Appeal No: SC/98/2010
Hearing Date: 6th November 2013
Date of Judgment: 14th January 2014

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE IRWIN (Chairman)

'J1'

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant:	Ms S Harrison QC and Mr E Grieves
Instructed by:	Birnberg Peirce & Partners
For the Respondent:	Mr R Tam QC and Ms K Grange
Instructed by:	The Treasury Solicitor
Special Advocates:	Ms C McGahey
Instructed by:	The Special Advocates' Support Office

OPEN RULING ON THE APPELLANT'S APPLICATION FOR AN ABSOLUTE AND IRREVOCABLE CONFIDENTIALITY ORDER

Mr Justice Irwin:

1. The Appellant has made a formal application following the judgment of the Supreme Court in *W (Algeria) and Others –v- The Secretary of State for the Home Department* [2012] 2 AC115, UKSC 8 to be permitted to give his evidence to the Commission subject to an absolute and irrevocable confidentiality order. At this stage I am called on to make a ruling on the basis of the information currently available to the Commission.

The Background

2. J1 is an Ethiopian national. The current summary of the national security case against him, submitted in July 2013, maintains the assessment that the Appellant is a:

> "long standing and committed Islamist extremist…..involved in terrorism activities since at least 2004. [J1] is assessed to have knowingly supported individuals who have engaged in terrorism-related activity both in the UK and East Africa. The Security Service assesses that [J1] has significant links to other Islamist extremists both in the UK and in East Africa."

The Respondent relies on earlier SIAC judgments which I need not recite in detail, but which include the finding that the Appellant was an important and significant member of a group of Islamist extremists in the UK before his detention in 2010.

3. In the course of the SIAC proceedings, J1 has signalled that he has had something of a change of heart. The matter is well summarised in the 2013 National Security Statement in the following terms:

> "In relation to the SIAC proceedings [J1] has produced a number of statements and provided oral evidence where he has made a series of assertions about a potential change in views and how since his arrest in September 2010 and subsequent detention he has reflected on his outlook and beliefs. In particular, in these statements [J1] describes his attendance on the Al Furqan Islamic Studies course and the influence of another detainee, …….
>
> In his oral evidence at the bail hearing in July 2012, [J1] stated that he accepts responsibility for his current situation and that 'ultimately everything that has happened it is because of my own doing, so of course I have to take responsibility. The security services acknowledge [J1's] reasons outlined in paragraph 119 of his amended statement about why he is unable to provide any specific detail in response to the allegations. However, without this information, it is difficult to assess whether [J1] accepts and has taken responsibility for his previous involvement in terrorism related activity."

Procedural Summary

4. By a decision notified on 25 September 2010, the Secretary of State decided to make a deportation order against the Appellant on conducive grounds for reasons of national security. On 8 October 2010, the Appellant appealed against that decision to SIAC. He has been in immigration detention or on bail since 25 September 2010. On 15 April 2011, SIAC issued a judgment adverse to the Appellant on national security. On 11 July 2011, SIAC issued a further judgment adverse to the Appellant respecting his safety on return to Ethiopia.

5. The Appellant lodged appeals to the Court of Appeal against both rulings. His appeal was stayed pending the handing down of the judgment of the Court of Appeal in another Ethiopian case, *XX –v- SSHD*.

6. Whilst the appeal was pending, J1 applied for bail in February 2012. In the course of considering the application, the previous Chairman of SIAC wrote to the Director of Public Prosecutions on 2 April 2012 in the following terms:

> "["J1"] has a wife and young family in England. He has been detained ever since the notice to deport was served upon him. He has applied to SIAC for bail. SIAC has indicated that it is willing to give favourable consideration to his application if he makes a detailed statement about past events which SIAC believe to be truthful. I enclose a transcript of the hearing of 29 February 2012 in which that statement was made ……He has stated his willingness to do so, but only on condition that no use adverse to him or others is made of the statement. SIAC has jurisdiction to make an order to that effect. Whether or not it should do so will be determined after representations by J1 and the Secretary of State have been considered……
>
> One factor of great importance is the attitude of prosecuting authorities. My purpose in writing to you is twofold:
>
> (i) To give you the opportunity of commenting, either in writing or by counsel at a hearing, on this proposal.
>
> (ii) To ask whether there are any, and if so, what, undertakings you might be willing to give about the use (or, more accurately, non-use) of any statement made by J1."

