[2024] BIOT CA (Civ) 3

IN THE BRITISH INDIAN OCEAN TERRITORY COURT OF APPEAL
ON APPEAL FROM THE SUPREME COURT
MARGARET OBI, SITTING AS AN ACTING JUDGE
BIOT SC/15/2023 AND BIOT SC/16/2023

London
United Kingdom

Date: 20th August 2024

Before:

SIR HOWARD MORRISON, K.C.M.G, C.B.E, K.C., PRESIDENT
THE HON. MR JUSTICE CLIVE LANE, JA
THE HON. MR JUSTICE NIGEL BIRD, JA

BETWEEN:

THE COMMISSIONER FOR THE BRITISH INDIAN OCEAN TERRITORY
Appellant

and

THE KING (ON THE APPLICATION OF VT & ORS)
Respondents

Mr. John Mc.Kendrick K.C., Mr. William Irwin, Ms. Anisa Kassamali, and **Mr. Andrew Ratomski (**instructed by **the Government Legal Department** for the Appellant
The 1st respondent was neither present nor represented
Mr. Jack Boswell (instructed by **Messrs Duncan Lewis**) for the 2nd-5th and 13th – 19th Respondents
Ms. Zoe McCallum (instructed by **Messrs Duncan Lewis**) for the 6th Respondent
Mr. Ben Jaffey K.C. and **Ms. Natasha Simonsen** (instructed by **Messrs Leigh Day**) for the 7th-12th and 20th – 41st Respondents
Mr. Ben Jaffey K.C. (instructed by **Messrs Wilsons Solicitors LLP**) for the 42nd – 48th Respondents

Hearing date: 9 August 2024

JUDGMENT

This judgment was handed down remotely at 10:00am UK time on 20 August 2024 by circulation to the parties or their representatives by e-mail.

THE PRESIDENT, LANE AND BIRD JJA:

1. This is the judgment of the court to which we have all contributed.

Introduction

2. For ease of reference, in this judgment we shall refer to the British Indian Ocean Territory as the BIOT; VT and Others as 'the Respondents', the Commissioner for the BIOT as 'the Commissioner'; the Foreign Commonwealth and Development Office as 'the FCDO'; and to the US Navy Support Facility Diego Garcia as 'the Facility'. We refer to the Commanding Officer of the Facility (who represents the United States Government) or the US Government, as the context requires, as 'the US'.

3. On 26 July 2024, Margaret Obi, sitting as an Acting Judge of the Supreme Court, made an interim order (the 'July 2024 Order') permitting the Respondents to enjoy a limited degree of conditional freedom of movement on the island of Diego Garcia (the main and only inhabited island in the Chagos Archipelago which comprises the BIOT). The Respondents are part of a group of citizens of Sri Lankan and Tamil ethnicity who were brought to Diego Garcia by the Royal Navy in October 2021 when their vessel ran into difficulties. A number of those who arrived in 2021 have left Diego Garcia voluntarily. Those who remained have claimed international protection from the United Kingdom. We shall deal further with those claims below.

4. The Facility operates subject to a series of diplomatic exchanges between the USA and United Kingdom governments. Entry to the BIOT is restricted; the United Kingdom government website (gov.uk) states that "The British Indian Ocean Territory is not a tourist destination. There are no commercial flights, access is restricted and you need a permit before you travel."

Background

5. This is the Commissioner's appeal against the July 2024 Order. The parties have described that order as one granting 'bail'. We shall return to that description later

in this judgment, but adopt it as a convenient and widely understood shorthand description of the effect of various interim orders made by the Supreme Court.

6. This court granted a stay of the July 2024 Order on 31 July 2024 and special leave to appeal on all grounds on 2 August 2024, the judge having refused leave to appeal.

7. The detailed background to this claim is summarised at paragraphs [7-11] of the judgment below and at paragraphs [5-12] of an earlier judgment dated 22 April 2024 dealing with an earlier grant of bail in similar circumstances. We gratefully adopt those summaries.

8. The status of the migrants (who comprise the Respondents and others who have not issued claims) remains in issue. In particular, whether or not they are unlawfully 'detained' on Diego Garcia is hotly contested; on 18 December 2023, the Respondents issued proceedings for relief for false imprisonment in the form of damages, declarations, and the grant of a writ of *habeas corpus* (the 'Proceedings'). We express no view on the Proceedings. Currently, the migrants have very limited freedom of movement:

   (i) Save for two individuals who are accommodated elsewhere, the Respondents live in tents in Thunder Cove (the 'Camp'). Except as permitted by court order or by consent of the Commissioner, they must remain in the Camp.

