Appeal Number: SC/51/2006
Hearing Date: 11th June 2008
Date of Judgment: 27th June 2008

IN THE SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE ALLEN
MR C SMITH

BETWEEN

OO

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Upon hearing:

MR K STARMER QC and MR E GRIEVES (instructed by Birnberg Peirce and Partners) appeared on behalf of the Appellant.

MR J GLASSON and MR A O'CONNOR (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State.

MS J FARBEY and MR D BEARD (instructed by the Special Advocates' Support Office) appeared as Special Advocates.

PRELIMINARY ISSUE (MB) JUDGMENT

MR JUSTICE MITTING :

Background

1. OO arrived in the United Kingdom on 23rd November 1991 and claimed asylum. On 11th June 1993 he was granted refugee status and, after a significant delay caused by his absence from the United Kingdom between 1993 and 1997, he was granted indefinite leave to remain on 19th April 1999. By a decision notice dated 26th January 2006, the Secretary of State notified the Appellant of his decision that he deemed it to be conducive to the public good to make a deportation order against him under section 3(5) of the Immigration Act 1971. He stated that he proposed to give directions for removal to Jordan, of which the Appellant was and is a national and to detain him under paragraph 2(2) of Schedule 3 to the Immigration Act 1971, pending the making of the deportation order, on the ground that his detention was necessary in the interests of national security. The notice identified his right of appeal to the Commission. By a notice dated 26th January 2006 the Appellant gave notice of appeal against the Secretary of State's decision. The grounds of appeal are in standard terms. Although they do not explicitly assert that the decision of the Secretary of State that the Appellant posed a risk to national security is erroneous, that is, as in many appeals to the Commission, the first substantive issue which it will have to determine. The remaining issues can be grouped under two heads: whether or not the United Kingdom would be in breach of its obligations under Articles 3 and, perhaps, 6 of the European Convention on Human Rights if he were to be returned to Jordan (commonly referred to as the safety on return issue) and whether or not, by reason of his poor physical and mental health, he can be returned to Jordan without infringing his rights under Articles 3 and/or 8. Subject to the decision of the House of Lords in the appeals of RB (identified in SIAC as BB) and U on the acceptability of assurances from states which have ill-treated persons detained by them, it is likely that the national security issue will be determinative of the appeal.

2. By a letter dated 16th October 2007 the Secretary of State notified the Appellant's solicitors that she had concluded that there were serious reasons for considering that he had been guilty of acts contrary to the purposes and principles of the United Nations and, so, was excluded from refugee status by virtue of Article 1F(c) of the 1951 Refugee Convention. "Therefore, his former status as a refugee has been revoked accordingly." A letter of the same date in similar terms was sent to the Appellant which noted, additionally, that there was no right of appeal against the decision to revoke refugee status, but that "the question of whether or not you are excluded by virtue of Article 1F(c) will be among the issues to be considered during your appeal against deportation before the Special Immigration Appeals Commission". The precise status and effect of these letters is not, at present, clear. Neither are in terms certificates under section 55 of the Immigration Asylum and Nationality Act 2006; but it appears to be at least likely that the Commission will be invited to consider and rule upon the correctness of the Secretary of State's decision under, or perhaps by analogy with, section 55(3) and (4). Mr Starmer QC, for the Appellant, submitted that the appeal would, in effect, determine

the Appellant's refugee status, with the consequences to which we refer below. Mr Glasson made submissions on the implied premise that it would; and, for the purposes of determining the present issue, we are content so to assume.

3. Since his detention, the Appellant has suffered very serious physical and mental health problems, which have substantially delayed the hearing of his appeal. A litigation friend was appointed. On the last occasion on which directions were given for the hearing of the appeal, it was fixed (with the consent of all participants) for the week beginning 9th June 2008. A last minute improvement in the Appellant's mental health led the reporting consultant psychiatrists (Dr Robertson for the Appellant and Dr Agrawal for the Secretary of State) to agree that he now had the mental capacity to participate effectively in the appeal. Mr Starmer saw him on Tuesday 10th June 2008 and told the Commission that he does wish to advance a positive case. This will require an exculpatory review and, at the hearing, the opportunity for him to give evidence or, if he chooses not to do so, to rely upon a written statement in response to the Secretary of State's open case. The hearing of the appeal is now listed for the week beginning 21st July 2008.

