Case Nos: XC: SC/77/2009; UF: SC/80/2009; U: SC/32/2005

IN THE SPECIAL IMMIGRATION APPEALS COMMISSION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2009

Before :

THE HONOURABLE MR JUSTICE MITTING

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Between :

U, XC, UF	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Stephanie Harrison and Charlotte Kilroy (instructed by **Birnberg Peirce & Partners**) for the **First Appellant**

Stephanie Harrison (instructed by **Birnberg Peirce & Partners**) for the **Second and Third Appellants**

Robin Tam QC (instructed by **Treasury Solicitors**) for the **Respondent**

Martin Chamberlain (instructed by **Special Advocates Support Office**) as **Special Advocate for the First Appellant**

Charles Cory-Wright QC and Kieron Beal (instructed by **Special Advocates Support Office**) as **Special Advocate for the Second Appellant**

Angus McCullough (instructed by **Special Advocates Support Office**) as **Special Advocate for the Third Appellant**

Hearing dates: 7 & 14 December 2009

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The Hon. Mr Justice Mitting :

1. On 20 March 2009, we gave our reasons for revoking the bail previously granted to U. On 21 May 2009, we gave our reasons for refusing to grant bail to XC and UF. In our judgment of 20 March 2009, we set out the approach which SIAC would take to applications to grant or revoke bail in the case of an appellant whose appeal against a notice of intent to deport on conducive grounds on the grounds of national security had been dismissed. In our judgment of 21 May 2009, we applied the same reasoning, qualified to accommodate the fact that neither appellant had yet had his appeal determined, to the cases of XC and UF. In *Cart, U and XC v The Child Maintenance and Enforcement Commission and SIAC* [2009] EWHC 3052, the Divisional Court held that our reasoning was wrong in a critical respect and that, in consequence, U and XC had not received the procedural protection afforded by Article 5(4) to which they were entitled. In consequence, the decision to revoke bail in U's case was quashed and to refuse bail in the cases of XC remitted to SIAC for re-hearing. UF again applied for bail. Meanwhile, the Secretary of State applied, afresh, to revoke bail under paragraph 33(3)(a) of Schedule 2 to the Immigration Act 1971, on the ground that U was likely to break a condition of the bail on which he would otherwise be released. At the conclusion of the hearing held on 7 December 2009, we announced that U's bail would be revoked. We adjourned the hearing of the applications of XC and UF for bail to 14 December 2009. On 14 December 2009 Miss Harrison, for XC and UF, asked for a further adjournment of their applications until a date to be fixed in the New Year. We granted her request. We have, nevertheless, heard full argument from her and Mr Tam QC, on the approach which SIAC should adopt to applications to grant, as well as revoke, bail. Both invited us to set out that approach in advance of the hearing of the applications of XC and UF. We accede to that invitation. This judgment, therefore, 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 is no closed judgment.

2. In *U, Y, Z , BB and VV*, 20 March 2009, we set out and explained the grounds upon which we would grant, withhold or revoke bail and the procedural rules which we would apply in deciding to do so. Briefly, the risk factors which we took into account were the risk posed by an individual appellant to national security and the risk that he would abscond. The procedural rules were the SIAC Procedure Rules, undiluted by any obligation to ensure that an individual appellant had disclosed to him any minimum standard of information about the grounds upon which the Secretary of State opposed the grant of bail or sought its revocation. The Divisional Court has now held that the second part of our approach is erroneous. The same minimum standard of procedural fairness applies in the case of SIAC bail hearings as applies in the case of control orders. The standard is that set down by the House of Lords in *Home Secretary v AF (No 3)* [2009] UKHL 28, 3 WLR 74: an appellant must be told sufficient about the grounds upon which the grant of bail is opposed and/or its revocation is sought, to permit him to give effective instructions to the Special Advocates about them. That proposition is subject to two qualifications: the Secretary of State can rely on closed material to support a ground, provided that sufficient information is given to permit effective instructions to be given about the ground; and the Secretary of State may elect not to rely upon a ground which he is, for one or more of the reasons set out in Rule 4(1), unwilling to disclose – in which event, SIAC will consider only those grounds which have been sufficiently disclosed to an

appellant. Our decisions were erroneous because, in the case of U, the decision to revoke bail was based entirely on closed material and, in the cases of XC and UF, the decision to refuse bail was based substantially upon such material.

3. For reasons which we explained in paragraphs 11, 12 and 13 of *U, Y, Z, BB and VV*, SIAC has always taken into account closed material when deciding whether or not to grant or revoke bail. Bail has always been granted in the knowledge that compliance with bail conditions will be monitored by a variety of means and that information about a future serious breach of bail conditions, in particular of absconding, is likely to come from covert sources. That knowledge has permitted balanced judgments to be made when granting or withholding bail about the two risks – to national security and of absconding – posed by an individual appellant; and to manage one or both risks in the event that it is contended by the Secretary of State that a breach of bail conditions is likely. It has permitted SIAC to grant bail to all but three current appellants (XC, UF and LO), to revoke bail in the case of three, Y (in August 2006), Othman and U and to refuse to revoke bail in March 2009 in the cases of Y, Z, BB and VV. It is not an exaggeration to describe the ability to rely substantially or decisively on closed material for these purposes as a vital tool. It is no longer available to us. We must, therefore, reconsider the grounds upon which we will grant or refuse bail.

