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Case No: CO/7155/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

9 August 2012

Before :

LORD JUSTICE HUGHES
Mr. JUSTICE SILBER

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Between :

The Queen (Omar Othman)	**Claimant**
- and -	
Special Immigration Appeals Commission, Secretary of State for the Home Department and Governor of HMP Long Lartin	**Defendants**

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Edward Fitzgerald QC, Danny Friedman and Charlotte Kilroy (instructed by **Birnberg Peirce**) for the **Claimant**
Robin Tam QC and Jessica Wells (instructed by **Treasury Solicitor**) for the **Second Defendant**
The other Defendants were neither present nor represented.

Hearing date: 31 July 2012

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Approved Judgment

Lord Justice Hughes:

This is the judgment of the Court to which both members of the Court have contributed.

1. The claimant is in immigration detention pending deportation. On 31 July we heard, expedited, his combined applications for habeas corpus and for permission to seek judicial review arising from his detention and from the decision of the Special Immigration Appeals Commission ("SIAC") (Mitting J), given on 28 May 2012, to refuse him bail. We refused those applications. These are our reasons.

2. There has been a prodigious litigation history to this claimant's position in this country. It would not help to attempt to set it out exhaustively. It is enough to summarise as follows.

3. Since before 2002, the UK Government has regarded him as an exceptionally high terrorist risk. That contention has been tested more than once in the specialist tribunal of SIAC and has repeatedly been found to be correct. In 2004 SIAC concluded from the evidence before it that:

> "He has certainly given the support of the Koran to those who wish to further the aims of Al Qa'ida and to engage in suicide bombing and other murderous activities. The evidence is sufficient to show that he has been concerned in the instigation of acts of international terrorism....
>
> The appellant was heavily involved, indeed was at the centre in the United Kingdom of terrorist activities associated with Al Qa'ida. He is a truly dangerous individual."

In 2007, SIAC found:

> "[Othman's] views on the use of violence in the UK have, we accept, hardened, and his expressions of them do encompass the legitimacy of attacking people in the UK. "

In addition to his importance to Al Qa'ida, he has connections with other terrorist groups. To the limited extent that he has even attempted to refute the contention, his assertions were described by SIAC in the past as "wholly deceitful".

4. Since 2002 the Government has wished to deport him to his country of birth, Jordan. In August 2005 it made a formal decision to do so.

5. The claimant has at all times resisted the attempt to deport him to Jordan, and no other destination appears available. In Jordan he would face re-trial upon two terrorist charges of which he was convicted in his absence in 1999 and 2000. He has consistently contended that to deport him there would be unlawful because it would involve the UK in the infringement of a number of his rights under the European Convention on Human Rights ("ECHR").

6. The litigation of this contention by the claimant took from August 2005 until January 2012. The last stage thus far was the decision of the Fourth Section of the European Court of Human Rights ("ECtHR") in that month. The court rejected the claimant's

contention that he would be tortured in Jordan if he were deported and thus rejected his complaint that deportation would involve a breach of his Article 3 rights. It rejected his claim that his Article 5 rights would be infringed by his detention by the authorities in Jordan upon his return. His alternative claim of potential breach of his Article 6 rights was, however, upheld in part. The basis on which it was upheld related to the risk that at his re-trial the confessions of two erstwhile co-accused might be used as part of the evidence against him. There was strong evidence that those confessions had been obtained, some years ago now, through torture. Although under Jordanian law material which is the product of torture is to be excluded if the accused demonstrates that this is what it is, there existed a real risk that, in the absence of the co-accused witnesses and given the practice of the relevant Jordanian court, the claimant would not be able to establish the fact. That, the ECtHR held, would not merely be a breach of Article 6 (which would not be sufficient to render deportation unlawful) but would satisfy the much more stringent relevant test – that it would represent a flagrant denial of justice; such is the gravity of the admission of the product of torture.