4. The Appellant has been detained, either in a category A prison or in a secure mental hospital (Broadmoor) since 26th January 2006. Although the Commission has indicated a willingness to admit him to bail for the purposes of rehabilitation, to a rehabilitation unit, it has, until recently, always refused to admit him to bail at his home. On 9th May 2008, the Commission decided that he could be admitted to bail at his home, but on stringent terms which will undoubtedly deprive him of his liberty, not least because they include a 22 hour curfew. On 11th June 2008 a detailed bail order to that effect was signed, with a view to his release home on Friday 13th June 2008. If his substantive appeal is heard in the week beginning 21st July 2008, it is, to all intents, certain that he will remain deprived of liberty until his appeal is determined.

The issue

5. Mr Starmer submits that the procedural safeguards considered in *Secretary of State for the Home Department v MB* [2007] UKHL 46 in proceedings about control orders apply with equal force to substantive appeals to the Commission. His submissions, and this decision are directed only to an appeal against a notice of intention to deport on conducive grounds when the Secretary of State has certified the decision under section 97(1)(a) of the Nationality Immigration and Asylum Act 2002. At the heart of his submission is the proposition that the Commission's decision on the appeal will determine whether or not the Appellant will continue to be deprived of his liberty. Accordingly, an issue arises under Article 5(4). The Strasbourg Court has identified minimum procedural safeguards which must apply to proceedings which engage Article 5(4). That minimum is correctly identified by the House of Lords in *MB*. Mr Glasson contends that, in determining a substantive appeal, the Commission's task is different: to determine whether or not the notice of intention to deport should be upheld. That is not a decision which engages Article 5(4). Consequently, different procedural safeguards apply

from those which would apply if the Commission were determining a challenge to deprivation of liberty.

6. The issue is of general importance and is capable of arising in every substantive deportation appeal determined by the Commission. Hence, no doubt, the permission to appeal on this issue granted by the House of Lords in *RB* and *U*. We have considered whether or not to defer determining the issue until the House of Lords has made its decision, but decided to proceed for two reasons: first, whether or not Article 5(4) (which requires speedy determination of the lawfulness of detention) applies, it is not acceptable that the appeal should not be heard for three years or more after the Appellant was first detained. To determine the appeal, we must address this issue. Secondly, the issue for which permission to appeal was given by the House of Lords has not been the subject of submissions or determination by the Commission in any appeal in which it has exercised its current jurisdiction. It is possible that the House of Lords will be assisted by the information, and, possibly, reasoning of the Commission set out in this judgment.

Detention and bail conditions

7. Omitting appellants in whose cases the Commission has made no substantive determination and is unlikely to do so, there have been 33 appellants, who have appealed against notices of intention to deport: 18 Algerians, 12 Libyans and 3 Jordanians. Nine Algerians have withdrawn their appeals, of whom all but one have returned to Algeria. Eight have had their appeals determined, of which one succeeded. The appeal of the remaining appellant is stalled, because his identity cannot be established. Two Libyan cases were determined as lead cases. The appeals were allowed on safety on return grounds and the notices of intention to deport have been withdrawn in all Libyan cases. Two Jordanian cases have been heard. Both appeals were dismissed by the Commission, but one was allowed by the Court of Appeal. Subject to appeals being remitted by the Court of Appeal or the House of Lords to the Commission for further determination, this Appellant's appeal and the stalled Algerian case are the only remaining in-country appeals.

8. In almost all cases, the appellant was initially detained. In every case, the Commission has either now signed a bail order or determined that the appellant should be released on bail. Bail conditions have been detailed and stringent and have varied from a twenty four hour curfew in one case to conditions which include a curfew of insufficient length to give rise to a deprivation of liberty on that ground in two cases. In a small number of cases the length of the curfew (seventeen or eighteen hours) would only require modest adjustment to avoid deprivation of liberty. The grant of bail, and the conditions to be imposed, are given individual consideration by reference to factors relevant to the appellant concerned. It is always open to an appellant who has demonstrated good compliance with bail conditions to apply for them to be relaxed. There is, however, no doubt that in the great majority of cases the risks to national security alleged or found to have been posed by an individual appellant have led to the refusal of bail, in the early months of the proceedings, and the subsequent imposition of conditions which amount to a deprivation of liberty.