   (ii) As a result of an order made by consent on 21 December 2023 in the Proceedings, they have access to a nearby beach. Initially, access was more restricted but can now be exercised every day.

   (iii) By consent, there is access to a building outside the Camp to allow consultation with lawyers, when required, and to an area 'downtown' for medical appointments. Respondents who have required medical treatment which cannot be provided on Diego Garcia have been treated in Kigali, Rwanda.

   (iv) By consent, the children of the Respondents attend school in a building which is not within the Camp.

9. For the purposes of this judgment, the significant bail orders are those of 22 April 2024 (the 'April 2024 Order'); 4 May 2024, which revised and superseded an order in April 2024 (the 'May 2024 Order'); and the order which is the subject of this appeal which was made following hearings on 23 and 26 July 2024.

The May 2024 Order

10. Since 4 May 2024, eleven Respondents (the claimants in the Proceedings save for VT, who is detained separately in connection with a criminal prosecution) have been able to leave the Camp pursuant to the May 2024 Order. Bail was granted on the following terms between 9am and 5pm local time:

    (i) The Respondents may walk along a road known as Highway DG1 (hereafter 'DG1');

    (ii) The Respondents may visit any beach which can be accessed safely from DG1;

    (iii) The Respondents' access to, and egress from, DG1 must be by a route specified by the Commissioner;

    (iv) The Commissioner may limit access to DG1 to 4 hours per day;

    (v) Any child exercising these rights must be supervised by an adult and the Commissioner may (but is not required to) arrange for those exercising bail rights to be escorted;

    (vi) The Commissioner may suspend the exercise of bail provided any limitation or curtailment of bail is reasonable and necessary to cater for military operational requirements.

11. There was no appeal against the May 2024 Order and there is no suggestion before us that the exercise of the rights granted by that order has caused any substantive issue. As we understand it, the Commissioner has only exercised the power to suspend bail on one occasion and in circumstances when there was no complaint about his decision. We consider those to be important factors. We shall return below to the power of the Commissioner to suspend bail.

12. From July 2024, the Commissioner also agreed to allow VE and TE (the two children of SE and ME) to exercise bail subject to the same conditions.

13. Mr Jaffey KC told us that the April 2024 Order (and the revision of that order by the May 2024 Order) were regarded by all parties as bail 'pilots' designed to test how the exercise of greater freedoms might operate in practice. In May 2024, the parties believed that the Proceedings would be finally determined following a

hearing on Diego Garcia in July 2024. For various reasons, the Proceedings have not yet been determined and no date has been fixed for the final hearing. We return to this issue below.

The application for extended bail: 16 July 2024

14. On 16 July 2024, the Claimants (being the eleven represented Claimants in the Proceedings and 29 new Claimants who had started similar claims seeking *habeas corpus*) made a joint application for extended bail. That application sought:

    a. to extend the May 2024 Order to all Respondents;

    b. to allow the Respondents to access a Nature Trail (a 1.5 km track accessed through woodland close to the Camp), Turtle Cove and The Brit Club, a social club operated by Royal Navy personnel;

    c. to permit the use of scooters and bicycles when exercising bail; and

    d. to retain the Commissioner's power to suspend bail for operational reasons but subject to a requirement to give reasonable notice to the Respondents of any suspension of bail.

Events immediately preceding the July 2024 Order

15. On 17 July 2024, the Commissioner invited the US to comment, by way of answers to a series of questions, on the bail application. The Commissioner asked the US to indicate 'the impact' should bail be extended, telling the US that, 'at a minimum, the BIOT Administration would be expected by the Court to facilitate some greater access.' The Commissioner suggested to the US an extension of bail to the Nature Trail or, alternatively, a 'Conservation Area' and invited any additional comments. It is clear that the Commissioner had given careful thought to how further freedoms might be extended to the Respondents.

16. Understandably, the Commissioner wanted to have the US response before the hearing. When it became clear that a response would not be received in sufficient time for instructions to be taken, the Commissioner asked the Court to delay the hearing by two days.