7. There followed a hiatus whilst the claimant applied to Strasbourg for a re-hearing by the Grand Chamber, in effect an appeal against the rejection of his other claims, but that came to an end on 9 May when the Grand Chamber declined to entertain it. On the other side, the Government appears to be willing to accept the ECtHR ruling. It contends, however, that assurances now provided by the Jordanian Government, plus events which have taken place in Jordan, mean that the claimant can lawfully be deported consistently with the ruling; the real risk that the claimant will face evidence which is the product of torture can now, she contends, be seen not to be present.

8. By the time the ECtHR decision was received, the claimant had long since exhausted the domestic appeals available to him. However, a procedural method was devised by which this contention of the Government could be tested by SIAC. The claimant applied to the Secretary of State to revoke the operative deportation order (February 2009). The Secretary of State refused the application, but it is itself an immigration decision against which there is a right of appeal to SIAC, since it was not certified clearly unfounded under section 94 of the Nationality Immigration and Asylum Act 2002.

9. As chairman of SIAC, Mitting J has now fixed a two week hearing for October of this year at which SIAC will adjudicate upon the factual question whether the obstacle to deportation identified by the ECtHR continues to exist or not.

10. For the majority of the very long time which all this litigation has taken, the claimant has been detained. At the outset in October 2002 he was detained under the then applicable statutory regime of the Anti-Terrorism Crime and Security Act 2001 ("ATCSA") as a certified international terrorist suspect whose presence in the UK was a risk to national security. That regime proved contrary to the ECtHR and was in due course abandoned by Parliament. There was then a period when he was not in detention, although subject to a non-derogating control order. In August 2005, however, the decision was made to deport him, and he was taken into immigration detention under paragraph 2 of Schedule 3 to the Immigration Act 1971, that is to say he was detained pending deportation. Apart from two periods totalling a little less than six months when he was released on conditional bail by SIAC, he has been detained since then. The period of immigration detention accordingly adds up to

about six and a half years, and that came after two and a half years detention under ATCSA.

11. A The claimant sought to challenge the lawfulness of his detention by applying for the issue of a writ for habeas corpus, and as an alternative permission to apply for judicial review and in the alternative to seek bail from SIAC . On 6 February 2012, Mitting J declared that SIAC had jurisdiction to review the lawfulness of the claimant's ongoing detention and in the exercise of its discretion, SIAC should determine the lawfulness of the claimant's detention. He also ordered that the claimant's application for writ of habeas corpus and application for permission to claim judicial review be stayed pending the exercise by SIAC of its bail jurisdiction. On that day, SIAC ordered that the claimant should be admitted to bail. The claimant was detained on 17 April 2012 as the Secretary of State had stated her intention to deport the claimant on about 30 April 2012. He applied to have the February 2009 deportation order revoked.

B The claimant then applied to SIAC on 28 May for bail. Mitting J refused the application. His decision of that date must be read with his earlier decision to like effect on 17 April this year, and with previous decisions in relation to the claimant on 8 May 2008 and 2 December 2008. He had a good deal of information about the exceptional risk to the public which the claimant poses. He found additionally that:

i) the end of the litigation was in sight and ought to come soon after the October SIAC hearing, with a decision one way or the other on the factual question whether there remained a real risk that a re-trial in Jordan would be a flagrant denial of justice as a result of the admission of the product of torture; and

ii) there was an increased risk of the claimant absconding, if granted bail, as the reality of deportation approached; in the past he successfully went into hiding to avoid looming detention under ATCSA, and had remained at large for some ten months; recent public threats from various Al-Qa'ida sources suggested the likelihood of active support in absconding from those well able to provide any necessary facilities to him; he was found in the past to have ready access to false documents and to money; and

iii) there was a particular difficulty in managing conditions of bail and in coping with any absconding during the period of the Olympic and Paralympic Games, with their greatly increased demands on the police and security services.

12. For the claimant, the central submission of Mr Fitzgerald QC is that any further detention is unlawful on the well-known Hardial Singh principles (R v Governor of Durham Prison ex p Hardial Singh [1984] 1 WLR 704). The first and major reason is said to be that the period of detention thus far is simply too long for any further detention to be lawful. The second reason advanced is that Mitting J wholly misunderstood the likely imminence of deportation. It is said that deportation could not possibly be accomplished in less than a year after October, given domestic appeals which will follow, and will probably take much longer, given the near certainty of a further application to the ECtHR. Thirdly, Mr Fitzgerald contends that Mitting J did not address the question of due diligence on the part of the Secretary of State and in any event that the further assurances now being suggested from Jordan could have been sought long ago.

