2009 SIAC gave judgment rejecting the Secretary of State's application to revoke the bail of the four other appellants, but holding that U's bail should be revoked. The Secretary of State had contended that the House of Lords' dismissal of appeals brought by U and others, in which the appellants had advanced contentions relating (for example) to the issue of risk on return to Algeria, "directly and significantly increases the risk of these individuals absconding". SIAC dealt with this contention at paragraph 19, which plays an important part in Miss Kilroy's submissions for U before us. The Secretary of State's principal argument was put thus in a witness statement by a Home Office official:

> "The principles of the deportation with assurances policy having been upheld by the House of Lords, each of these individuals will be aware that the prospects of deportation are now substantially higher, even if deportation is not yet quite imminent."

Other related arguments were deployed, which SIAC summarises at paragraph 19. They considered, however, that it was a "practical certainty" that the European Court of Human Rights would accept applications from the appellants (raising ECHR issues on the House of Lords' conclusions) as admissible, and give "an Article 39 indication" (that is, an indication that the appellants should not be deported until the Strasbourg court had ruled on the substance of the case). SIAC added (again paragraph 19):

> "We do not accept, as a realistic assessment, the proposition that 'deportation in the near future is now a realistic prospect'. Nor do we accept that the appellants and their advisers will regard applications to the Strasbourg court as hopeless..."

12. Accordingly SIAC (paragraph 20) concluded that the Secretary of State's application to revoke bail was not determined "on those general propositions [sc. relating to the effects of the House of Lords' decision], but on considerations specific to an individual appellant". They proceeded to consider the individual appellants in turn, and as I have said declined to revoke bail in relation to any of them save for U, whose case they addressed last of all. They stated (paragraph 44):

> "For the reasons which are wholly set out in the closed judgment, we are satisfied that the risk that U will breach his bail conditions has significantly increased."

13. And so in his case they acceded to the Secretary of State's application. It is not disputed that their decision on 20 March 2009 to revoke U's bail was based entirely on closed evidence, and the reasons for it were (as SIAC stated) entirely set out in their closed judgment.

14. Now I may come to SIAC's reasons for revoking U's bail on 7 December 2009, contained in Mitting J's written judgment of 21 December 2009. Paragraph 1 refers

to the decision in *Cart* and (following an invitation from counsel for both parties) states:

> "This judgment... sets out the approach which we will adopt to bail applications in the future and gives our reasons for the decision to revoke bail in U's case."

There follows some account of the history, then this:

> "7. In the case of a new appellant, it is unlikely that the national security case will be fully deployed at the start, at least in the open material. We do not start with a presumption that he must be detained but, save in exceptional cases, we are unlikely to be able to determine, at least on the open material, whether or not the two risks [sc. the risk the appellant poses to national security, and the risk of his absconding if bailed] could be managed if an appellant were admitted to bail. A precautionary approach will be adopted. Removal of the vital tool of reliance on closed material will make it unlikely that SIAC will grant bail. The means of ensuring that detention is not arbitrary or even unduly prolonged will be to insist upon a tighter timetable for the taking of steps preparatory to an appeal than has hitherto been customary..."

15. SIAC turned to the specific decision that fell to be made in U's case at paragraph 11:

> "SIAC's assessment of the threat to national security posed by U is set out in paragraphs 1 to 11 inclusive of its open judgment in his case of 14 May 2007. Of all SIAC appellants he is, in our judgment, the one who would pose the greatest risk to national security if he were to abscond. Given his historical role as the leader of a terrorist group, it is likely that there are individuals with the incentive and ability to assist him to abscond. Tagged house arrest will not prevent him from doing so: the tag does not contain a tracking device. It merely alerts the monitoring company to the fact that he has left the house and garden to which he would be confined. However quick the response of the police, he would have sufficient time in which to abscond. If, as we believe likely, absconding would be assisted by others, there would be a substantial chance that he would then disappear from view and/or leave the country. The incentive for U to abscond is great and, now, quite urgent. He will be aware that, if deported under guard to Algeria, he is likely to be detained, charged and prosecuted and, if convicted, sentenced to a very long term of imprisonment under Article 87(a)(6) of the Algerian Criminal Code. His only hope of escaping that fate, apart from the success of his legal challenge, is to abscond. His domestic legal challenge has now nearly run its course. Not only was his appeal on the main grounds on which deportation with assurances has been challenged, rejected by the House of Lords, his challenge to the reconsidered decision of SIAC has also failed in the Court of Appeal, save in one respect: *Z, G, BB, U, Y, VV, PP and W*