17. The US response (the 'Response') was received by the Commissioner at 06:37 hours BST on 23 July 2024, that is about three hours before the hearing of the bail application. In short, the US rejected any extension of bail, stating that the proposed bail order 'poses operational, security, health and safety risks to [the Facility] and its personnel that cannot be mitigated or would be unduly burdensome to mitigate.' The US restated its view, first advanced in a *note verbale*

dated 12 June 2024, that the Commissioner should arrange for the removal of all migrants from Diego Garcia without further delay.

18. On 23 July 2024, the judge refused the Commissioner's application for an adjournment. She had the Response before her and stated in her subsequent judgment that "there is no indication from the [US] in their written response to the Questions, or during Mr McKendrick KC's oral submissions, that another 36-48 hours would make any difference. In my view, leaving to one side the position of the US authorities, the Commissioner has had ample time to express a view on the proposed bail conditions."

19. After the hearing on 23 July 2024, but before the judge delivered her judgment, the Commissioner received two letters which he disclosed to the Respondents and the Court. The first dated 24 July 2024 was from Ms. Harriet Matthews CMG OBE, Director General for Africa and the Americas at the FCDO. That letter concludes:

> "In principle…. the UK would consider that any order for bail that fails properly to consider and reflect either the United States' responsibility for security of the NSF, its assessment of security concerns, which should be afford a high degree of deference, or its discretion in making available the use of any of its facilities, to be contrary to the UK's agreements with the United States concerning the BIOT. For present purposes, that is likely to be the case in respect of any order for enlargement of bail that is contrary to the position taken in the US response as regards either the security of the NSF or the provision of logistical support by the United States. I can only reiterate the serious consequences to the UK's interests were the Court to take such a course."

20. The second letter, dated 25 July 202, was from Mr Stephen Doughty MP, Minister of State for Europe, North America and the UK Overseas Territories. Part of the letter deals with a public interest immunity matter with which this court is not concerned but, as regards the bail application, the Commissioner was instructed by Mr Doughty to seek leave to appeal in the event that the court made "an order for enlarged bail which could come into conflict with the position that has been set out by the United States as to its security concerns."

21. On 26 July 2024 and before delivering her judgment, the judge permitted oral submissions regarding both letters and further witness evidence dealing with recent developments.

The July 2024 Order

22. At the hearing on 26 July 2024, the judge delivered her judgment. She extended the terms of the May 2024 Order to all Respondents and permitted them access to the Nature Trail. She rejected all further extensions to bail. She preserved the power of the Commissioner to suspend or restrict bail but required him to notify the Respondents and their solicitors of any suspension of bail "as soon as reasonably practicable and before coming into effect."

23. It is clear to us that the judge intended her judgment to be read with her decision in the first bail decision (the April 2024 Order). The judge expressly noted that the application raised "highly sensitive political and diplomatic relationship issues with regard to the US authorities."

24. The judge [12]-[13] noted "recent developments" in the Camp. She referred to a Safeguarding Incident Report submitted by Ms Lisa Lund, the Commissioner's on-island mental health practitioner, which detailed "prolific self-harming behaviour" and concluded that the Camp was "in complete crisis". At [19]-[21], the judge summarised the Response and stated:

> "I recognise, of course, that Diego Garcia is a military facility and that none of the Claimants have been subject to the usual vetting procedures and security checks. Such checks cannot be carried out because the personal details of the Claimants cannot currently be shared with their country of origin. Any US/UK sensitivity in respect of this issue is to be respected not least because the Commissioner is in the best position to assess and determine whether wider access to a sensitive military facility should be granted."

25. The judge acknowledged [27] that, even with "stringent conditions", the extension of bail to "up to 40" Respondents would present a "logistical challenge". The judge refused to extend bail to the Brit Club or to Turtle Cove. She refused to permit the Respondents to use bicycles or scooters. She extended bail to the Nature Trail observing that:

> "I accept the submission made on behalf of the Claimants that accessing the Nature Trail is not a significant security risk. Furthermore, in terms of health and safety, I am not persuaded that accessing the Nature Trail is any more hazardous than the beach adjacent to the Camp or any of the other beaches along DG1. The Bailed Claimants have been permitted to access these beaches since the grant of conditional bail in April 2024 and revised bail conditions in May 2024."

The Legal Framework

26. In order to understand the respective roles of the Commissioner, Ms Matthews and the Minister of State, Mr Doughty, it is necessary to consider how the BIOT functions within the United Kingdom constitution.