13. The decision in Hardial Singh is simple enough and was helpfully explained by Lord Dyson in R (Lumba) v SSHD [2011] UKSC 12; [2012] 1 AC 245 at [22]. The power to detain under Schedule 3 to the Immigration Act 1971 is a power to detain "pending" either the making of a deportation order or the person's removal under such. It can therefore only be exercised in aid of proposed deportation and only to the extent reasonably necessary to achieve it. If it becomes apparent that the Secretary of State will not be able to deport within a reasonable time, the person should no longer be kept in detention. The Secretary of State must act with reasonable diligence to progress deportation. It is, however, not enough that he or she is doing his or her best to achieve it if it cannot be done within a reasonable period.

14. In both Lumba and Hardial Singh these principles were applied to foreign prisoners who had committed one or more crimes in this country and whom the Secretary of State wished to deport after their sentences had been served on the grounds that removal would be conducive to the public good. Lumba had committed various offences of which the most serious was wounding with intent for which he had been sentenced to four years imprisonment. Singh had committed two burglaries for which the total of two sentences had been two years. Lumba's case depended additionally, and principally, on the fact that the power to detain was being exercised on the footing of an unpublished policy which conflicted with the published one.

15. Lord Dyson further explained the correct approach in Lumba. The Hardial Singh question is fact sensitive [121] and must not be applied mechanically [115]. The best starting point is whether and if so when there is a realistic prospect that deportation will take place [103]. Thereafter the resolution of the legality of the detention depends upon weighing the various factors, which are principally (1) the risk to the public (2) the timescale (3) the contribution to the timescale of any appeals or other legal steps taken by the prospective deportee and the merits (or absence of merits) of them (4) any refusal of the person concerned to leave voluntarily if there can be no proper objection to return to country of origin and (5) the effect of the detention on him and his family. Since the issue is fact sensitive, these are not exhaustive factors and none of them is singly determinative.

16. We accept, as did Lord Dyson at [144], that there will come a time when, however grave the risk of absconding and/or offending it ceases to be lawful to detain pending deportation. Mr Fitzgerald's principal submission in the present case, however, founded on the timescale alone, amounts to relying on one only of the relevant factors, without balancing it against those which sit in the other side of the scale pans. The risk to the public is, as Lord Dyson said at [121], always of paramount importance. It is apparent that the risk to the public in this case is of a wholly different order from the risk of Mr Lumba's sporadic personal violence or Mr Singh's propensity to burgle.

17. There was some debate before us as to the jurisdiction which this court is now being invited to exercise. Mr Fitzgerald submitted that SIAC had no jurisdiction to determine the Hardial Singh question of the lawfulness of the claimant's detention, since it is a statutory creation and thus limited to the powers given to it; those are, he contended, not those of the High Court but are limited to hearing appeals and to granting bail. In consequence, he submitted, his present application ought to be treated as an invitation to this court to exercise its original jurisdiction to review the decision of the Secretary of State to detain, and only alternatively as an application for

judicial review of the decision of SIAC. For the Secretary of State, Mr Tam QC contended that since SIAC was patently created by Parliament in order to provide a court such as the ECHR requires to be available to determine (inter alia) the lawfulness of any deprivation of liberty, it follows that the power to determine the Hardial Singh question is implicit in the statutory power to grant or refuse bail. Moreover, SIAC alone has the evidence, and the evidence-handling procedures, which provide the essential means of deciding this question. On 6 February this year, Mitting J, as a judge of the High Court, decided precisely this, whilst accepting the concurrent jurisdiction of the High Court.