7. On 27 April 2012, the Director of Public Prosecutions replied to Mitting J, declining to provide an undertaking or immunity of the type requested. The letter gave closely argued reasons, but the central conclusion was:

> "I believe that it would be difficult to see what public interest in J1's case could outweigh the public interest in using the evidence of any confession that he might make. Whilst I accept that any confession made in these circumstances is unlikely

ever to be admissible in any trial, it may provide information that could found an investigation."

8. The Appellant was eventually released on bail on 26 November 2012. He has been subject to strict conditions since his release.

9. J1's appeal was heard by the Court of Appeal on 5 and 6 February 2013 and on 27 March 2013 the judgment was handed down with the neutral citation [2013] EWCA Civ 279. J1's appeal was allowed on a single ground, namely that on the findings made by SIAC, the only conclusion open to the Commission was that the Appellant's return to Ethiopia would subject him to a risk of persecution which would infringe Article 3 of the European Convention. The key factor relating to the Appellant's safety if returned to Ethiopia was that the question "when and whether the Ethiopian Human Rights Commission could effectively monitor the activities of junior officials" of the Ethiopian Government, had been left for the Secretary of State to determine at a later stage. The Secretary of State made a fresh decision to deport J1 and he has appealed to SIAC. There is an outstanding issue between the parties as to the ambit of that appeal.

10. At a directions hearing in June 2013, the Appellant's counsel raised the possibility of an application for an irrevocable and absolute confidentiality order. Pursuant to those directions, the Appellant gave notice of such an application on 31 July 2013. I heard oral argument on the point on 6 November 2013. The oral submissions were followed by successive further written submissions, concluding on 16 December 2013.

The Order Sought

11. The effect of the order sought would be to restrict the disclosure of the evidence given under the protection of such an order to defined individuals: the Secretary of State and her Private Secretary, named lawyers acting for the Secretary of State, the Special Advocates Support Office ["SASO"], named Special Advocates, and to departmental legal advisors and officials "whose names or means of identification have been provided to SIAC" prior to the making of the order.

12. The essential proposition underlying the application is that it is said J1 wishes to show that he is no longer a risk to national security because of a change of heart. In order to do so, he wishes to prove his good faith by being frank about his past life. At least initially, a major concern was to avoid prosecution for criminal offences either in the United Kingdom or Ethiopia. He also wishes to minimise or avoid the risks of torture, ill-treatment or even death to himself and to others.

13. In his amended witness statement of 24 February 2011, between paragraphs 1 to 116, J1 gave a full account of events. There is no suggestion in that part of his statement that he is constrained in what he has to say. However, in passages beginning at paragraph 117, J1 rejects the assertion by the Secretary of State that he holds extremist views, indicates that his "life has taken a

number of twists and turns …..I do not have any developed or sophisticated political understanding or allegiances", but indicates that:

> "At this stage however I express reticence about what I can say further. I have attempted to provide detailed evidence thus far, but from this point I cannot easily give detailed evidence."

14. Aside from a complaint that the allegations against him are generalised, J1 goes on to complain that he is facing deportation to Ethiopia and:

> "Anything I say will inevitably be provided to the Ethiopian authorities, and I believe will put me at risk there of every kind of danger and abuse. Not only would I be at risk of detention, interrogation and torture to get information out of me and to punish me, I could be killed or disappeared or be held for years in prison in appalling conditions without any recourse to proceedings and that could not conceivably be called fair."

15. He also complains that the allegations place his family in Ethiopia in danger and, despite his estrangement from his father, he is unwilling to put him at risk. Further, J1 states that:

> "Any individuals about whom I am being asked could undoubtedly be placed in danger too or in further danger if I give an account of contact I've had with them and the circumstances of that contact. I am aware that a number of individuals in Ethiopia as well as Somalia have been subjected to horrific torture. I am aware "information" can be used or misused."