27. The recent decision of the Divisional Court in *BAA v (1) Commissioner for the British Indian Ocean Territory (2) Secretary of State for the Foreign, Commonwealth and Development Office and (3) Secretary of State for Defence* [2023] EWHC 767 (KB) restated the principle of law that the undivided Crown acts in different capacities through its territories. The court noted [47]-[48] that:

> "In the case of BIOT, the British Indian Ocean Territories (Constitution) Order 1984 establishes the office of Commissioner, who is appointed by Her Majesty by instructions given through a Secretary of State. The Commissioner has both executive and legislative power. When exercising these powers, he is an officer of the Crown in right of the Government of BIOT ("CBIOT").
>
> As the *Quark* case shows [*Quark Fishing Ltd v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2005] UKHL 57, [2006] 1 AC 529, there are some cases where the King does some legal act through or on the advice of the Foreign Secretary, but the act is nonetheless done under the system of government of an overseas territory. The act will still be attributable to the Crown in right of the government of the territory. Usually, however, the Foreign and Defence Secretaries act as representatives of the Crown in right of the Government of the UK ("CUK"). It is common ground that the Foreign Secretary represents CUK when acting on the international plane to conclude agreements and arrangements with other States, even when the agreements and arrangements concern an overseas territory."

28. In the context of the present appeal, it follows that, although he exercises executive and legislative power on the BIOT (a power not subject to the scrutiny of the United Kingdom Parliament), the Commissioner does not have any authority to conduct foreign policy; that remains a matter for the United Kingdom government.

29. We are aware that our judgment may be read by those who may be unfamiliar with the basis upon which appellate courts in this jurisdiction operate. We therefore set out below in detail the principles by which we have approached the determination of this appeal.

30. Section 3(1) of the BIOT Courts Ordinance 1983 provides as follows:

> "Subject to and so far as it is not inconsistent with any specific law for the time being in force in the Territory, and subject to subsections (3) and (4) of this section and to section 4, the law to be applied as part of the law of the Territory shall be the law of England as from time to time in force in England and the rules of equity as from time to time applied in England: Provided that the said law of England shall apply in the Territory only so far as it is applicable and suitable to local circumstances, and shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary."

The parties have not argued that any specific law in force in the BIOT or any local circumstance should prevent this court applying the principles of law set out below.

31. In the appeal before us, the Acting Judge of the Supreme Court was the sole judge of the facts. We emphasise that the appeal before us was not a *de novo* rehearing of the bail application. As articulated by Baroness Hale in her speech in in *AH (Sudan)* [2007] UKHL 49 at [30]:

> "It is not enough that [the judge's] decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. [The judge's] decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

The same principles were restated recently in the leading Court of Appeal judgement of *Volpi v Volpi* [2022] EWCA Civ 464 per Lewison LJ at [2]:

> "(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> (ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> (iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> (iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> (v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> (vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

We have applied those legal principles in our determination of this appeal.

32. In her judgment at [15], [16] and [22], the judge wrote:

"15. Section 6 of the BIOT Courts Ordinance 1983 provides that the Supreme Court of BIOT has the powers of the High Court of England and Wales, and it is well established that the High Court has an inherent jurisdiction to grant bail in civil proceedings including judicial review and habeas corpus.

16. As I stated in my original bail judgment, dated 22 April 2024, there are four well-established principles when considering bail:

- First, there is a presumption in favour of bail and cogent reasons are required to justify any refusal to grant bail.
- Secondly, it is for the relevant authority (in this case the Commissioner) to demonstrate why concerns cannot be addressed through conditions.
- Thirdly, bail applications have to be determined on a case-by-case basis and not on the basis of general hypothetical risks.
- Fourthly, a breach of any bail conditions is liable to lead to a withdrawal of bail.

…

22. In considering the applications for bail I draw, by analogy, on the factors relevant to bail under s61 of the Immigration Act 2016 and paragraph 3(2) of Schedule 10 to that Act. These factors (with some adaptation for present purposes) are as follows:

- The likelihood of the Claimants failing to comply with a bail condition;
- Whether the Claimants have been convicted of an offence;
- The likelihood of the Claimants committing an offence whilst on bail;
- The likelihood of the Claimant's presence causing a danger to public health or being a threat to the maintenance of public order;
- Whether detention is necessary in the Claimant's interests or for the protection of others;
- Whether the Claimants have failed without reasonable excuse to cooperate with any process;
- Such other matters as the court considers relevant."