> [2009] EWCA Civ 1287 27 November 2009. Only one of the two grounds upon which permission to appeal has been granted relates to him: the claimed ability of an appellant to adduce 'reversed closed evidence'. If his appeal were to succeed on that ground, the result would not be that his appeal against the notice of intention to deport would be allowed, only that it be remitted to SIAC to admit further evidence on the 'reverse closed evidence' principle. He was given leave to argue that point in his original appeal, but did not, we are told for 'strategic' reasons do so. The failure of all but one of the grounds of challenge in domestic proceedings must, by now, have led him to a gloomy view about the likely prospects of success. His last and only hope would be an application to Strasbourg, the outcome of which is uncertain. He is a single man, without family ties or responsibilities in the UK. He has a good record of compliance with bail conditions, but only for 7 or 8 months. In his case, this factor is only of limited weight. Our assessment of the current circumstances in his case is that if we were to re-admit him to bail, there is a real risk or serious possibility that he will breach the condition of his bail which requires him to reside throughout the day and night at the address in Brighton at which he lived for seven or eight months or, on slightly less stringent terms, at another address in the United Kingdom. Removal of the opportunity to consider covert intelligence about an impending risk of absconding would make it impossible to manage that risk, even if (which we are not) we were prepared to take it. We are satisfied that the grounds for revocation of bail under paragraph 33(3)(a) of Schedule 2 to the 1971 Act are made out."

THE FIRST ISSUE: DID THE "PRECAUTIONARY APPROACH" PLAY ANY PART IN SIAC'S DETERMINATION OF 7 DECEMBER 2009?

16. Miss Kilroy has points to make on the decisions of 26 and 27 February 2009, but they were both taken on a purely interim basis. Her argument on this part of the case depends essentially on the force of her submission that the open evidence which might have militated in favour of revoking U's bail in March 2009 was considered and held not to justify revocation at paragraphs 19 and 20 of SIAC's decision of 20 March 2009; the same open evidence, therefore, cannot have justified revocation in December 2009. Some other factor must have been at work. Miss Kilroy submits that it was the "precautionary approach" heralded in paragraph 7 of the judgment of 21 December 2009.

17. The first point to make, as it seems to me, is that the factual material described in paragraph 11 of the 21 December judgment – "Of all SIAC appellants he is, in our judgment, the one who would pose the greatest risk to national security if he were to abscond. Given his historical role as the leader of a terrorist group, it is likely that there are individuals with the incentive and ability to assist him to abscond" – (a) reflects what SIAC had said in greater detail on 14 May 2007, (b) is entirely based on open material and (c) on any reasonable basis amply justifies the revocation of bail. In addition events which happened since the May 2007 decision (U's failure in the House of Lords and partial further failure in the Court of Appeal) can only have made matters less promising.

18. But I must confront Miss Kilroy's submission that the open evidence was considered and held not to justify revocation at paragraphs 19 and 20 of SIAC's decision of 20 March 2009; it cannot therefore without more have justified revocation in December 2009. In my judgment the evidence shows that the open material upon which, on the face of it, SIAC relied for its decision to revoke U's bail in December 2009 had not been considered in March. Paragraph 19 of the 20 March judgment (which is central to Miss Kilroy's argument) does not discuss the open material set out on 14 May 2007. I have summarised the reasoning contained in paragraph 19 of the 20 March judgment at paragraph 11 above. It turned on the effects of the then recent House of Lords decision, the prospects of success in the forthcoming Court of Appeal proceedings, and the likelihood or otherwise of an Article 39 indication from Strasbourg; and SIAC's judgment on those matters did not carry the day for the Secretary of State's application to revoke bail. But the underlying facts or apprehended facts as to U's terrorist connections, earlier investigated in open evidence, were not touched upon.

19. Miss Kilroy, however, submits that the court should be sceptical at the suggestion that SIAC in December only had regard to the existing open material relating to U. The theme of her case is a rhetorical question: if that material was so decisive in favour of the Secretary of State's application to revoke bail in December, surely it would have been seen as a short answer in March; and there would have been no necessity to go down the more problematic road of reliance on closed material.

20. SIAC no doubt gave careful consideration to the arguments put to it in March 2009, whatever form they took. It is in my judgment clearly impossible to infer from the context or the specific terms of the March decision that SIAC then regarded the open material concerning U's terrorist links as insufficient to justify a revocation of his bail. But if that were in doubt, the matter is in my judgment put to rest by certain passages in the transcript of the argument before SIAC on 7 December 2009 (transcript p. 45 line 22 ff):

> MITTING J: The way in which Mr Tam [for the Secretary of State] seeks to [show that U's bail should be revoked] is to say U historically has posed a very serious threat to national security, the incentive for him to abscond because of what faces if he goes to Algeria lawfully, that is detention and retrial and a sentence up to life imprisonment is such that he is likely to abscond.
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> COUNSEL (for U): I had not understood that it was going to be possible to reinvent the wheel...
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> MITTING J: ... When bail was granted it was granted with the Secretary of State agreeing. What we declined to do when the previous Home Secretary wanted to withdraw bail from all five of the Algerian appellants [sc. in March 2009] was to examine each case individually in the light of our then understanding as to the way in which we should exercise our power. And now we know that was not right and we have got to go back to square one.
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> COUNSEL: It is my respectful submission that that is basically re-writing the position because everybody has proceeded on the