16. J1 reverts to the same theme in his sixth witness statement of 12 March 2012 in the following terms:

> "This process would enable me to give a detailed account including my views and beliefs then relating to the armed struggle in Somalia; my views on the AS [Al Shabaab] movement, whether I supported this group directly or indirectly in any way shape or form; whether I kept contact with people involved in this armed struggle. I understand the relevance of this history in relation to how I have changed since my arrest in September 2012 and how I continue to develop, and I am willing to engage in this process."

The Law

17. The decision in *W (Algeria)* arose in a different context. The application in that case concerned witnesses able to speak from a specially knowledgeable position as to the safety on return of *W* and the other appellants to Algeria. The witnesses concerned were, for obvious reasons, never identified or indeed closely described. The reader of the case report is left to infer that they might

be members of the Algerian State, whether the executive branch of government or another branch, or experts, or both.

18. The court accepted, following agreement between the parties, that SIAC has power under Rule 39(1) of the SIAC Procedure Rules 2013:

> "To give directions relating to the conduct of any proceedings."

That power is expressed in wide and unlimited terms and can be used in conjunction with the Commission's power under Rule 43(2), to conduct a hearing in private "for any good reason so as to prevent disclosure to other persons, including the authorities of the appellant's country of origin." Thus it is accepted that SIAC has jurisdiction to make an order of the kind sought. The issue is whether such an order is proper and appropriate on the facts of a given case.

19. The objection in principle mounted by the Secretary of State to an order of this kind was summarised in the judgment of Lord Brown, in paragraphs 11 to 16 of the judgment. In essence, it was that the foreign relations between the United Kingdom and a relevant foreign country might be seriously imperilled. The risk was that the Secretary of State learned of relevant and security-sensitive information, but learned those facts subject to an absolute and irrevocable confidentiality order, and in compliance with the order, did not pass on the information to the foreign country concerned, with the potential effect that terrorist activities abroad were not prevented or disrupted.

20. In his leading judgment, Lord Brown made a number of significant observations as to the difficulty surrounding such orders. In paragraph 16 he made it explicit that he did not "overlook the radical nature of the orders of the sort proposed here, nor, indeed, the kinds of difficulty they may bring in their wake." It was "difficult to think of any other situation in which a respondent would be unable to seek release from a permanent injunction – in this case, not to communicate his knowledge to others." In paragraph 17, Lord Brown observed that the "very making of the initial order must to a degree undermine the likely weight of the evidence and devalue its overall worth", since the Secretary of State will be "largely unable to investigate [the evidence] and will find it difficult, therefore, to explain or refute it."

21. The *ratio decidendi* of the decision is contained in paragraph 18 of the judgment:

> "In the last analysis, however, none of these considerations to my mind outweighs the imperative need to maximise SIAC's chances of arriving at the correct decision on the Article 3 issue before them and their need, therefore, to obtain all such evidence as may contribute to this task."

22. It was on that basis that Lord Brown concluded that it is open to SIAC to make such absolute and irreversible *ex parte* orders as "the least worst option open to us – the lesser of two evils". However, he went on to make it clear, in very

strong terms, that such an order should be a rare event. In paragraph 19 of the judgment he said:

> "But at the same time I should make plain that I am far from enthusiastic about such orders and would certainly not expect a rash of them. Rather it would seem to me the power to make them should be most sparingly used. There is, of course, the risk that the very availability of such orders may be exploited by the unscrupulous in the hope that SIAC may thereby be induced to receive untruthful evidence which, had it in the ordinary way been subject to full investigation, would have been exposed as such."

23. Lord Dyson gave explicit support to the caution with which SIAC could approach such an application. In paragraph 34 of the judgment, Lord Dyson said:

> "SIAC should be astute to guard against the danger of abuse and should scrutinise with great care and test rigorously the claimed need for an order. But if SIAC (i) is satisfied that a witness can give evidence which appears to be capable of belief and which could be decisive or at least highly material on the issue of safety of return and (ii) has no reason to doubt that the witness genuinely and reasonably fears that he and/or others close to him would face reprisals in Algeria if his identity and the evidence that he is willing to give were disclosed …..then in my view an irrevocable non-disclosure order should be made."