33. We have adopted 'bail' in this judgment as a convenient way to describe the grant of freedoms which, without an order of court, would not exist. We have done so with some hesitation. The applications before the Supreme Court should more accurately be described as applications for interim relief in *habeas corpus* proceedings; it is arguable that the principles applying to criminal bail or immigration detention are not properly relevant to applications before the BIOT civil courts. Whilst that observation may be academic, given that neither party objects, the judge's application of these principles sits uneasily with the exceptional situation of the Respondents. Where a person is seeking 'bail' outside a criminal context, it is difficult to see that the risk of re-offending is a salient factor.

Where the person granted bail is not detained pending removal, it is difficult to see that the *Hardial Singh* principles or those set out in the 2016 Act apply. Criminal and immigration bail both focus on the individual circumstances, characteristics and conduct of applicants, which has not been the case here, not least because the Commissioner has chosen to employ close supervision of the Respondents' exercise of any freedoms. As Mr McKendrick KC observed, the respondents have been considered generically as group of migrants and not as individual applicants for bail.

34. Our hesitation in using the word 'bail' is also heightened by the fact that the order under appeal in part concerns the rights and freedoms of young children. The process of granting bail is about allowing freedoms. In our view, the better approach in this case should be to concentrate on ensuring that restrictions to freedom are as limited as possible. The distinction, in our view, is important.

35. We remind ourselves that an appellate court ought only to interfere with the grant of interim relief when "*it is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree*" (see paragraph [13] of *Global Torch Limited v Apex Global Management Limited (No 2)* [2014] UKSC 64 and paragraphs [66] and [67] of *The Commissioner for the BIOT v The King (On the application of VT and others)* [2024] BIOT CA (Civ) 1).

36. We also accept that questions of national security and questions relating to international relations are within the exclusive domain of nation states and are not matters for the court. Such matters are not generally justiciable in the context of a claim for Judicial Review (see for example *R v Secretary of State for Commonwealth Affairs ex p Perbhai* (1985) 107 ILR 462).

37. However, the fact that such matters are not justiciable does not mean that they must necessarily dictate the outcome of the court's inquiry. We understand that all parties agreed with that proposition. Indeed, the grounds of appeal proceed on that basis. At the hearing before us, both Mr McKendrick KC and Mr Jaffey KC submitted that factors relevant to the judge's evaluative analysis, which concerned relations between the US and United Kingdom governments, should be attributed very significant weight but did not, adopting the expressions used by all the advocates in the hearing before us, amount to a 'trump card', still less a 'veto.'

38. Mr Jaffey KC submitted (and Mr Boswell and Ms McCallum concurred) that the weight to be attributed to a particular factor is generally a matter for the judge alone. We accept that submission. There will be cases which fall outside this general position where a failure to afford appropriate weight to a particular matter renders a decision plainly wrong.

39. The Respondents seek permission, which we grant, to rely on a witness statement of CAC, the 21st Respondent which deals with events on Diego Garcia subsequent to the judge's order. We accept Mr McKendrick KC's submission that it contains nothing of relevance to the appeal, although we accept that it sets out matters that are of interest to the Respondents. The evidence refers to the fact that, after the stay was granted and pending the outcome of this appeal, the Respondents were permitted to access the Nature Trail. We note that the Commissioner did not exercise his right to suspend or curtail bail and that the visit passed without incident.

Discussion

Ground 1: The Judge's decision to consider the Respondents' application for bail on 23 July 2024 was procedurally unfair.

40. Mr McKendrick KC submitted that to require the Commissioner to formulate a response to the Response within three hours was unreasonable and that, as a consequence, the hearing had been unfair. We disagree with that submission for the following reasons.

41. First, we agree with Mr Jaffey KC that there was nothing in the Response that came as a surprise to either party. The Response does not obviously require interpretation; it is a document which speaks for itself. Although we note the extent of significant cooperation provided by the US to the Commissioner since the arrival of the Respondents, the US has consistently opposed any bail arrangements; it is to that consistent and unvarying opposition that we understand the judge is referring when she describes the US position as "generic and rigid". In the particular circumstances, we do not accept that the short interval between the receipt of the Response and the hearing could or should have caused any difficulties for the presentation of the Commissioner's case before the judge.