4. In *U, Y, Z, BB and VV*, we noted in paragraphs 9 and 10 the approach which domestic and Strasbourg law requires a court to adopt for detention for the purpose of deportation to be lawful and said, in paragraph 12, that there was a choice to be made between SIAC's risk-based assessment and the alternative, which we found unacceptable: that the period of detention necessarily occasioned by an appellant's legal challenge to a notice of intention to deport should be ignored in determining the lawfulness of his detention. Mr Tam QC submits that, because SIAC can no longer make a fully informed assessment about the two risks, the issue is no longer justiciable – just as, in pre-SIAC days, issues of national security were to be determined by the Government, not the Courts: *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, per Lord Fraser at 401G and 402C-E, per Lord Scarman at 406H-407A, per Lord Diplock at 412E-G. Once satisfied that the risks of either of them exist, SIAC must refuse bail while an appeal and/or deportation is pending, unless some feature of the case leads to the conclusion that continued detention would be unlawful. Lawfulness would be gauged by *Hardial Singh* principles and nothing else. Miss Harrison submits that the power which SIAC has to grant bail is founded upon prior detention being lawful. To restrict the circumstances in which bail could be granted only to those where detention had become unlawful would defeat the intention of Parliament in conferring a wider jurisdiction upon SIAC. She submits that SIAC should continue to assess the two risks, but to do so by the only procedural means now recognised to be lawful. If that means that obvious risks to national security and/or of absconding cannot be properly evaluated, that is a price worth paying in the interest of the rule of law.

5. There is force in the first part of her submission. The power to grant bail, derived ultimately from paragraphs 22 and 29 of Schedule 2 and paragraph 2 of Schedule 3 to the Immigration Act 1971, can be exercised when detention would be lawful; but it does not follow that the approach which SIAC takes to the grant of bail must remain

unaltered by the removal of a vital tool for addressing and managing the two risks which may be posed by an individual if admitted to bail.

6. The submissions of Mr Tam QC and of Miss Harrison demonstrate the existence of a profound, possibly irreconcilable, conflict between two of the requirements of the Strasbourg court: the need for effective independent scrutiny of the reasons for a decision to deport and to detain meanwhile on national security grounds; and the requirement to disclose to an individual affected by a decision to detain the minimum necessary to permit him to give effective instructions to challenge it. Any attempt to reconcile the irreconcilable is bound to result in an imperfect answer. We are conscious of the fact that the answer attempted below is imperfect and will be difficult to apply in individual cases. It is the best that we can do. We are reluctant to abandon altogether the attempt to assess the two risks in an individual case, especially when, as is the case with a number of longstanding appellants, we have gained considerable knowledge about their circumstances including, family ties, state of health and compliance with bail conditions to date. Despite the removal of the ability to make assessments which depend substantially or determinatively on closed material, there may be cases in which it will remain possible to determine that the risks posed by an individual appellant can be managed while he remains on bail. We also do not wish to foreclose the possibility that, in the case of an appellant against whom the evidence that he poses either risk is unconvincing, he should be admitted to bail at an early stage in the proceedings. There may be other circumstances in which a similar exercise of judgment is called for. The approach set out below is not intended to be a rigid formula, merely an indication of the approach likely to be taken by SIAC at each of the stages at which bail may be considered other than revocation.

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 could be managed if an appellant were to be 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. The aim will be to ensure that all cases involving appellants who are detained will be heard within about six months of the filing of a notice of appeal. If only the national security case can be determined within that time, we will determine it and adjourn the issue of safety on return to be determined separately.

8. In the case of the only two appellants who have not yet been granted bail, the same approach will be adopted subject to one proviso: we will check the outcome against the test previously applied in their cases, and do so on the basis of the material which has been sufficiently disclosed to them, to permit them to give effective instructions about it. Neither has yet done so.

9. If and when deportation orders are signed in the case of any individual appellant, he will be liable to be detained by the Secretary of State under paragraph 2(3) of Schedule 3 to the Immigration Act 1971. A precautionary approach to any application for bail by him will be adopted, subject to two provisos which arise from the fact that SIAC is likely to have far more information about him than it would have

about a new appellant: it will not be necessary to revisit the grounds for finding that he posed a risk to national security, whether those grounds were open or closed or both. Nothing in the judgment of the Divisional Court in *Cart, U and XC* undermines that premise. We will, however, take into account what is known about the appellant's history and circumstances, including compliance with bail conditions, in determining whether or not he can be readmitted to bail.

10. When the Secretary of State applies to revoke bail, the test is that set out in paragraph 33(3)(a) of Schedule 2 to the 1971 Act. It must be satisfied by grounds which have been sufficiently disclosed to an appellant to permit him to give effective instructions about them.

U

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 "reverse 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.