Appeal No: SC/10/2002
Hearing Date: 5th July 2011
Date of Judgment: 20th July 2011

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE WAUMSLEY
MR W V FELL CMG

Jamal AJOUAOU

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant:

For the Respondent: Ms L Giovannetti QC and Ms C Owen, (instructed by the Treasury Solicitor)

Special Advocates: Mr M Shaw QC and Ms M Plimmer (instructed by the Special Advocates Support Office)

OPEN JUDGMENT

Mr Justice Mitting :

Background

1. The appellant is a citizen of Morocco, born on 28 February 1963. He arrived in the United Kingdom on 24 December 1985 on a visitor's visa. He subsequently obtained leave to remain as a student. He married a British citizen on 4 October 1986 and was granted one year's leave to remain on the basis of his marriage. On 21 June 1988, he was granted indefinite leave to remain on the same basis. He worked at a number of different hotels, as a waiter. In 1990, he applied for naturalisation as a British citizen. Some time after he did so, he left to work for a year in Bermuda. His application for naturalisation was refused. Nevertheless, when he returned to the United Kingdom in 1994, he was granted indefinite leave to remain as a returning resident. In the same year, he divorced his first wife. He again applied for naturalisation in 1997. No decision has been made on that application. In 2000, he married a British citizen of Moroccan origin. On 6 August 2001, their only child, a daughter, was born. On 17 December 2001, the appellant was detained and certified under s21 of the Anti Terrorism Crime and Security Act 2001. Notice of intention to deport him on conducive grounds for reasons of national security was served on the same date. Two days later, he appealed to SIAC against both decisions. On 21 December 2001, he left the United Kingdom voluntarily and returned to Morocco. On the same date, the Secretary of State personally directed the appellant's exclusion from the United Kingdom on the ground that his presence was not conducive to the public good for reasons of national security. That decision was made under prerogative powers and still subsists. On 25 January 2002, he gave fresh notice of appeal against his certification. His appeal was dismissed by SIAC on 29 October 2003, for reasons given in both open and closed judgments.

2. In 2002 his second wife and daughter visited him in Morocco for about a month. In an entry clearance interview on 27 November 2006, the appellant said that he and his wife had only lived together for about two months in all. At the same interview, he said that he had not seen his daughter for four years and last spoke to her four years before (ie in 2002). In none of the documents served by him or in his name has he suggested that he has written or spoken to her or that she has written to him since. He divorced his second wife in 2003.

3. On 10 August 2006, he applied for entry clearance as a returning resident. In the interview, in which he gave the information referred to above about his daughter, he said that his intention was to start work or do business, perhaps in the hotel or restaurant industry. On the same date, he was refused leave to enter by the entry clearance officer on the basis that he did not satisfy all of the requirements of paragraph 18 of the Immigration Rules, because he had been away from the United Kingdom for more than two years. The entry clearance officer also noted that he had no pre-arranged accommodation, offers of employment, savings or assets. He gave notice of appeal against that decision on 22 December 2006. On 19 July 2007, the entry clearance officer made an explanatory statement in support of his decision to refuse leave to enter. It drew attention to the existence of the Secretary of State's decision to exclude

him on conducive grounds and maintained his earlier refusal of leave to enter. The appeal was heard on 10 August 2007 and dismissed in a determination promulgated on 21 August 2007. The appellant was legally represented, but, it seems, presented no more information than that summarised above to the Immigration Judge. The grounds upon which the appeal was dismissed made no reference to the decision of the Secretary of State to exclude on conducive grounds. In due course, for this and other reasons, Senior Immigration Judge Peter Lane ordered reconsideration on 1 October 2007. Nothing further occurred in that appeal. On 21 December 2009, the entry clearance officer refused the application for entry clearance as a returning resident under paragraph 320(6) of the Immigration Rules. The Secretary of State certified the decision under s97(3) Nationality Immigration and Asylum Act 2002. Any appeal against the fresh decision, accordingly lay to SIAC. It was exercised by a notice of appeal dated 13 January 2010. The grounds of appeal can be distilled into two propositions: the appellant was not and is not a threat to national security; the decision to refuse leave to enter infringes his and his daughter's rights to respect for private and family life under Article 8 ECHR and breaches s55 of the Borders Citizenship and Immigration Act 2009.