In paragraph 35, Lord Dyson went on to emphasise the exceptional nature of such an order and the real caution necessary before such an order is made:

> "I accept that to make such an order is a striking step for any court to take and is contrary to the instincts of any common lawyer. It is inimical to the fundamental principles which we rightly cherish of open justice and, above all, procedural fairness. To make an order without giving the Secretary of State an opportunity to be heard is a clear breach of the principles of natural justice. Any such order requires compelling justification."

24. In paragraph 36, Lord Dyson emphasised that SIAC has to decide what is demanded by the interests of justice. In weighing the prejudice which may arise he said:

> "It should not be overlooked that the appeals themselves will be conducted entirely inter partes. In particular, no material that is placed before SIAC by the appellants will be withheld from the Secretary of State. She may be able to demonstrate that the claimed need for confidentiality is without foundation and to

> persuade SIAC to give the evidence little or no weight for that reason alone."

Six Observations

25. I hope it will be helpful to set out six matters which clarify the approach I take to this application, and would take to other such applications if and when they arise. Firstly, I adopt and repeat the extreme caution emphasised by the Supreme Court in relation to any such order. As Lord Brown indicated, "it is difficult to think of any other situation in which a respondent would be unable to seek release from a permanent injunction – in this case not to communicate his knowledge to others". That is particularly so where the knowledge might prove life saving. Although it is true, as Lord Brown emphasised in paragraph 11, that "but for the order, the Secretary of State would never have been put in possession of the information in the first place", it would be a truly remarkable court order, perhaps particularly in the context of domestic national security, if representatives of the intelligence agencies were made aware of knowledge equipping them to prevent or disrupt terrorist activity under circumstances where, in the last resort, a suspected terrorist – in this case a man with undisturbed findings of past terrorist activity – could withhold consent from the deployment of that knowledge to detect and disrupt terrorist networks, and potentially to save life.

26. Secondly, the situation in this case is very different from that arising in *W (Algeria).* We are not here concerned with the evidence of a disinterested expert or a "whistleblower". We are not concerned with the issue of safety on return but with the evidence to be given by an Appellant, an interested party, about his own activities and the inferences to be drawn from that evidence, bearing in mind the conditions under which it is given. In my judgment that sets up a very different context for my ruling.

27. Thirdly it was argued by the Secretary of State that the decision in *W (Algeria)* was only a precedent for cases concerned with safety on return. Fourth, it was also argued that such an order could simply never be appropriate to cover the evidence of an appellant. I reject both of those points. The observations of the Supreme Court were general. If the court had wished to confine their conclusions to cases involving the issue of safety on return, or to the evidence of experts and/or "whistleblowers", the court would have done so. For similar reasons, and on first principles of fairness, I reject any suggestion that appellants should, as a category, be excluded from the benefit of such an order. The extreme difficulty attending any such order covering the evidence of an appellant may be obvious, but there is in my view no proper basis for a categorical bar, preventing such an order covering the evidence of an appellant.

28. Fifth, the application in this case before my predecessor appears to have been focused principally on avoiding the risk of prosecution. Before me, this aspect was in effect abandoned, in my view rightly. I cannot see circumstances in which an order so radical and so problematic could be justified, even in part, by the desire to avoid legitimate prosecution, whether in the United Kingdom or abroad.

29. Sixth, the proper approach to such an application is to consider with clarity the issues arising which bear on the application, the facts of the case and the practical consequences of such an order, all of which taken together will determine the justice of the case. The default position must be against such an order. The true question is whether and to what extent justice compels the grant of such an order.

The Issues in this Case

30. It appears to me there are a number of questions, the answers to which should determine my ruling. First, I must consider important practical questions affecting whether this procedure can achieve a reasonable process and a just result. Second, what are the likely effects on the Appellant of the constraint of giving his evidence in public? Next, if the order is withheld, can justice be done to the Appellant by allowing for those constraints when inferences are drawn? Fourth, if the evidence is given subject to an absolute and irrevocable confidentiality order, is the weight of the evidence likely to be undermined and its worth devalued and, if so, to what extent? Finally, in the light of the foregoing is there a "compelling justification" for the grant of such an order?

