SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/63/2007
Hearing Date: 2 July 2014
Date of Judgment: 8th August 2014

BEFORE:

THE HONOURABLE MR JUSTICE IRWIN
UPPER TRIBUNAL JUDGE PERKINS
MR STEPHEN PARKER

BETWEEN:

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Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

PART JUDGMENT MOVED INTO OPEN

MR T EICKE QC and MR DAVID CRAIG (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

MR A UNDERWOOD QC and MR M GOUDIE (instructed by the Special Advocates' Support Office) appeared as Special Advocates.

1. The facts of this case are familiar. It is not necessary to adduce them in detail in this judgment save as appears below. The CLOSED judgment should be read alongside the OPEN judgment delivered orally on 2 July 2014 and subsequently distributed in writing.

2. It is necessary for us to apply that ruling now to the critical facts of this case. We are indebted to counsel for the Secretary of State and to the Special Advocates for the clarity of their submissions.

3. The test promulgated by the CJEU in this case and approved by the Court of Appeal is that the law of the European Union requires minimum disclosure to this Appellant of "the essence of the grounds" relied on against him. The law thus far has been fully addressed in our OPEN judgment. We regard this formulation as plain English, and we are not assisted in understanding this phrase by other authority.

4. We accept the submissions of all counsel that there is no requirement, where there is established to be a risk to national security, to disclose the evidence or indeed the "essence of the evidence", if such a thing were possible. Mr Underwood QC accepts that. Mr Underwood QC submitted that the Court of Appeal in ZZ(France) v Home Secretary (No 2) [2014] 2 WLR 791, in the following passages, appeared to imply that the level of disclosure or summary contemplated by the House of Lords in SSHD v MB [2008] AC 440 might be appropriate here:

> "36. The SIAC's open judgment states in terms that if the requirements in Secretary of State for the Home Department v MB [2008] AC 440 applied and required the gist of the case against ZZ to be disclosed to the applicant, they had not been fulfilled: see para 7 above. It is not necessary to consider the MB case in any detail or Mr Southey's submission that the requirement to disclose the essence of the grounds involves a higher standard than that laid down in the MB case. It seems to me that the flavour of the point that the SIAC had in mind in referring to the MB case is given by this passage in the judgment of Lord Bingham of Cornhill, at the end of para 34:
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> > "I do not understand any of my noble and learned friends to have concluded that the requirements of procedural fairness

> under domestic law or under the Convention would be met if a person entitled to a fair hearing, in a situation where an adverse decision could have severe consequences, were denied such knowledge, in whatever form, of what was said against him as was necessary to enable him, with or without a special advocate, effectively to challenge or rebut the case against him."
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> 37. In any event, it is clear from what it said about the failure to meet the MB case requirements or to meet a requirement to disclose the gist of the case that in the SIAC's view the essence of the grounds relied on by the Secretary of State had not been disclosed to the applicant. The SIAC was in an unrivalled position to form a view on that matter, being familiar from other contexts with disclosure of the essence or gist of a case and having considered the entirety of the material in the particular case. But we have also been able to form a view of our own. We have read the SIAC's closed judgment as well as its open judgment and we heard short submissions from Mr Goudie as special advocate and from Mr Eicke on behalf of the Secretary of State in closed sessions at the hearing of the appeal. All that has served amply to confirm the SIAC's view that the essence of the case against the applicant was not disclosed to him. It is sufficient to state that conclusion in this open judgment, without the need for any separate closed judgment on the appeal to this court.'

5. We draw no more from that submission than that the "gist of the case" or the "essence of the grounds" may mean the same thing, although "the case" is capable of referring to "the evidence in the case", and to our mind "the grounds' is both more precise and more consistent with the overall approach of the CJEU and the Court of Appeal.

6. Mr Underwood was on stronger ground, in our view, when he likened the requirement here to the indictment in criminal proceedings, as opposed to the evidence. Whilst an indictment has various technical requirements not germane here, it does represent the essence of a criminal prosecution. It is a useful analogy, and we so treat it. It is still not a substitute for application of the phrase itself "the essence of the grounds".