Law

4. The decision of the Secretary of State to exclude the appellant on conducive grounds was made under prerogative powers and is not an immigration decision. It could only be challenged by judicial review proceedings. The entry clearance officer had no discretion to grant leave to enter under paragraph 320(6) of the Immigration Rules. Nevertheless, the appellant has a right of appeal against that decision, to SIAC. In EV v SSHD 7 April 2009, SIAC concluded that an appellant without an ECHR claim enjoyed a right of appeal in which the merits of the Secretary of State's decision could be reviewed. Miss Giovanetti QC submits that in a case, such as this, in which one of the grounds of appeal is that Article 8 rights were infringed, SIAC must determine whether or not the decision to refuse leave to enter is proportionate; and, in doing so will inevitably consider the validity of the Secretary of State's grounds for exclusion. Miss Giovanetti is, strictly, correct; but the approach which we will adopt is that set out in EV – to attempt to find the facts as to past events on balance of probabilities and, giving due deference to the view of the Secretary of State that it was and is conducive to the public good to exclude the appellant from the United Kingdom, to review her decision in the light of the facts which we find. To that end, we must attempt to determine whether the Secretary of State's decision that the appellant was and remains a threat to national security is justified and, in any event, whether or not the decision to refuse him leave to enter infringes Article 8. We do not understand that approach to be controversial.

5. Miss Giovanetti submits that we should treat the open and closed judgments of SIAC on the certification appeal as the starting point for our decision. It is unnecessary for us to rule upon that submission, save in one respect. We have in fact conducted our own review of the material upon which the Secretary of State's decisions to exclude and certify were based. That review, in particular of the closed material, has permitted us to reach conclusions on balance of

probabilities about the appellant's conduct while in the United Kingdom. We have then checked our findings – in particular our closed findings – against those of SIAC in its judgments of 29 October 2003. In almost all significant respects, they are – allowing for the differences in the standard of proof – effectively identical. In one respect, we accept the submission that we must treat SIAC's earlier findings as a starting point, not to be departed from without good reason: the findings about the nature and purposes of the activities of extremist groups made in the open and closed generic judgments of 29 October 2003. The reasons are self-evident and can briefly be summarised. Those judgments were given after considering extensive evidence, including evidence from two Security Service witnesses, with deep and extensive knowledge of extremist activity in the United Kingdom and abroad and wide ranging submissions from all sides. The material available to SIAC was far more extensive than anything that could reasonably be deployed in this appeal. Further, the generic judgments were intended to inform SIAC's judgments in the individual cases then determined and in subsequent appeals. There would have been little purpose in the exercise unless the generic judgments provided a starting point for subsequent individual appeals. We have accordingly accepted SIAC's findings about generic matters – notably about the nature and purposes of the Abu Doha and Beghal groups and other groups associated with them and of the Chechen Mujahiddin, set out in paragraphs 294 to 303 of the open generic judgment and in the closed generic judgment. No material has been placed before us which would cause us to depart from the conclusions there expressed.

National security

6. The Secretary of State's open case, in 2003, was that, before he left the United Kingdom in December 2001, the appellant posed a threat to national security, for three reasons:

(i) he was a trusted associate of extremists engaged in terrorism related activity, in particular Beghal, Abu Doha, Allouche, Al-Sirri, Abu Qatada and Moazzem Begg;

(ii) he was involved in the procurement and supply of non-lethal military equipment and clothing for the Chechen Mujahiddin; and

(iii) he handled and distributed propaganda videos promoting jihad to the Muslim community in the United Kingdom.

7. The appellant has given three accounts of his life in the United Kingdom for the purpose of appeals to SIAC: an unsigned witness statement dated 15 September 2002; an unsigned and unapproved statement served in January 2011 and a long email sent by him to his then solicitors on 25 June 2011, which they, at his request, copied to SIAC. The thrust of all three is the same, but the latest email contains a surprising allegation against his former second wife and her family. In the next paragraph, we set our a summary of the main points of his account.

8. Since his arrival in England in 1985 until his detention in December 2001, he led a relatively uneventful life in England. At some stage – he does not say in which year, but it appears to have been in the mid 1990s – he began to become involved in the Islamic Information Centre in Shepherd's Bush. In consequence, he became a practising Muslim. He first met Abu Doha in 1999 and believed him to be a man of integrity and a god-fearing person. The appellant acted as his translator. He supported his wish to help people in Chechnya, in the second Chechnyan war. To that end, he collected second hand clothes, shoes and blankets and paid for communications equipment. On one occasion, he attempted to secure the release of a consignment of communication items from Customs. After Abu Doha's arrest, he visited him and others, as an interpreter for their (and until very recently his) solicitors. He also encountered Abu Qatada, whom he regarded as honest, warm and frank, and knew Al-Sirri. He does not deny that he knew Abu Doha, Allouche, Beghal and Moazzem Begg, but denies that he knew or believed that they were involved in terrorist acts. In his recent email, he appears to claim that a Moroccan jihadist (or, perhaps, more than one Moroccan jihadist) brainwashed the woman who was to become his second wife to manipulate him (but in a manner that he does not describe). The documents found by the police in his house on his arrest were produced by men called Anssar and Jahanghir, so that the police could show them to the elders of the Muslim community, who could, in turn, go to the Home Secretary, to tell him to arrest him and kick him out of the country. He suggests that this was a diversionary tactic to cover up the activities of Anssar and Jahanghir.