18. In the end, interesting as this debate was, it is not necessary to resolve it, although we share the conclusion of Mitting J that Mr Tam is correct. We agree, first, that the grant or refusal of bail is not the same as determining the legality of detention; indeed it assumes the power to detain: see for example the observation to that effect in Lumba at [118]. Secondly, however, even if we are wrong to conclude that SIAC is impliedly vested with the authority to decide the Hardial Singh questions, we have not the slightest doubt that it is entitled to address them. Any tribunal charged with considering bail is bound sometimes to have to ask, en route to its decision, whether the detention is still lawful or not, and this was not in the end disputed by Mr Fitzgerald. This is particularly so of the fact-sensitive Hardial Singh issue, where detention may be at one stage lawful and a little later cease to be so. That is quite unlike an issue as to whether there exists any power at all to detain. There is in a case like this no doubt about the *existence* of the power to detain; the question is whether in the precise circumstances it can or cannot properly be *exercised.* Thirdly, we agree that the overarching jurisdiction of the High Court to intervene if necessary to review the decision of the Secretary of State and to determine whether detention is or is not lawful is not ousted by the ability of SIAC to decide or address the question. What matters is when this court ought to do so and when it ought to decline to exercise its undoubted power.

19. SIAC is a highly specialist tribunal with a particular expertise in matters relating to national security. Its chairman must hold or have held high judicial office and in practice is always a very experienced High Court Judge. Its other members have special expertise in security and immigration matters. Mitting J dealt with this bail application, as is frequently the practice, sitting alone, but he brought to it vast experience of cases such as this generally and of this one in particular. *Qua* high court judge, he might himself perfectly properly have considered an application for judicial review of the decision to detain; indeed in January/February of this year, at the invitation of the claimant, he did exactly that concurrently with entertaining, *qua* SIAC, a bail application. Moreover, SIAC has available to it special procedures which are not available to the ordinary courts, including where necessary closed hearings and special advocates to represent the interests of the appellant – there was a brief such hearing on this application and there had been substantial information provided about the claimant in earlier such hearings. These features make SIAC peculiarly suitable to conduct the essential balancing exercise involved in determining the Hardial Singh issue. By contrast, this court cannot properly evaluate the vital risk elements which have to go into the scale pans on one side. It is not enough to learn from the earlier published decisions of SIAC the general proposition that the claimant is extremely dangerous; the balancing exercise necessarily involves knowing much more than that about the nature and extent of the risk which he poses. For these

reasons, this court ought to accord considerable respect to the decision of SIAC on a point particularly within its remit, and it ought not to exercise its undoubted jurisdiction to re-decide the Hardial Singh issue, unless some hard-edged or florid error of law or approach is demonstrated to have occurred.

20. That approach is symmetrical with the stance of this court if judicial review is sought of a SIAC decision which is unarguably within its jurisdiction. SIAC is formally amenable to judicial review. But Laws LJ explained the approach in R (Cart) v Upper Tribunal [2011]QB 1120, DC when that case was in the Divisional Court:

> "I think it is important to emphasise the limited consequences…of my holding that SIAC is subject to judicial review jurisdiction. A final determination of an appeal by SIAC is by SIACA s 7 subject to appeal to the Court of Appeal. It is elementary that judicial review is a discretionary remedy of last resort. Accordingly it will not be deployed to assault SIAC's appealable decision. Not of course for want of jurisdiction but because the court's discretion should not be so exercised. Nor will it go to interlocutory decisions on the way to such a determination, at least without some gross and florid error. 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 a 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."

21. That approach has not been challenged before us. If such a hard-edged or florid error of law were demonstrated in this case, this court ought to exercise its original jurisdiction to re-determine the Hardial Singh issue. It would, as is conventional nowadays, do so via a grant of judicial review (whether of the decision of the Secretary of State or of SIAC is in the end not material) rather than by the blunter instrument of the grant of habeas corpus, so that for example the question of bail could be remitted to SIAC to reconsider in the light of this court's judgment. In the present case, however, there is simply no such arguable error of law.