Three Stages

7. There are three stages to our consideration. SIAC has already considered in its previous hearing what can be disclosed to the Appellant which is not "contrary

to the interests of national security". Obviously all such information must always be disclosed. A degree of refinement of that has taken place here by agreement, with the assistance of counsel. There is no need to rehearse the product here.

8. The two important stages thereafter are firstly, to consider what represents "the essence of the grounds" against the Appellant and then to consider whether, and to what extent, revelation would compromise national security. We come to the specifics below. However, part of the consideration of potential damage to national security involves consideration of the policy of HMG and the intelligence agencies that they should "neither confirm nor deny" ["NCND"I key aspects of information concerning security.

9. This policy has attracted a degree of judicial consideration over recent years. Mr Eicke QC produced a number of examples to us. The first to which we turn is the most authoritative United Kingdom authority, the decision of the Divisional Court of the Queen's Bench of Northern Ireland, presided over by Carswell LCJ (as he then was) in Scappaticci, re an application for Judicial Review [2003] NIQB 56. Scappaticci was suspected of being an undercover agent within the IRA working for the security services, with the code name of Stakeknife. His life was in danger because of the suspicion. He sought from the Secretary of State for Northern Ireland a denial that he was an agent. When the Security Minister declined to issue a denial, Scappaticci sought judicial review of that decision on the basis that the refusal was putting his life at risk, and was a breach of the Minister's duty, infringing the Applicant's rights under Article 2 of the ECHR.

10. The Minister did not disagree that Scappaticci [A] s life was in danger. She did assert that a denial from the government would be of little protection to him. However, the main thrust of her argument was that the efficacy and importance of the policy of NCND was such that it justified her position even in the context of an Article 2 claim where the threat to life was accepted as high. It is not

necessary to rehearse here the detail of the case; the reasoning behind the policy and the importance of rigorous adherence to it are set out in the judgment, in large measure in extensive quotations from the affidavit of the Permanent Under-Secretary of State of the Northern Ireland Office. The Court accepted the NIO arguments and dismissed the claim.

11. The ECtHR considered the policy of NCND in Kennedy v United Kingdom [2010] ECHR 26839/02. This case concerned allegations of intercept of communications by the police and security services. Mr Kennedy made subject access requests under the Data Protection Act 1998 and then complaints to the Investigations Powers Tribunal, which were refused. He then complained to the ECtHR of unlawful interference with his Article 8 rights. The response of the UK government was in essence a "plea of NCND", coupled with reliance on the safeguard represented by the Investigations Powers Tribunal ["Il) The Court recognised the importance of the protection of surveillance capacity where strictly necessary to safeguard democratic institutions, provided there were adequate and effective guarantees against abuse. In the course of the critical concluding passages of its judgment, the Court said this:

> "186. At the outset, the Court emphasises that the proceedings related to secret surveillance measures and that there was therefore a need to keep secret sensitive and confidential information. In the Court's view, this consideration justifies restriction in the IPT proceedings. The question is whether the restrictions, taken as a whole. were disproportionate or impaired the very essence of the applicant's right to a fair trial.
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> 187. In respect of the rules limiting disclosure, the Court recalls that the entitlement to disclosure of relevant evidence is not an absolute right. The interests of national security or the need to keep secret methods of investigation of crime must be weighed against the general right to adversarial proceedings (see, mutatis mutandis, Edwards and Lewis v UK [2004] ECHR 39647/98 and 404461/98, para 46). The Court notes that the prohibition on disclosure set out in Rule 6(2) admits of exceptions, set out in Rules 6(3) and (4). Accordingly, the prohibition is not an absolute one. The Court further observes that documents submitted to the IPT in respect of a specific complaint, as well as details of any witnesses who have provided evidence, are likely to be highly