Some Practicalities

31. It is necessary for me to consider the practical effects of such an order, on the facts of this case. I sought during argument, and as a consequence of written submissions after argument, to establish what such an order would mean in effect. The most striking matter is that the Secretary of State has indicated clearly that she will not attend, and will not be represented, at any hearing where evidence from the Appellant is given subject to the conditions sought. On instructions, the Commission was told that it is not practical to identify individuals within the legal team or the relevant officials, sequester them from their colleagues and give them conduct of the case, so that the relevant evidence can be heard and addressed whilst observing the order. Given my understanding of the way in which the Intelligence Agencies in particular are structured, I have some understanding of the difficulties involved. However, the fact is that the Secretary of State will not receive or address such evidence.

32. If I made such an order, the Appellant's open lawyers would hear evidence given under the confidentiality order, but not the national security evidence held within SIAC's closed material procedure. The Secretary of State's lawyers and relevant officials would hear the ordinary open evidence and the closed evidence within the closed material procedure, but not the evidence given under the confidentiality order. The Appellant's Special Advocates would be able to hear the evidence given under the confidentiality order, if the Appellant consents. I would expect the Appellant would consent. I would expect that no such application could credibly be made in the absence of such consent. Hence the Special Advocates would hear all the evidence. Subsequently, when addressing the Commission in relation to the evidence given under the confidentiality order they would do so in the absence of the Appellant's open lawyers and in the absence of any representative of the Secretary of State. The Special Advocates acting on behalf of the Appellant would be able to address any inconsistencies between the evidence given

under confidentiality and the national security case, but they would do so in the absence of the Secretary of State. They would also do so in the interests of the Appellant: they are not neutral.

33. I raised the question in argument, anticipating some of these difficulties, as to whether it was proper for the Commission to appoint an *amicus curiae*, with suitable security clearance, to assist the Commission, having been made privy to both the evidence given under a confidentiality order and the evidence within the closed material procedure. A number of responses to this proposition, which I need not detail here, raised considerable difficulties with such an approach.

34. Very careful arrangements have been developed to facilitate the closed material procedures in SIAC. The Secretary of State permits advocates instructed by her, with knowledge of the closed material, to cross-examine witnesses and to address the Commission. The constraints on cross-examination of witnesses in OPEN are significant. The advocate must take great care not to communicate sensitive information inadvertently in the course of questioning. Special Advocates are permitted to see the sensitive material and to cross- examine witnesses in CLOSED but not to question witnesses in OPEN, to avoid the risk of inadvertent disclosure. Any *amicus curiae* might well be prevented from questioning the Appellant or witnesses in OPEN.

35. The consequence is that the role of an *amicus* might very likely be confined to making submissions to the Commission. Neither the Appellant nor the Secretary of State would be present. Nevertheless, it seems to me that such an approach would be proper and, in the right case, might be practicable despite the challenges.

36. Another potentially serious problem is the procedure to be followed before such an order is granted. In paragraph 20 of *W(Algeria),* in a passage with which Lord Dyson expressed explicit agreement, Lord Brown advocated that before making such an order, SIAC should require "the very fullest disclosure" of the proposed evidence, of the particular circumstances said to give rise to the fear of reprisal and of the relevant surrounding circumstances. In the instant case, it appears to me that would mean full and detailed proofs of evidence from the Appellant and any other witness in respect of whose evidence such an order was sought, and a document making clear what parts of the evidence the Appellant would not be prepared to give under ordinary conditions. I would certainly require such evidence as a minimum before granting such an order. If in the course of that statement or statements, or in the course of oral evidence given *ex parte* as the application were pursued, if the Appellant gave evidence which was inconsistent with his open case, how should the Commission deal with such inconsistency? The Commission would know of the inconsistency, but the Secretary of State would not. If the application was in the end unsuccessful, the Commission would know of the inconsistency but the Secretary of State would not. Even if the Secretary of State had been present during the earlier process, the inconsistency could never be explored when the Appellant came to give his open evidence,

precisely because it had been given under an irrevocable confidentiality order in the course of the *ex parte* application.

