

SPECIAL IMMIGRATION APPEALS COMMISSION

Wednesday, 18th December 2013

BEFORE:

**THE HONOURABLE MR JUSTICE IRWIN
SIR ANDREW RIDGWAY
UPPER TRIBUNAL JUDGE JORDAN**

BETWEEN:

L1

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

MS AMANDA WESTON (instructed by BPP Solicitors) appeared on behalf of the Appellant.

MR JONATHAN GLASSON QC and MR DAVID MANKNELL (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State.

MS JUDITH FARBEY QC (instructed by the Special Advocates Support Office) appeared as Special Advocate.

RULING

MR JUSTICE IRWIN:

1. A preliminary issue arises in this case as to whether SIAC should receive evidence in a closed material procedure on the remitted appeal. We will deal later with the question of the judicial review proceedings which sit alongside the appeal.
2. The Court of Appeal in a decision of July of this year (Neutral Citation 2013 EWCA (Civ) 906) declined to reach a conclusion on the first ground of appeal before the court. That ground reads:

"SIAC erred in failing to consider the consequences of its finding that the Secretary of State had deliberately contrived to serve the decision to deprive the appellant of his citizenship after he and his family had temporarily left the UK; and the Secretary of State's doing so amounted to an abuse of power or process or was so unfair that the court should intervene".

L1 had made a relevant application to the Court of Appeal that, in order to determine that ground, they did not require to see any closed material in the appeal. The Secretary of State submitted that the Court of Appeal should look at closed material.

3. In response to those conflicting applications, the court, in paragraphs 21 to 26 inclusive, gave their conclusions. The sense of the matter can be drawn from paragraph 24.

"Since there is a live issue between the parties as to the relevance of the closed material, both for the purpose of deciding whether the procedure adopted by the Secretary of State was an abuse of power and for the purpose of deciding what relief might be granted if the appellant's argument on ground one is right, we considered that those issues would be best resolved in a forum that would be able to consider both open and closed evidence. This applies with particular force to the question of relief."

4. The question at issue, of course, is the procedure in SIAC. It is a relevant piece of background to note that, in the decision in the Court of Appeal, there was some criticism of a truncated closed procedure which had been adopted earlier in the course of the rather long life of this case. The court did indicate that, if a closed material procedure is to be adopted, it should be the full procedure.
5. The appellant makes a number of submissions. We will summarise them as follows. Firstly, it is an important benefit to be able to have any appeal conducted in-country and a considerable disbenefit if the individual is removed from the country and must conduct the proceedings from out of country. That gains emphasis where the country abroad is the Sudan, with the practical difficulties attendant on the circumstances in Sudan. Secondly, the key point in relation to ground one, the issue of fairness or abuse of power, can be decided in principle or in relation to the open evidence. Thirdly, the open evidence already before SIAC contains reasonably full material as a basis for that decision. There is particular reliance on the quite extensive evidence from Philip

Larkin, the relevant senior official concerned. Fourthly, Ms Weston emphasises that the open evidence confirms that this was a clearly deliberate decision to reach the decision to deprive and give notice of it only when L1 was outside the country. It was said to be justified by the threat posed by L1 and by the gain to the disruption of terrorist activity by proceeding in that way. Ms Weston says that that deliberate decision is perfectly clear on the open material and its validity can be examined on the open material.

6. She emphasises two important pieces of context. Firstly, what she has termed the "layers of unfairness" in proceeding as the Secretary of State did. Here is a man who, if there is closed material, will not hear it, who is faced with the real difficulties attendant on an appellant proceeding from the necessary constraints built into the SIAC regime. In addition to all of that, as, so to speak, an additional layer of unfairness, she says, being forced to do so from outside the country is an important matter and an important context. Secondly, she emphasises what might be summarised as the procedural limitations given where we are with the judicial review litigation. SIAC has limitations on its powers. The appellant wishes for the issue of abuse of power and/or unfairness to be addressed, firstly, in the existing judicial review proceedings rather than in the SIAC appeal and, because of the limitations which are attendant on the powers of SIAC in an appeal, if it is necessary for there to be injunctions or orders compelling behaviour by the Secretary of State, those powers to make such orders are not available to SIAC in the appeal. Lastly, in making detailed submissions in relation to the Court of Appeal decision we have already quoted, Ms Weston stresses that the court did not order SIAC to have a closed material procedure in this case, a point which must be agreed. She submits that the real interest to the Court of Appeal was not as to the primary issue or principal issue of abuse of power, but in having the capacity to listen to closed material on the question of remedy. The remarks of the Court of Appeal which we have quoted, she says, are to be read in that way.
7. Mr Glasson QC for the Secretary of State immediately contradicts the last submission. He says that the remarks of the Court of Appeal are not to be read in that way. They declined to decide ground one, they declined to receive closed material, they identified the issues (plural) which arise in paragraph 24 and their remarks in relation to the advantage of the availability of closed evidence applied to both issues, even if with "particular force to the question of relief".
8. Mr Glasson goes on to emphasise that a great deal of the evidence has been redacted or is wholly missing from the open evidence before the Commission. Annex C to the submission to the Secretary of State upon which she made the decision is the summary assessment of national security risk. One sentence is in open, the great bulk of it in closed. Annex D, which is the full security assessment of the case, is wholly missing from the open evidence. Mr Glasson says that the Commission needs it all. He makes a further point. In the absence of the closed material, says Mr Glasson, the Commission would have to assume that the national security case was compelling, especially where the good faith of the Secretary of State in taking this decision is not in issue, in the sense that there is no suggestion that the decision was taken for an ulterior motive. It would be very hard, he submits, for the Commission to conclude against the Secretary of State if the Commission had deprived itself of the opportunity to see information upon which she acted. Turning to the Court of Appeal's decision, Mr

Glasson says that that is precisely what they meant and that was the reasoning which informed their remarks.

9. We are in agreement with those submissions from the Secretary of State. This clearly was the meaning of the Court of Appeal. It would be extremely dangerous to proceed other than in a very broad-brush and in-principle fashion, without knowing the information which informed the decision. That must have been what was behind the Court of Appeal's decision to remit the matter to SIAC. We see clear advantages to both sides in the capacity of the Commission to examine the closed material. It is often assumed, when submissions are made that closed material procedures should not be engaged, that closed material only favours the Secretary of State. That is not the experience of those who have conducted closed proceedings.
10. For all those reasons, SIAC will receive closed material in the course of the SIAC appeal.