> basis that the reason why U remained in detention and everyone else was granted bail was because of the closed material unique to him. That is what differentiates him from all the others who were released.
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> MITTING J: Indeed that was the basis on which we reached our decision [sc. on 20 March 2009], but it does not mean to say that revisiting the matter we are inhibited from reaching a different decision on different material.
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> COUNSEL: Obviously the critical question is is there different material. I am not aware of any.
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> MITTING J: I do not mean new material. We did not consider whether in U's case his bail should be revoked because of the factors I mentioned to you a minute or two ago full stop. We decided it on the basis of closed material, but it does not mean to say that we cannot when revisiting the decision in the light of the law as we now know it to be, we are not [*sic*] prevented from approaching it afresh in the light of considerations which we did not then consider.
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> COUNSEL: ... [I]t would be my respectful submission that that is essentially seeking to go behind the effect of the judgment and that in truth there is no distinction between U and any of the others save for the national security [sc. meaning the closed] material.
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> MITTING J: That I do disagree with. On any view of the hierarchy of those with whom we are concerned U is at the top, the others are not.

21. In my judgment it is plain that in these exchanges Mitting J was pointing to a basis for revoking bail which in no way depended on closed material but on known facts about U which had long since come to light in open evidence, but which had not been considered on 20 March 2009.

22. I see no reason to doubt, and every reason to accept, that this was the basis on which SIAC concluded as it did in its written judgment of 21 December 2009. Miss Kilroy was disposed to submit, as I understood her, that Mitting J's observations in the passages cited may not have represented the view or approach of all three members of the tribunal. That will not do. Nothing supports the submission. The other two members may in the nature of things have been guided by the High Court judge in the chair but if they or either of them felt that he was putting a point of view distinctly at odds with their own, one would expect them to have said so.

23. Miss Kilroy also has a point on the second last sentence of paragraph 11 of the judgment of 21 December 2009, which I repeat for convenience:

> "Removal of the opportunity to consider covert intelligence about an impending risk of absconding would make it impossible to manage that risk, even if (which we are not) we were prepared to take it."

The risk referred to is that U would breach the conditions of his bail. Miss Kilroy says, as I understood her, that this sentence somehow shows that on 21 December 2009, despite the decision in *Cart*, SIAC continued to have regard to closed material S

and/or were relying on the contentious precautionary approach.

24. The sentence is, with respect to Mitting J, somewhat delphic. But it is in my judgment clear that SIAC was stating that it was *not* prepared to take the risk of U's breaching his bail conditions. It follows that any consideration of the position that might obtain if it *was* prepared to do so belongs to a different scenario which does not arise. There is no reliance on closed material or the precautionary approach in reaching the decision to revoke bail.

25. For all these reasons I conclude that SIAC's determination of December 2009 was uninfluenced and unaffected by any closed material or the precautionary approach.

THE SECOND ISSUE: LEGALITY OF THE "PRECAUTIONARY APPROACH"

26. This issue does not arise if my Lord agrees with my conclusion on the first issue, since it means that the legality or otherwise of the precautionary approach is irrelevant to the legality of the December decision to revoke bail. In the circumstances I do not think it appropriate to enter into the second issue. Our views on the point would be *obiter*. This is not in my opinion one of those cases where it would be profitable, as it sometimes is, for the court to give *obiter* guidance on a point which has become moot in the litigation in hand. The "precautionary approach" is itself an elusive notion and its legal merits will be much better judged against concrete relevant facts.

CONCLUSION AND POSTSCRIPT

27. For the reasons I have given I would dismiss this application for judicial review. I would not, however, leave the case without making these general observations. One dimension of Miss Kilroy's argument was the suggestion that if the December decision was driven only by the earlier open material, then it should be condemned as irrational in the *Wednesbury* sense ([1948] 1 KB 223) given the fact (as Miss Kilroy urged) that the same material did not justify revocation of bail in March. I have not, of course, accepted the supposed fact; but I mention the matter in order to give emphasis, if I may, to what I said in *Cart* at paragraph 85:

> "As for bail, the court will not allow judicial review to be used as a surrogate means of appeal where statute has not provided for any appeal at all. In a sensitive area where the tribunal is called on to make fine judgments on issues touching national security, I would anticipate that attempts to condemn the refusal (or grant) of bail as violating the *Wednesbury* principle will be doomed to failure. A sharp-edged error of law will have to be shown."

28. Permission to bring this present judicial review was with respect rightly given by Sales J because SIAC's December judgment articulated, in a single narrative, the

tribunal's response (the precautionary approach) to this court's ruling in *Cart* as to the impact of ECHR Article 5(4) on bail cases together with its decision on the merits of the Secretary of State's application to revoke U's bail; and this provided the opportunity for Miss Kilroy's submission, which for my part I have rejected, that the former infected the latter. But I think it should be clearly understood that challenges to bail decisions by SIAC will be rare and exceptional, requiring, as I expressed it in *Cart*, a "sharp-edged error of law".

Mr Justice McCombe:

29. I agree.