

SPECIAL IMMIGRATION APPEALS COMMISSION

Field House,
Breams Buildings
London
EC4A 1WR

Friday, 29th July 2011

BEFORE:

THE HONOURABLE MR JUSTICE MITTING

BETWEEN:

U

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Ms D Rose QC, and Ms S Harrison (instructed by Messrs Birnberg Peirce & Partners) appeared on behalf of the Appellant.

Mr J Eadie QC, and Mr A O'Connor (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Ms A Dhir QC (instructed by the Special Advocates' Support Office) appeared as Special Advocate.

JUDGMENT

Mr Justice Mitting:-

1. This is a further application by 'U' for bail. For reasons which I will indicate I am going to accede to the application. Before I do I must deal with a question of principle concerning SIAC's power to consider closed evidence in a bail application made otherwise than under its free-standing jurisdiction to entertain a bail application in a national security case where there is no appeal to the Commission.

2. Broadly speaking SIAC enjoys the same powers as the First Tier Tribunal in an immigration and asylum appeal, in national security cases. Those powers include the power to grant bail. Schedule 3 to the SIAC Act 2007 expressly gives SIAC the same powers as the First Tier Tribunal under, amongst other provisions, paragraphs 22 and 29 of Schedule 2 to the Immigration Act 1971. It does so via Schedule 3 to that Act which deals with deportation cases with which SIAC is of course concerned. Paragraph 22(1)(a) expressly confers on the First Tier Tribunal the power to release a person detained by an immigration officer on bail. That power is free-standing - it does not depend on the existence of an appeal to the First Tier Tribunal. When an appeal is brought the power is to be found in paragraph 29 which provides:-

 “(i) where a person in the following provisions of the Schedule referred to as 'an appellant', has an appeal pending under Part 5 of the Nationality, Immigration and Asylum Act 2002, and is for the time being detained under Part 1 of the Schedule, he may be released on bail in accordance with this paragraph...
 (iii) the Asylum and Immigration Tribunal, now the First Tier Tribunal, may release an appellant on his entering into an recognisance...”

3. Schedule 3 to the SIAC Act simply substitutes SIAC for the First Tier Tribunal in those paragraphs. Section 5 of the SIAC Act contains the enabling power, under which the Lord Chancellor may make SIAC's procedure rules. The relevant provisions are 5(1), (3) and (5).

"(1) the Lord Chancellor may make rules;

- (a) for regulating the exercise of the rights of appeal confirmed by Section 2 or 2B above,
- (b) for prescribing the practice and procedure to be followed on or in connection with appeals under Section 2 or 2B above including the mode and burden of proof and admissibility of evidence on such appeals and
- (c) for other matters preliminary or incidental to, or arising out of such appeals, including proof of the decisions of the Special Immigration Appeals Commission...

(3) Rules under this Section may in particular

- (a) make a provision enabling the proceedings before the Commission to take place without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal
- (b) make provision enabling the Commission to hold proceedings in the absence of any person including the appellant and any legal representative appointed by him...

(5) The power to make rules under this Section shall include power to make rules with respect to applications to the Commission under paragraphs 22 to 24 of Schedule 2 to the Immigration Act 1971 and matters arising out of such applications".

4. It is thus apparent that no express provision is made in the enabling section for the exercise of powers under paragraph 29 of Schedule 2 to the 1971 Act. Accordingly, Ms Rose QC, for the appellant submits that as a matter of principle Parliament cannot be taken to have approved the use of closed procedures when determining an application for bail under paragraph 29. Mr Eadie QC for the Secretary of State submits that the power to make rules to that end is contained in subsection 5(1)(c). Bail is clearly a matter preliminary or incidental to, or arising out of an appeal, consequently the general words permit rules to be made about the use of

closed material. Ms Rose's submission is founded on the principle of legality. Parliament is here dealing with a most important topic, if not the most important topic, the liberty of a person present in the United Kingdom. Parliament must make express provision limiting the common law rights of access to adverse material in the enabling section. Accordingly she submits that the SIAC Rules, in particular Rule 4(1), do not permit material on which the Secretary of State relies, which cannot be disclosed to the appellant, to be withheld from him.

