

SPECIAL IMMIGRATION APPEALS COMMISSION

TRS/6/2012

Field House
Breams Building
London

Friday, 27th January 2012

BEFORE:

MR JUSTICE MITTING

- - - - -

R1

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - -

Mr N S AHLUWALIA (instructed by Messrs Birnberg Peirce & Partners Solicitors)

MR P GREATOREX (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

MR GOMES (of the Special Advocates' Support Office) appeared on behalf of the Special Advocate.

- - - - -
DIRECTIONS HEARING
(**DECISION**)
(**As Approved**)

- - - - -

Transcribed by Harry Counsell
Court Reporters
Cliffords Inn
Fetter Lane,
London EC4A 3LD
Tel: 020 7269 0370

- - - - -

1 MR JUSTICE MITTING: The appellant applies to have his appeal to the Commission
2 stayed. The background is unusual and needs to be briefly set out.

3 On 31st July 2008 the appellant was removed from the United Kingdom by the
4 Secretary of State in the exercise of her powers under section 10 of the Immigration
5 and Asylum Act 1999. He did not challenge that decision by appealing to the Asylum
6 and Immigration Tribunal or by a judicial review claim. A decision to exclude him
7 on grounds of national security was made on 2nd June 2009 by the Secretary of State
8 in the exercise of prerogative powers. It was not served upon him in Morocco. He
9 arrived back in the United Kingdom on 24th July 2010, whereupon he was served with
10 the decision to exclude him. He was detained. A decision to refuse leave to enter was
11 made and notified to him on 11th February 2011. Although the decision letter is not
12 clear, it was taken because he had applied for leave to enter for a reason that was not
13 covered by the Immigration Rules. He also made a claim for asylum which was
14 refused. It was not refused under Article 1(f) of the Refugee Convention or under
15 Article 33, but, simply, on the basis that he did not have a Refugee Convention
16 ground for seeking the protection of the British state. However, the Secretary of State
17 has throughout acknowledged that someone who is believed to pose a threat to the
18 national security of the United Kingdom by the Moroccan authorities might be at risk
19 of ill treatment of a kind that might cross the Article 3 threshold, if he were to be
20 returned to Morocco. Accordingly, the Secretary of State has stayed her hand on
21 removal and, indeed, has applied, successfully, to have these proceedings dealt with at
22 a leisurely pace.

23 Late last year a Memorandum of Understanding was signed by Morocco and
24 the United Kingdom under which Morocco agreed to give certain assurances for those
25 of its citizens who were returned by the United Kingdom, who were thought, to put it
26 loosely, to have been involved in terrorism.

27 The Secretary of State seeks to take advantage of those assurances in relation to
28 this appellant, but no assurances have yet been given. It is possible that they will not
29 be given. If so, the Secretary of State's public position from which she will, no doubt,
30 find it difficult to resile, if she were to choose to do so in the future, is that without
31 assurances it is not possible to return the appellant to Morocco without putting the
32 United Kingdom in breach or in possible breach of its obligations to him under Article
33 3 of the European Convention on Human Rights.

34 However, the Secretary of State has not asserted in these proceedings that the
35 reason for refusal of leave to enter has anything to do with the national security of the

1 United Kingdom. This is not a case in which leave to enter has been refused under
2 paragraph 320(6) of the Immigration Rules. It is a case in where refusal is based, as I
3 have said, simply on the ground that the application for leave to enter was for a
4 purpose not covered by the Rules.

5 Mr Ahluwalia for the appellant applies for a stay of these proceedings, because,
6 he submits, the basic issue of whether or not the appellant poses a threat to the
7 national security of the United Kingdom should be first determined. That cannot be
8 determined by an appeal to SIAC, because the decision was not connected with an
9 appealable decision. It was simply a decision made under prerogative powers and so
10 the route which SIAC has in the past adopted to deal with combined decisions under
11 prerogative powers and under the Immigration Rules is not available.

12 There is a tactical advantage for an appellant who seeks to challenge a
13 freestanding decision taken under prerogative powers, in that there is no statutory
14 regime which would permit the closed reasons for the decision to be scrutinised by a
15 court. The position until and unless a statutory regime is put in place is, therefore, on
16 any view, going to be unsatisfactory: either the Secretary of State will not be able to
17 deploy her case, or her full case, to justify her decision or the proceedings will be
18 stayed permanently as untriable, following *Canduff and Rock*.

19 On any view, the judicial review challenge which the appellant has made to the
20 exclusion decision carries with it the potential for interesting but protracted and costly
21 litigation. Would it serve any purpose? I, for my part, strongly doubt that it would.
22 As far as this appeal to SIAC is concerned, it does not matter whether the Secretary of
23 State's decision to exclude the appellant for reasons of national security is justified or
24 not, because she does not rely upon national security issues to justify her decision to
25 refuse leave to enter.

26 Mr Ahluwalia argues that, in those circumstances, the appellant does not fall
27 within the scope of the Memorandum of Understanding between Morocco and the
28 United Kingdom. That may be so, but what counts is not whether, as a matter of
29 construction, he falls under it, but whether the Moroccan authorities accept him as
30 being covered by it and whether their assurances contained in the Memorandum are
31 acceptable and sufficient to reduce what would otherwise be an Article 3 risk to nil or
32 to a level below which the United Kingdom would not be in breach of its obligation
33 under that Article to the appellant.

34 Therefore, the outcome of any challenge to the decision taken under prerogative
35 powers is irrelevant to this appeal. Given that it is and given that this is a live appeal

1 | with live issues, I see no good purpose in staying it and I, therefore, reject this
2 | application.

3 | -----

4 |