9. After the determination of the two lead Libyan cases, applications were made by all other Libyan appellants for bail. The applications were opposed by the Secretary of State. The Commission accepted that, in the light of the Commission's reasons for determining that it was not safe to return the two appellants to Libya, detention of them and of the other Libyan appellants would be "on the cusp of legality". Their release on bail was ordered on terms which included a 12 hour curfew but did not amount to a deprivation of liberty.

10. Hitherto, bail hearings have taken place on the same basis as substantive hearings as regards the disclosure of closed material: pursuant to Regulation 4 of the Special Immigration Appeals Commission (Procedure) Rules 2003, the Commission has secured that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom or in any other circumstances where disclosure is likely to harm the public interest. The Commission has not heard fully developed submissions about *MB* disclosure at bail hearings. The Commission will hear and determine such submissions, if and when made.

The nature of the appeal decision

11. The jurisdiction and task of the Commission is to determine an appeal against a decision to make a deportation order under section 5(1) of the Immigration Act 1971 when the Secretary of State has issued a certificate under section 97 of the Nationality Immigration and Asylum Act 2002: section 2(1)(a) of the Special Immigration Appeals Commission Act 1997 and section 82(2)(j) of the 2002 Act. A decision on that issue is not a decision about the lawfulness of the detention of the Appellant; nor, necessarily, does it have an indirect effect upon detention, as the one Algerian case in which an appeal was determined when the Appellant was not deprived of his liberty by his bail conditions demonstrates. Nevertheless, Mr Starmer submits that, in the case of this appellant, as in the case of most, determination of the principal issue will result in a decision about continued detention: if the appeal is allowed (and there is no subsequent successful appeal by the Secretary of State), the Secretary of State will, in short order, withdraw the notice of intention to deport; and the legal basis for the Appellant's detention (under paragraph 2(2) of schedule 3 to the Immigration Act 1971) will go.

12. Mr Starmer's submission begins with an analysis of the Strasbourg Court's decision in *Chahal v United Kingdom* 23 EHRR 413. The basic facts of the decision (which gave rise to the establishment of the Commission) are well known to all who practise in this field and need not be set out. The Court decided four questions:

   i) If the applicant were deported to India there was a real risk that he would be subjected to treatment contrary to Article 3, so that his rights under that Article would be violated (paragraph 107)

   ii) The then existing procedures for deciding whether or not he should be deported, in the light of that risk, were not effective remedies in respect

of his Article 3 complaint for the purposes of Article 13 (paragraph 153)

iii) The advisory panel procedure afforded a sufficient guarantee against arbitrariness (implicit in Article 5(1)) in reaching that decision, so that there was no violation of Article 5(1)) (paragraphs 122 and 123)

iv) Neither the procedure before the advisory panel nor the judicial review and habeas corpus proceedings satisfied the requirements of Article 5(4) for a decision by a court about the lawfulness of his detention, pending deportation (paragraph 132).

The Court's suggestions as to the means by which the United Kingdom might lawfully determine the issues which arose in Chahal's case were contained in that part of the decision which dealt with Article 5(4) (paragraph 131) as well as the part which dealt with Article 13 (paragraph 144). Unsurprisingly, therefore, it was widely understood, before *MB*, that the 1997 Act and 2003 Regulations provided a Convention – compliant code for dealing both with the substantive appeal and with bail applications before and after it. As far as we know, the single argued exception was that the Commission should not consider closed material relevant to the issue of safety on return.