5. I have no doubt at all that Mr Eadie's submission is right. The express words of Section 5(1)(c) are clearly sufficient by themselves to permit rules authorising, or requiring a closed procedure in the case of bail applications under paragraph 29. The fact that express provision is made in Section 5(5) for the use of closed procedure in bail applications under paragraph 22 to 24 is explicable, because, without it, a submission could be made that in the exercise of its free-standing bail jurisdiction SIAC was not determining matters preliminary or incidental to, or arising out of, an appeal to SIAC. Consequently, out of abundance of caution, the draftsman had thought it necessary to make it clear that the SIAC Procedure Rules, in particular Rule 4(1) applied to free-standing bail applications as well as to those that were preliminary or incidental to, or which arose out of, an appeal. This application arises out of, ultimately, an appeal to SIAC. Although the appeal was determined long ago, there is still a pending appeal to the Supreme Court, the proceedings are still alive - the bail application is accordingly not free-standing. It arises under paragraph 29. I am satisfied that SIAC can and should deal with the application under its own procedure rules and is empowered to take into account closed material under Rule 4(1) and the rules which now apply to bail applications following AF no 3.

6. I have therefore taken into account when determining this application the closed material on which the Secretary of State relies. I do so with a caveat that it may be necessary to revisit an aspect of the closed material in considering upon what conditions bail should be granted. It may, however, not be necessary to do so - that is a matter which I defer until it arises.

7. I turn then to the merits of the application. The appellant has been either detained in a prison under immigration powers, or subject to genuine 24 hour house arrest for all but 2 weeks of 6 years. The period of house arrest which he describes favourably in his witness statement lasted 7 months. Before his detention under immigration powers he was detained under other powers and in fact, the total period of his detention or house arrest, is over 10 years. On any view, for a man who has not been convicted of any offense, that is a troubling fact. As SIAC's open judgment on the issue of national security in his case demonstrates, he was, in the late nineties, and the start of his litigation in 2001, assessed to be an active terrorist head of a group of individuals in the United Kingdom with international reach. In its open judgment in the main appeal, SIAC upheld that assessment on balance of probabilities for reasons briefly stated in the open judgment. At the conclusion of that judgment the Commission observed that clear evidence of a change of heart on his part, would be required before the assessment that he posed a serious risk to the national security of the United Kingdom could be re-evaluated. That has been a thread of SIAC's decision making in his case, not only on the main appeal but also in bail hearings ever since.
8. He has, now, produced a hand-written statement - in fact he produced one almost a year ago, but this is the first occasion on which it has been actively deployed in litigation - in which in a circumspect, and general manner he has signalled a change of heart. He describes, with satisfaction, the 7 months of house arrest which he enjoyed with the man who has now become his friend, Mr H, and with friends of his. They speak in admiring terms of his intellect and breadth of knowledge and openness of mind. I have therefore not only the word of the appellant himself that his outlook has changed, but some supportive evidence that it has. I am conscious, of course, that it may all be for show. But if it is for show, it has been the work of a highly skilled actor. What he says in his statement is that he wished to have the chance to show "how I and my world views have changed". He speaks of reading two books about the resolution, conditional though it may be, of the conflict in Northern Ireland, and how he drew lessons from them for his own country, Algeria;

"I look at these two case studies and find parallels with my own country, Algeria, and other places of conflict. I have seen the chaos and suffering caused by war and violence and want to see another way".

He concludes;

"The world in which we live today has changed. And my own personal journey reflects the way in which I have changed too in my belief as to what is appropriate but which I no longer believe to be so". (I think he must mean "as to what was appropriate but which I no longer believe to be so").

9. So much time has now elapsed since his initial detention and since his detention under immigration powers that it would no longer be reasonable not to give him the opportunity of demonstrating that he means what he says.
10. In other cases appellants to SIAC and those subjected to Control Orders have provided detailed and substantially, but not entirely true, accounts of their former lives and activities. This appellant has done no such thing. That may be readily understandable. Ms Rose submits that he can hardly be expected to make a statement incriminating himself under English law. Perhaps of greater significance, knowing that he faces, pursuant to the judgment of SIAC, so far upheld by the appellate courts, the prospect of return to Algeria, in circumstances where, on SIAC's own findings, he faces the prospect of prosecution and long term imprisonment if convicted, he may be unwilling to provide any assistance to the Algerian authorities to achieve those ends. I do not discount the recantation that he has, in clear terms made, simply because it is general.
11. For the reasons which I have given, the time has now come where he should be re-admitted to bail. There is no objection to his being re-admitted to bail in Mr H's house and company. I will now deal with the detailed terms upon which that can be achieved.