9. If we have correctly understood his latest account, we have no hesitation in rejecting it. For reasons set out in the closed judgment, the interest of the Security Service in his activities was not prompted by Anssar or Jahanghir or by his wife or by her relatives. We are satisfied that he was instrumental in procuring the communications equipment supplied to N Knauss, as evidenced by the invoice recovered from his home when it was searched by the police on 17 December 2001 (2/5y/9). We also do not accept that he simply acted as an interpreter for Abu Doha and others, but provided active help to him in furthering an extremist agenda – principally, the support of the Chechen Mujahiddin, by finance, propaganda and the supply of non-lethal military equipment, such as communications equipment, boots and clothing. We are satisfied that he was a trusted associate of active extremists, including Abu Doha, Al-Sirri, Beghal and Allouche. We make no finding in relation to others. We have reached these findings on balance of probabilities, for reasons which are principally set out in the closed judgment. We are satisfied that the Secretary of State's decision to exclude the appellant on conducive grounds for reasons of national security was fully justified.

10. The appellant maintains that he has lived a peaceful and uneventful life in Morocco, has not consorted with extremists and has been of no interest to the Moroccan authorities. We have no reason to doubt any of these contentions. Nevertheless, the Security Service continues to assess that he poses a genuine risk to national security. The twin foundations for this assessment are his activities in the United Kingdom before he departed and his failure since to account truthfully for them. Accordingly, in their view, it is impossible to

determine that the risk which he undoubtedly posed before departure has now been reduced to such a level that it is no longer conducive to the public good that he should be excluded. We accept the judgment of the Security Service. The risk which he poses is undoubtedly much diminished, both because of his own probable inactivity and because many of his former associates in the United Kingdom have been neutralised. But we cannot be confident that the risk which he posed has wholly disappeared. Not only has he not given a truthful account of his activities before departure, he has invented a fanciful and untrue explanation for how he came to be identified as a potential risk. Further, he has no right to return under paragraph 18 of the Immigration Rules. The Secretary of State has a discretion to admit him under paragraph 19; but, subject to his Article 8 and related claims, he has put forward no substantial ground upon which that discretion should be exercised in his favour. For those reasons, and subject to Article 8 and related issues, to which we now turn, the entry clearance officer's decision (like that of the Secretary of State to maintain exclusion) was unimpeachable.

Article 8 and related issues

11. We approach this issue by answering the five questions posed by Lord Bingham in Razgar v SSHD (2004) UKHL 27 at paragraph 17. We take the first two together. We strongly doubt that the exclusion of the appellant from the United Kingdom interferes with his right or that of his daughter to respect for their private or family life. If our doubt is misplaced, the interference is not of such gravity as to engage the operation of Article 8. The appellant has not lived in the United Kingdom for nine and a half years (eight years if the date of refusal is the relevant date). He does not claim to have maintained contact with his ex second wife or, more importantly, his daughter. We have no evidence that she has ever expressed any wish to make contact with or to see him. Their relationship is no more than the blood tie. For those reasons, as well, there is no material on which we could conclude that her best interests require that he should be permitted to re-enter the United Kingdom with a view to re-establishing contact with her. Not only have the appellant's family ties with England been severed, any social ties which he may have had also appear to have withered. The only interference in the appellant's life which the entry clearance officer's decision causes is to prohibit him from conducting it, as a single man, in the United Kingdom, rather than elsewhere. On no view is that such a serious interference with his right to respect for private and family life as to engage Article 8. If, contrary to our view, it does, the decision to refuse entry would be in accordance with the law, necessary in a democratic society in the interests of national security and proportionate to the legitimate ends sought to be achieved: the protection of national security and the maintenance of immigration control.

Conclusion

12. For the reasons given in the open and closed judgment, the appeal is dismissed.