13. Now that the issue is live, it is necessary to analyse precisely what the Strasbourg Court decided under Article 5(4). First, it decided that the advisory panel was not a "court" within the meaning of Article 5(4), because, although it provided some degree of control, the applicant was not entitled to legal representation, he was given only an outline of the grounds for the notice of intention to deport, it had no power of decision and its advice to the Home Secretary was not binding or disclosed (paragraph 130). Secondly, the court which did decide whether detention was lawful (MacPherson J in the Divisional Court) was "wholly unable" to decide whether the Secretary of State had acted unlawfully or with procedural impropriety or perversely (see the extract from his judgment in paragraph 43). Accordingly, the domestic courts were not in a position to review whether the decisions to detain the applicant and keep him in detention were justified (paragraph 130, first sentence). The question was whether the available proceedings "to challenge the lawfulness of Mr Chahal's detention and to seek bail provided an adequate control by the domestic courts" (paragraph 129). The answer was no (paragraph 132). The Court did not decide that the Secretary of State was not entitled to rely on material not disclosed to the applicant for the purposes of Article 13. Indeed, its requirements fell a good way short of that. What was required was "independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3" (paragraph 151), but that "such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective" (paragraph 152). The shortcomings of the proceedings before the advisory panel were reiterated, so that it could not be considered to offer sufficient procedural safeguards for the purposes of Article 13 (paragraph 154). Reduced to essentials, the Strasbourg Court decided that the lawfulness of detention had to be reviewed by a court

with a power of decision and that Article 13 requires that there be independent scrutiny of an Article 3 claim (i.e. safety on return).

14. The second strand of the Court's reasoning has been considered and developed in subsequent cases. The mechanical application of short time limits to claims engaging Article 3, precluding a meaningful assessment of the claim violates Article 13: *Jabari v Turkey 40035/98 11/10/2000*, paragraphs 40 and 48 – 50: "The notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3". Where Article 8 is engaged by a deportation decision based on national security, "the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority must be informed of the reasons grounding the deportation decision even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative after security clearance": *Al-Nashif v Bulgaria 50963/99 20/09/2002* paragraph 137. In *Maaouia v France 33 EHHR 1037*, the Court rejected, in the clearest of terms, the proposition that Article 6(1) applied to expulsion decisions, essentially for two reasons: first, the proceedings (for the rescission of an exclusion order) did not concern the determination of a "civil right" for the purposes of Article 6(1). In so doing, it can be taken to have applied its long standing jurisprudence that the "civil" proceedings to which Article 6(1) applied were "all proceedings the result of which is decisive for private rights and obligations": *Ringeisen v Austria (1) 1971 1 EHRR 455* paragraph 94. Secondly, it considered that the states which adopted Article 1 of Protocol No. 7 on 22nd November 1984 can be taken to have been aware that Article 6(1) did not apply to procedures for the expulsion of aliens (paragraph 36). The Court's conclusion was expressed in broad and unequivocal terms: "The Court concludes that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations…within the meaning of Article 6(1) of the Convention" (paragraph 40). The rights engaged in *Maaouia* arose under Article 8; but the principle also applies to applications where Article 3 is engaged: *Mamatkulov v Turkey* [2005] 41 EHRR 494 (paragraph 82 and 83 and note 24).

15. Nothing in the jurisprudence of the Strasbourg Court requires, or even suggests, that in determining a substantive appeal, the Commission is permitted or required to read down rule 4 so as to create a court-fashioned exception requiring disclosure of material on which the Secretary of State relies even if disclosure would be contrary to the interests identified in it. On the contrary, the observations which the Court has made, to which reference is made above, suggest that the Court would regard the Commission's procedures as compliant with Article 13, in a case in which Articles 3 or 8 or both were engaged.

16. The first strand of the Court's reasoning was reiterated in *Al-Nashif* in paragraphs 93 – 98. The Court expressed no view on the conformity of the UK system with the Convention – in the context of the application under

Article 5(4) (paragraph 97); but it did note in the context of the Article 8 claim that, where national security was at stake lawfulness and the rule of law required that measures affecting fundamental human rights "must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information". (paragraph 123). Nothing in the jurisprudence of the Strasbourg Court thus far suggests disapproval of the UK system, even in the context of determining applications which directly decide the lawfulness of detention.