42. Secondly, we note that the judge permitted oral submissions to be made on 26 July 2024 regarding additional items of evidence which had materialised since the hearing on 23 July 2024 (viz. the letters from Ms Harriet Matthews [judgment, [13] and Mr Stephen Doughty MP and the witness statement). Mr McKendrick KC told us that, although he made oral submissions with regard to those letters on 26 July 2024, he did not seek permission to make further submissions regarding the Response, notwithstanding that the Commissioner had been in possession of it for a further two days. We consider that, had the Commissioner had anything more to say about the Response, he would have instructed Mr McKendrick KC to seek the judge's permission to make further submissions at the 26 July 2024 hearing. It was open to the Commissioner at that hearing to seek to remedy any unfairness which he considered may have occurred at the first hearing, but he chose not to

do so. We find that no additional submissions were advanced regarding the Response on 26 July 2024 because the Commissioner had nothing to add. We conclude that the hearing was not unfair as asserted in Ground 1.

Ground 2: *The Judge's Decision involved an unreasonable exercise of her discretion because she failed properly to consider and/or place adequate weight upon the impact of a grant of expanded bail on US/UK relations*

43. At [21], the judge wrote:

> "21. I recognise, of course, that Diego Garcia is a military facility and that none of the Claimants have been subject to the usual vetting procedures and security checks. Such checks cannot be carried out because the personal details of the Claimants cannot currently be shared with their country of origin. Any US/UK sensitivity in respect of this issue is to be respected not least because the Commissioner is in the best position to assess and determine whether wider access to a sensitive military facility should be granted. However, the Commissioner has not put forward any specific reasons for denying bail to the New Claimants or reasons why they should be made subject to particular bail conditions. He solely relies on the security concerns as expressed by the US authorities. In my judgment these concerns are generic and unduly rigid. I fully understand that from a diplomatic relations perspective this places the UK authorities in an extremely difficult position and has knock-on consequences for the Commissioner. However, this is a court of law, and I am required to exercise my powers independently and judicially, in order to safeguard the rule of law."

44. On first reading, the description of the position adopted by the US in the Response as "generic and rigid" may appear dismissive of genuine concerns which the judge was obliged to consider. However, we are satisfied that it was open to the judge to find that no "specific reasons for denying bail to the New Claimants or reasons why they should be made subject to particular bail conditions had been advanced by either the US or the Commissioner". The Response can be properly described as 'generic' in the sense that it addressed the Respondents as a group not as individuals. Moreover, as we noted with regard to Ground 1, the US opposition to bail has been wholly consistent throughout; discussion of the latest bail application opens with the words "As the United States has previously explained…". Accordingly, to describe the position of the US as 'rigid' in the sense that it was unchanging and fixed is correct. We are satisfied that the judge did not dismiss without proper consideration the concerns of the US; her use of the words 'generic' and 'rigid' were essentially descriptive rather than evaluative. We are satisfied that she weighed the Response and the arguments of the Commissioner with all other relevant factors before reaching her decision.

45. The grounds at [57]-[58] assert:

> "57. The Courts must be particularly slow to intervene in matters concerning foreign relations. In, for example, *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 where an application for judicial review was made in respect of the Foreign Office's failure to make representations on behalf of a British national detained at Guantanamo Bay. The Court of Appeal held at §107(ii) that it would not be "appropriate to order the Secretary of State to make any specific representations to the United States, even in the face of what appears to be a clear breach of a fundamental human rights, as it is obvious that this would have an impact on the conduct of foreign policy…".
>
> 58. Where – as here – a Court has been provided with evidence that a proposed order for interim relief had the potential to have a profound impact on international relations between the UK and its most important security partner, the limitations on Courts taking steps which interfere with foreign relations apply with full force."

46. We consider that the reference to *Abbasi* is unhelpful. The Supreme Court had not been asked to "order the Secretary of State to make any specific representations to the United States" concerning the conduct of its citizens in its sovereign territory. As we have noted, the conduct of foreign policy is not justiciable, but to cite *Abbasi* in the context of the present appeal and to suggest that similar limitations on the court "taking steps which interfere with foreign relations apply with full force" does not advance the Commissioner's case. We repeat that all parties were agreed that, whilst the views of the US and the possible impact of extended bail on United Kingdom/US relations were factors of great importance, they were factors which could be outweighed in the judge's evaluation by a combination of countervailing factors. The judge was correct to observe that she was "required to exercise my powers independently and judicially."

47. As we have observed, each successive bail order was made in the context of previous orders by the same judge. In her April 2024 bail judgment (which was not appealed), the judge stated three times that "weight and respect" should be attached to the views of the executive on matters of security. We are satisfied that she continued to adhere to that principle in reaching her July 2024 decision.

