Appeal no: SC/56/2006
Hearing Date: 17/01/12
Date of Judgment: 17/02/12

SPECIAL IMMIGRATION APPEALS COMMISSION

OPEN JUDGMENT

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
UPPER TRIBUNAL JUDGE GLEESON
MR M G TAYLOR, CBE DL

"SS"

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellants:	Mr A Mackenzie (instructed by TRP Solicitors)
For the Respondent:	Mr T Eicke, QC (instructed by the Treasury Solicitor for the Secretary of State)
Special Advocate:	Ms J Farbey, QC (instructed by the Special Advocates Support Office)

MR JUSTICE MITTING :

1. On 19th December 2011 the Court of Appeal handed down judgment in SS's appeal against SIAC's dismissal of his appeal against the rejection by the Secretary of State of his claim to asylum. All grounds of appeal, bar one, were dismissed. The appeal was allowed on a single ground and remitted to SIAC for redetermination in the light of the judgment of the Court. The single ground was identified in paragraph 16 of the judgment of Carnwath LJ, with whom Rimer and Jackson LJJ agreed under the heading "Procedure": SIAC made findings which were contrary to the Secretary of State's open case. In paragraphs 50 and 51, Carnwath LJ set out the passages in the Secretary of State's two open statements which made it clear that it was the Security Service's assessment that SS had been involved in terrorism related activity while resident in the United Kingdom – i.e. since his arrival in the United Kingdom in 2001. In paragraph 52, he cited SIAC's finding that while in the United Kingdom and almost certainly before his arrival, SS had been a member and supporter of the LIFG. In paragraph 57, he identified the error of law made by SIAC:

> "...I am forced to the conclusion that the panel has overlooked the temporal limits of the open case as advanced by the Secretary of State. This view is supported by their opening comment that he had been given no details "save for the assertion that he was and is a member of the LIFG" (para. 2), without any reference to the 2001 start-date. Similarly, in the remainder of the judgment they drew no clear distinction between the periods before and after 2001. On that basis their reliance in paragraph 18 on activities in the 1990s is understandable."

   In paragraph 58, he observed that SS was "entitled in my view to expect consistency between the closed and open cases".

2. We understand the judgment of the Court of Appeal to be founded on the conclusion that, by overlooking the temporal limits of the open case, SIAC founded its decision that there were serious reasons for considering that SS had been guilty of acts contrary to the principles and purposes of the United Nations, wholly or in part on events occurring before 2001.

3. SIAC did not make that error, as would have been apparent to the Court of Appeal if it had read the closed judgment. In paragraph 26 of SIAC's decision, it made it clear that it had relied determinatively on closed material in reaching the conclusion that SS had been guilty of acts contrary to the principles and purposes of the United Nations. Rule 47 of the Special Immigration Appeals Commission (Procedure) Rules 2003 requires SIAC to record its decision and the reasons for it and to serve on the parties a written determination containing its decision and "if and to the extent that it is possible to do so without disclosing information contrary to the public interest, the reasons for it" (Rule 47(3)). Rule 47(4) provides that where the determination under paragraph (3) does not include the full reasons for the decision "the Commission must serve on the Secretary of State and the Special Advocates a separate determination including those reasons". Rule 48 permits the Secretary of State to apply to the Commission to reconsider its proposed determination if she considers that notification to the appellant of any matter contained in the determination would cause information to be disclosed contrary to the public interest (rule 48(3)). Rule 4(1) requires the

Commission, when exercising its functions to "secure that information is not disclosed contrary to the interests of national security…or in any other circumstances where disclosure is likely to harm the public interest". Thus, when serving on the open parties a written determination containing its decision, SIAC remains bound not to disclose in it anything contrary to those interests. In a case such as this, in which it cannot set out its determinative reasons in the open judgment, the only means by which they can be discerned is to read the closed judgment. The Court of Appeal declined to look at what Carnwath LJ described in paragraphs 18 and 20 of his judgment as "the closed material". We understand that phrase to include the closed judgment. If correct, and if that remains the position, there is an impasse: SIAC cannot explain, and the Court of Appeal cannot understand, the reasons for its decision.

4. In accordance with the direction contained in paragraph 61 of Carnwath LJ's judgment, SIAC has considered what if any further disclosure should be made to the appellant. At a directions hearing on 17th January 2012, Miss Farbey, special advocate for SS, requested two weeks in which to undertake research into closed material with a view to making submissions under rule 38 that further disclosure should be made to him. On 27th January 2012, she notified SIAC that she did not wish to make any further submission under rule 38. We have not ourselves undertaken any investigation into closed material in the exercise of our powers under rule 4(3). Nor would it be sensible or appropriate for us to do so. We accept the implication behind Miss Farbey's notification: that there is no further closed material which can be disclosed to SS without infringing rule 4(1). The appellant has elected not to give or call further evidence. The Secretary of State has not undertaken a further exculpatory review under rule 10A on the basis that, given that this is an historic case in which no further evidence has been adduced and has been remitted to SIAC on a limited basis, it would be disproportionate to do so. We agree. Accordingly, the material upon which we have reconsidered the single aspect of the case remitted to us by the Court of Appeal is identical to that which we had in July 2010.

5. In further written submissions, Mr. Mackenzie submits that Article 47 of the Charter of Fundamental Rights of the European Union requires that further disclosure is made to him of the closed case. We understand him to submit that he must have disclosed to him sufficient information to permit him to give effective instructions to the special advocates about potentially determinative closed material. We decline to do so, for two reasons:

    (i) The issue is not one remitted to us by the Court of Appeal. In the last sentence of his judgment Carnwath LJ required us to consider what, if any, further disclosure should be made to the appellant for "that purpose" – i.e. "re-determination in the light of this judgment". The case has not been remitted to us to re-determine the scope of disclosure on the basis of a discreet legal argument, not advanced in the original appeal to us and already determined by the Court of Appeal in paragraphs 43 to 48 of the judgment of Carnwath LJ.

    (ii) In the circumstances in which the appellant now finds himself, there is no basis for concluding that he requires humanitarian protection under EU law. In the light of changed circumstances in Libya, the Secretary of State

> has properly concluded that the appellant would not be at risk in Libya. He has put in no evidence to challenge that conclusion. On those facts, a claim to humanitarian protection would, if made now, fail irrespective of any ground established by closed material.

6. On the facts, Mr. Mackenzie submits that "it must be an agreed factual premise for this appeal that SS had no affiliation with or involvement in the LIFG prior to arrival in the UK". We disagree. We remain of the view that he was almost certainly a member and supporter of the LIFG before he arrived in the United Kingdom, on the simple common sense ground, that it is very highly unlikely that he would have joined an organisation of declining vigour and effectiveness after his arrival in the United Kingdom.

7. Mr. Mackenzie invites us,

> "Either (i) to confirm in open that SS does not stand accused of actions in support of Abu Laith al-Libi and his faction, and/or more generally in support of pro-AQ members and/or Afghanistan-based members of the LIFG; or (ii) to require the SSHD to clarify what the Court of Appeal evidently felt was an unfairly confusing aspect of the case against him".

We could not do so without infringing rule 4(1) and decline to do so.

8. We reach the same decision – that SS's appeal is dismissed – for the same reasons as those set out in the closed judgment given on 30th July 2010. There is no separate closed judgment on this occasion.