> sensitive, particularly when viewed in light of the Government's "neither confinn nor deny" policy. The Court agrees with the Government that, in the circumstances, it was not possible to disclose redacted documents or to appoint special advocates as these measures would not have achieved the aim of preserving the secrecy of whether any interception had taken place. It is also relevant that where the IPT finds in the applicant's favour, it can exercise its discretion to disclose such documents and information under Rule 6(4) (see para 84 above).
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> 189. Concerning the provision of reasons, the Court emphasises that the extent to which the duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case (see RUIZ Torija v Spain [19941 ECHR 18390/91, para 29). In the context of the IPT's proceedings, the Court considers that the "neither confirm nor deny" policy of the Government could be circumvented if an application to the IPT resulted in a complainant being advised whether interception had taken place. In the circumstances, it is sufficient that an applicant be advised that no determination has been in his favour. The Court further notes in this regard that, in the event that a complaint is successful, the complainant is entitled to have information regarding the findings of fact in his case (see para 87 above).
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> 190. In light of the above considerations, the Court considers that the restrictions on the procedure before the IPT did not violate the applicant's right to a fair trial... "

13. The policy of NCND was also considered in a decision of the Investigation Review Tribunal, Frank-Steiner v The Data Controller of the Secret Intelligence Service IPT/06/81/CH, 26 February 2008. The context of that decision is very different to the present case. However the Tribunal made a careful examination of the statutory and regulatory framework within which the Security Services must operate, and of the police of the NCND policy in that framework. The importance of the case is that the judgment recites senior ministerial endorsements for the policy. It may be helpful to reproduce that of the then

Foreign Secretary Mr Robin Cook, of 12 February 1998:

> "The records of the Secret Intelligence Service are not released: they are retained under Section 3(4) of the Public Records Act

> 1958. Having reviewed the arguments, I recognise that there is an overwhelmingly strong reason for this policy. When individuals or organisations co-operate with the service, they do so because an unshakeable commitment is given never to reveal their identities. This essential trust would be undermined by a perception that undertakings of confidentiality were honoured for only a limited duration. In many cases, the risk of retribution against individuals can extend beyond a single generation."

14. The SSI-ID also relied on a number of other cases, in particular Attorney General v Guardian Newspapers Ltd (No 2) ("Spycaĺcherĺ") [19901 1 AC 109; Gosling v SSHD [2003] UKIT NSA4; Hitchens v SSIID [2003] UKIT NSA5•, In Re IPT/01/62 and IPT/01/77.

15. Mr Eicke relies on that body of caselaw to the Commission in essence to emphasise the critical nature of the policy of NCND to the operational effectiveness of the intelligence agencies and the need to maintain that policy over long periods of time. He also relies on the acceptance of the policy by the Courts and Tribunals concerned, as being both legitimate and vital for the State.

16. We pay due regard to that authority and accept the proposition that NCND is important. Although discretion to depart from the policy was asserted by the Minister in Scappaticci, the importance of not departing from it is emphasised elsewhere in the material.

17. We also bear in mind the recent remarks of Maurice Kay LJ in Mohamed and CF v SSf1D [2014] EWCA Civ 559, an authority we drew to the attention of counsel before us. The case concerned an appeal arising from a claim of abuse of process by the Secretary of State in connection with control orders and then terrorism prevention and investigation measures ["TPIMs"]. At paragraph 20, Maurice Kay LJ said this:

> "Lurking just below the surface of a case such as this is the governmental policy of "neither confirm nor deny" (NCND), to which reference is made. I do not doubt that there are circumstances in which the courts should respect it. However, it is not a legal principle. Indeed, it is a departure from procedural norms relating to pleading and disclosure. It requires justification

> similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so. In the present case I do not consider that the appellants or the public should be denied all knowledge of the extent to which their factual and/or legal case on collusion and mistreatment was accepted or rejected. Such a total denial offends justice and propriety. It is for these fundamental reasons that I consider the appellants' principal ground of appeal is made out. The approach to their abuse of process applications was largely flawed. I make no comment on the merits of those applications."

We keep carefully in mind the strictures of Maurice Kay LJ in the consideration we give to the operation of the NCND policy, when assessing whether and to what extent the revelation of the "essence of the grounds" will be "likely to harm the public interest".

The Essence of the Grounds in This Case

18. We now consider what must be disclosed to comply with the requirements of EU law.