48. Whilst the judge quotes at length from the letter of Ms Harriet Matthews, Mr McKendrick KC is correct to point out that she did not refer at all in her judgment to the letter of Mr Doughty. We have considered whether her failure to consider the letter constitutes an error of law. We find that it does not. The letter adds little to the material already before the court. It begins by acknowledging the minister's commitment to the rule of law and then instructs the Commissioner to appeal any extended bail order. It refers to the "position that has been set out by the United States" in other words the Response which was before the judge. The remainder of the letter concerns a potential application for public interest immunity which was not before judge. The judge was not obliged to refer to every item of evidence before her. We are satisfied that the judge had regard to the letter but, even if she

did not, she was aware of all the relevant matters raised in the letter before reaching her judgment.

Ground 3: The Judge's Decision involved an unreasonable exercise of her discretion because she failed to place any or any adequate weight on the US authorities' evaluation of their own security concerns

49. At [68], the Grounds observe that, as with foreign relations, the "Court must be equally slow to intervene in national security questions" and note the remarks of Lord Hoffmann in *Rehman* [2001] UKHL 47 at [50]: "the question of whether something is 'in the interests' of national security is not a question of law. It is a matter of judgement and policy. Under the constitution of the United Kingdom…decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive." However, we consider that there is a significant difference between a court questioning or contradicting the executive's assessment of national security and attributing weight to such an assessment in an evaluative exercise such as that which the judge was required to carry out. At [75] of the Grounds we read:

> "The Court was obliged to have proper regard to US security concerns; to afford them significant weight in any assessment of whether or not to grant bail; and to avoid taking a step which would interfere with national security. Instead, the Court dismissed the US security concerns as being generic and proceeded to take the decision without affording those concerns any or any significant weight. That approach was not rationally open to the Judge."

The Grounds here conflate several different principles. As with its treatment of foreign relations, the suggestion is that the judge went beyond weighing the US's assessment of its own national security interests and took "a step which would interfere with national security." We do not find that she did anything of the sort. The judge did not question whether the US was right to take the view that the presence of the Respondents close to its base was not 'in the interests of' US national security. She accepted the US's evaluation and then weighed it against other factors in reaching her decision. As with Ground 2, the implication in Ground 3 is that, notwithstanding that all parties (i) accepted that the assessment of national security and the conduct of foreign policy were solely matters for the executive (ii) which required the most careful consideration and evaluation by the judge and (iii) whilst very important, were not of paramount, overriding effect in the court's analysis, the judge had nonetheless no choice but to defer the opinions of the Commissioner and the US. That is not a correct representation of the function of the court.

50. Ground 3 also complains of the judge's use of the phrase 'generic and rigid' to describe the Response. We shall not repeat what we have said above regarding Ground 2. We do not accept, for the reasons given at [44], that the judge uses the phrase unlawfully to 'substitute' her view on a 'complex national security question' as the grounds assert.

51. In our judgment, it is important to note which parts of the application for extended bail were favourably considered by the judge and which were not. The fact that the judge refused key parts of the extended bail application is, in our judgment, an indication that, far from diminishing or dismissing the US concerns, she took those concerns fully into account.

52. The judge extended the bail area to include the Nature Trail, an extension first suggested by the Commissioner himself, no doubt in the knowledge of the likely response of the US. The Response deals with the Nature Trail, but it does so in terms of health and safety, rather than security concerns (noting the proximity of the trail to an area of 'dangerous currents, dangerous wildlife, lack of accessibility and absence of lifeguards') and the difficulties posed by an 'aerial medical evacuation' in the event that someone suffered an injury on the Nature Trail which could not be treated on site. These concerns would all have been apparent to the Commissioner when he suggested extending bail to the Nature Trail whilst medical evacuation might be required anywhere on Diego Garcia, including the Camp. The health and safety issues are not particular to the operation of the Facility nor do they obviously engage the relationship of the US and UK on Diego Garcia.

53. The judge did not extend bail to the Brit Club, mainly because doing so would place an inappropriate 'positive obligation on the Commissioner' to commit additional resources (see our comments below on Ground 4). We note that the Commissioner's submissions to the judge and before us made little reference to the extension of bail from eleven to up to forty Respondents, other than by noting the commitment of additional resources. The Response does refer to the extension of bail to more Respondents but only to comment that the new bail order 'does not specify that escorts must be at a ratio of one to one,' a matter which the judge was careful to reserve to the Commissioner, not the court [judgment, [38]]. The judge extended bail to all Respondents because she agreed with the argument that it was not possible to distinguish the extended group from those who had originally been granted bail. That decision, taken after according proper respect to the Response, was rational and cogent.