22. Mitting J correctly adopted Lord Dyson's starting point by considering when deportation was in prospect. We do not agree with Mr Fitzgerald's gloomy prognosis that another year or more of litigation is to be expected after the fortnight's hearing in SIAC in October and the subsequent announcement of its decision, probably in or about November. The governing Convention rule is now very clearly explained by the ECtHR decision. There remain, no doubt, questions of fact for determination in October as to whether there does or does not remain a real risk that the product of torture will be relied upon in any re-trial of the claimant in Jordan. There may be other questions of fact surrounding the likely re-trial. But questions of fact are what they appear to be. There exists a right of appeal from SIAC's decision but only on a point of law. Whilst the ingenuity of counsel in devising a point of law is not to be underestimated, the Court of Appeal can determine very quickly if necessary whether there really is an arguable issue of law. We do not agree that further acceptance of the

case by the Strasbourg court is an inevitability. Mitting J was right to observe that that court has proceeded thus far in the present case on the basis of accepting the primary facts found in the domestic courts. It has made the Article 6 position clear; the possibility of flagrant breach here depends on the real risk of the admission of the product of torture in the face of an inability of the claimant to resist it. Mitting J was entitled to conclude that there was a reasonable prospect of deportation taking place within a reasonable time. If he should prove to be wrong, no decision on bail is ever final. A further application will be possible if the anticipated timetable is falsified, and the timetable will in any event fall to be considered again in October. There have already been two occasions when SIAC (in both cases including Mitting J) has granted this claimant bail at times when although detention was lawful the future timetable towards deportation was too imprecise.

23. For the reasons already explained, we likewise do not agree that Mitting J fell into patent error in deciding that the time thus far spent in detention, enormously lengthy as it is, is necessarily determinative of the legality of detention between now and November. We agree with Mr Tam that the time of detention under ATCSA was, by definition, not detention in aid of deportation. That is because ATCSA detention was expressly created for those whom the Secretary of State could not deport. The fact that deportation remained the ultimate ambition of the Secretary of State does not enable the detention to be mischaracterised in law as detention under Schedule 3 of the Immigration Act. But, in the end, this factor is of limited significance. The period of past detention is, without it, still extremely long. It has been attributable to the length of the litigation process, to which both sides have contributed, but also of the considerable importance of the issues. SIAC was, however, not only entitled, but obliged, to balance with the period of past detention all the fact specific considerations. That included the vital question of risk to the public (to which the special circumstances of the present demands on the security and police services made a contribution) and the critical one of whether the present detention was or was not properly in aid of deportation which was sufficiently in prospect. Its conclusion betrays no florid error of law; indeed no error of law of any kind. There is no occasion calling for this court to intervene.

24. Nor do we see any error in relation to the question of due diligence. Before SIAC Mr Fitzgerald realistically disclaimed any submission that the Secretary of State had not demonstrated reasonable diligence. He sought to argue before us that that concession was limited to the period since January of this year and that there ought to have been efforts long before then to extract the kind of assurances as to the conduct of the trial in Jordan which are now relied upon. To the extent that this application is for judicial review based on an error of Mitting J, this contention is not open to Mr Fitzgerald; Mitting J made no such error because the point was never before him. To the extent that he asks us to review the decision of the Secretary of State we have little or no evidence to justify the contention and do not consider that she can be said arguably to have been shown to have failed unreasonably to act in anticipation of the ruling of the ECtHR.

25. Mr Fitzgerald further contended that Mitting J was patently wrong in his assessment of the risk of absconding. This is, we are satisfied, unarguable. There is simply no basis on which this court could go behind the expert assessment of the material, which we have not had before us, which goes to the risk of absconding. It would be

extremely surprising if that risk were not considerable, and rising as the reality of deportation nears. The public threats made appear to endorse the risk. Mitting J was fully entitled to take into account the special risks which would attend the management of this dangerous man at a time when the resources of the police and security services are very tightly stretched. We do not regard as arguable the contention that he erred in not considering separately a prospective grant of bail in September, not least because he was not asked to do so, but also because it would appear that the risk of absconding will then be likely to be at its highest as the hearing in SIAC draws nigh.

26. It was for these reasons that we refused these applications. We give permission for this judgment to be cited.