37. SIAC proceedings are already problematic because of the movement between closed and open proceedings. This requires great discipline of all concerned to avoid breach of the rules and leakage of information and evidence. To employ an ugly but expressive term, a confidentiality order in the terms sought would mean that proceedings before SIAC would become trifurcated, rather than the usual bifurcation we have come to live with.

38. A further problem which arises relates to the judgment, or rather judgments, which would be written at the end of such a process. SIAC procedure already requires two judgments: OPEN and CLOSED. The Appellant never reads the CLOSED judgment. In proceedings where the order sought was made, there would be three judgments: OPEN, CLOSED and CONFIDENTIAL AND CLOSED. The Appellant and his lawyers would read only the OPEN judgment. The Secretary of State could read the OPEN and the CLOSED. But the result of the self-denying ordinance by the SSHD would mean that the CONFIDENTIAL AND CLOSED judgment, where the Appellant's confidential evidence was tested against the CLOSED case, could only be read by the Tribunal, the Special Advocates and any *amicus curiae*.

39. None of these practical considerations I take to be an absolute or categorical bar on the grant of such an order to cover the evidence of an appellant. However, they are powerful considerations when deciding whether justice requires such an order.

My Conclusions in this Case

40. I consider first the constraints in play upon the evidence from the Appellant. The Appellant's central objective in all of this is to demonstrate his good faith to the Commission. He seeks to persuade the Commission, in essence, that he has changed his outlook. His previous witness statements and the arguments advanced on his behalf have given a fairly clear picture, for better or for worse, of the concerns he has about being fully frank in open evidence. His assertion of a change of heart is already public. So is the clear implication that he had terrorist connections, which he no longer upholds.

41. The issue which all agree must be re-examined in detail in this case is safety on return. Inevitably, the Commission will become well versed in each side's propositions on that issue. To a large extent the evidence on safety on return will overlap with evidence of the risks which would be run were the appellant to give evidence in public about the detail of his activities in the past. In my view this will be of help in enabling the Commission to draw the correct inferences about evidence given in the open.

42. I consider that the Commission can in this case make reasonable inferences about the constraints operating on him whilst giving evidence in public. Cross-examination about those constraints will be legitimate and his position can be tested, but the Commission will be able to ensure that no unfair point is taken in questioning.

43. Conversely, evidence given under the order sought would have to be viewed with some scepticism. For reasons which I hope are already clear, the Appellant would be giving such evidence to a significant degree untested. He would not be cross-examined on behalf of the Secretary of State, nor of course by his own special advocates, and probably not by any *amicus curiae*, even if one were appointed. Of course the Commission would be able to form an impression of the Appellant and his evidence, but he could not be effectively challenged on an important part of the evidence.

44. A disadvantage for him would be that he could not meet suggested inconsistencies. The Commission often faces the difficulty that inconsistencies between an Appellant's case and the closed evidence are hard to explore, because the obvious questions would tend to reveal the closed evidence. SIAC has become adept at tactics to minimise that problem by careful structuring of questions, by the use of summaries and gists of the evidence, by a careful approach to inference, and by giving great care to enable justice to be done. But here the difficulty would be very pronounced, because the Secretary of State would not be aware of the evidence given under the order sought, and there would be no cross-examination by anyone privy to both the "confidential" evidence and the closed evidence.

45. It is important not to forget that the Appellant will be able to give direct and open evidence about his views now, about how they came about through contact with others, in particular his experience of the *Al Furqan* course, and his reading and thinking since then. None of that will expose him to risk. If the order sought is refused, he will be able to argue against any adverse inference from his failure to give a detailed account of the relevant events, on the basis that he sought conditions for the giving of such evidence and failed to achieve them. That should not be taken as an indication of what inference will be drawn in the end, but the argument will be available and will be considered.

46. For all these reasons I have concluded that justice does not require that such a confidentiality order is made. The application is refused.