Ground 4: The Judge's Decision was an unreasonable exercise of her discretion as it necessarily impacts upon the Commissioner's resource allocation decisions

54. The Grounds at [76] assert that "it is very well-established that the allocation of public money is not usually justiciable" and at [77] that "the judge in the Decision specifically held that it is not intended to impact upon the Commissioner's resourcing decisions. However, the reality is that the Court's decision cannot be implemented without the allocation of significant additional resources by the Commissioner."

55. We find that the judge has not purported to tell the Commissioner how to spend the funds available to the BIOT. The judgment makes it very clear that the judge was well aware of the need to avoid committing the Commissioner to any 'positive obligation' to expend additional resources (see our comments above regarding the Brit Club [53]). On the particular issue of escorts, the judge wrote that "it is a matter for the Commissioner to determine whether to (i) reduce the ratio of G4S officers [who supervise respondents during the exercise of bail] or (ii) increase the number of G4S officers". We find that the judge's approach was correct. The judge did not inconsistently commit the Commissioner to additional expenditure, having said she would not do so; rather, she correctly acknowledged that the deployment of resources is a matter solely for the Commissioner. As we observed above [53], the US appears to have misunderstood that the deployment of resources (in particular, escorts) by the Commissioner was not a matter for the court. Having made a decision on the issues properly before her, the judge was then very careful not to trespass on matters such as the deployment of resources which were for the Commissioner alone to determine.

56. We also agree with Mr Jaffey KC's submission that many lawful bail conditions routinely involve expense for the detaining authority (for example, a direction for an individual to wear an electronic tag). Such bail conditions are no more unlawful than those contained in the judge's order.

The Suspension Clause

57. We observe that each of the judge's bail orders have provided that access to the bail areas may be limited or suspended without the consent of the Respondents or the court. The clause in the July 2024 Order provides:

> "Access to the Bail Areas may be subject to such limits as are reasonably necessary by reason of the operational requirements of the military facility (such as particular equipment being moved or exercises, events or operations being undertaken that would render such access unsafe). Any such limits shall be notified to the Claimants and their solicitors as soon as reasonably practicable and before coming into effect."

58. The inclusion of this provision clearly indicates that, contrary to the submissions advanced by the Commissioner, the judge has been very much alive to the practical problems which may arise from permitting unvetted civilians any freedom of movement close to a military facility. Any use of this suspension clause is, of course, a matter for the Commissioner, subject only to any limit imposed by public law considerations. We understand that the power to suspend bail has only been used once for a limited period during a military operation. However, reserving to the Commissioner a power to limit or cancel bail entirely and without any prior reference to the court is, in our opinion, very significant. Permitting the authorities charged with the day to day management of the Facility to remove any or all of the bail freedoms granted to the Respondents whenever they consider it necessary to do so serves to underline the fact that the judge has given considerable weight to the concerns of the US and the Commissioner.

Conclusion

59. For the reasons we have given, we dismiss the Commissioner's appeal on all grounds.

60. We conclude with the following observations. We were told at the appeal hearing that several of the Respondents had received positive decisions in respect of their protection claims, although they remain on Diego Garcia. Mr McKendrick KC said that other Respondents had received negative decisions, but, on further enquiry, it seems that those individuals have received 'minded to' responses inviting further submissions before any final decision is taken. We were told that such submissions have included requests by the solicitors for their clients to be medically examined and that such requests have been refused. There appears, therefore, to be no prospect of the majority of the protection claims being determined in the foreseeable future. Moreover, no date has yet been set for the final hearing of the *habeas corpus* claims following the cancellation of the hearing on Diego Garcia which had been due to take place in July 2024.

61. The lack of progress in any of the legal remedies available to the Respondents occurs in the extraordinary context of a unanimity of opinion of the Commissioner, the Respondents and the US that all the Respondents should leave Diego Garcia as a matter of urgency. The Commissioner appears to have come to this view after his own safeguarding lead found in June 2024 that the children in the Camp "are at immediate risk of harm" and that the Camp is "in crisis".

62. It is not for this court to require that action is taken to resolve matters, still less to propose possible solutions. However, we wish to record our very serious concern regarding the welfare of all the migrants on Diego Garcia and, in particular, the children.

63. That is the judgment of the Court.