17. Nevertheless, Mr Starmer points to a long and, until *R(Roberts) v Parole Board* [2005] 2AC 738, unbroken and unqualified line of domestic authority that when liberty is at stake, natural justice required that the person affected should be made aware of the charges or allegations against him: see, by way of example only, the speeches of Lord Bingham in *R(Roberts) v Parole Board* [2005] 2AC 738 paragraphs 15 and 16 and in *Secretary of State for the Home Department v MB* [2007] 3WLR 681 paragraph 29. The common law is mirrored in the Strasbourg Court's approach to bail hearings: they must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question, must be adversarial and must always ensure "equality of arms": *Reinprecht v Austria* 67175/01 12/04/2006 paragraph 31(b) and (c) and *Garcia Alva v Germany* 23541/94 13/02/2001 paragraph 39. Therefore, information essential for the assessment of the lawfulness of detention must be made available to a suspect's lawyer: paragraph 42. In the light of the observations of the Strasbourg Court about procedures to be adopted when national security is engaged, we doubt that it would require these principles to be applied in an unqualified manner; but even if it were to do so, it would only do so in relation to proceedings which did decide upon the lawfulness of the deprivation of liberty, i.e. bail hearings. If and when such submissions are made in support of bail, there will be number of possible outcomes: in the light of the observations of the Strasbourg Court referred to above, the statutory procedures are compliant with Article 5(4); the application will be determined on the basis of open allegations only, including those which the Secretary of State elects to gist after a ruling by the Commission, on *MB* lines; in cases in which the open material would not justify the deprivation of liberty, bail must be allowed on terms which restrict the liberty of an appellant, but do not deprive him of it. There may be other possibilities. There is no right of appeal against a SIAC bail decision, because it is not a final determination of an appeal under section 7(1) of 1997 Act, but the Commission would pay close and respectful attention to any observations, if made, of the Appeal Committee on this topic.

18. Mr Starmer accepts that common law principles are, in domestic law, effectively restricted by the statutory scheme.

19. Mr Starmer's subsidiary arguments can be dealt with shortly. He submits that deportation and the revocation of refugee status both interfere with domestic civil rights, so that, in proceedings to challenge the decisions, Article 6(1) applies. In his skeleton argument, he also submitted that, whatever the position was before 2nd October 2000, when the Human Rights Act came into

force, or 10th October 2006 when member states were required to transpose into domestic law the provisions of Council Directive 2004/83/EC of 29th April 2004, the civil rights guaranteed by the Convention or required to be guaranteed to those recognised as refugees by the Directive (i.e. elements of family life, the right to receive state benefits and to seek employment or self employment) have been incorporated into English domestic law. Accordingly, a challenge to decisions which interfere with them now involves the determination of civil rights, so as to engage Article 6(1) even if they did not do so before. The latter argument is fallacious: persons granted refugee status or indefinite leave to remain have always had those rights in English law. Strasbourg jurisprudence gives an unequivocal answer to the submission: "the fact that the exclusion order incidentally had major repercussions on the Applicant's private and family life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6(1) of the Convention": *Maaouia v France* paragraph 38.

20. *MB* has no direct bearing on proceedings of the kind that we are considering. The Secretary of State conceded that control order proceedings fell within the civil limb of Article 6(1), because they were in effect "decisive for civil rights, in some respects at least": paragraph 15. The concession is understandable: the imposition of a control order will have a direct and intended effect on the controlled person's enjoyment of many of the incidents of family and private life and many control orders restrict his ability to obtain paid work. Conversely, determination of the appeal against a notice of intention to deport has only an indirect effect upon the enjoyment of such rights; and, as *Maaouia* demonstrates, that does not bring it within Article 6(1).

<u>Conclusion</u>

21. For the reasons given, we reject the submission that rule 4 should be read down so as to require the Secretary of State to disclose material to the Appellant which, in her opinion, or in the opinion of the Commission if the issue is litigated under rule 38, would be contrary to the interests identified in regulation 4 or to be put to an election not to rely upon such material if not disclosed. We reject the submission that rule 4 should be read down to achieve that effect and will determine this appeal under and within the statutory framework.