

SPECIAL IMMIGRATION APPEAL COMMISSION

Field House, Breams Buildings
London

BEFORE:
THE HONOURABLE MR JUSTICE MITTING

BETWEEN:

SHOAIB KHAN (TG),
ABDUL WAHAB KHAN (SH),
TARIQ UR REHMAN (RI)

Applicants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

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MR A. O'CONNOR (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State

Ms C MCGAHEY and MR B RAWAT (instructed by the Special Advocates Solicitor Support Office) appeared as Special Advocate.

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OPEN JUDGMENT

MR JUSTICE MITTING: This is the first part of the closed judgment which I intend should in due course be made public.

1. Ms McGahey submits that, as a matter of statutory construction, Rule 4 of our Procedural Rules and, if necessary, Rule 47, permits the Commission to direct that the Foreign Secretary must make no disclosure of the outcome of the two appeals to his counterpart in Pakistan.
2. The part of Rule 4.1 on which Ms McGahey relies is "when exercising its functions, the Commission shall secure that information is not disclosed ... in any other circumstances where disclosure is likely to harm the public interest"; the relevant part of Rule 47 is: "(i) this Rule applies when the Commission determines any proceedings; (ii) the Commission must record its decision and the reasons for it; (iii) the Commission must serve on the parties a written determination containing its decision if and to the extent that it is possible to do so without disclosing information contrary to the public interest the reasons for it".
3. Ms McGahey submits that it is contrary to the public interest that information should be disclosed to the Pakistani authorities where disclosure would put an individual at the risk of ill treatment or torture.
4. To determine whether or not either or both Rules confer that power upon the Commission, it is necessary to examine the enabling power under which the Rules are made. Section 1 of the Special Immigration Appeals Commission Act 1997 establishes the Commission "for the purpose of exercising the jurisdiction conferred by this Act". Sections 2 and 2b set out its jurisdiction.

They do so by identifying the decisions against which an appeal may lie to the Commission and circumstances in which an appeal may only be determined by it.

5. By necessary implication the function of the Commission is to determine appeals thus brought. Section 3 gives the Commission jurisdiction over bail, irrelevant for present purposes. Section 5 sets out, under the heading "Procedure in relation to jurisdiction under sections 2 and 3", the enabling power to make the Rules. Sub-section (i) provides, "The Lord Chancellor may make rules (a) for regulating the exercise of the rights of appeal conferred by sections 2 and 2b above; (b) for prescribing the practice and procedure to be followed on or in connection with appeals under sections 2 and 2b above, including the mode and the burden of proof and admissibility of evidence on such appeals; and (c) for other matters preliminary or incidental to or arising out of any such appeals, including proof of the decisions of the Special Immigration Appeals Commission". Sub-section (vi) contains the specific enabling power under which Rules 4 and 47 are made: "In making rules under this section, the Lord Chancellor shall have regard in particular to ... (b) the need to secure that information is not disclosed contrary to the public interest".
6. The statutory enabling provisions are thus concerned and concerned only with the procedure by which the Commission may determine appeals within its jurisdiction. The Commission is given no power to regulate the conduct of the Secretary of State, save in so far as he may act in connection with an appeal to the Commission.

7. There are sound practical reasons for such a course as well as the answer being, to my mind, obvious as a matter of statutory construction. The sound practical reasons are that the conduct of foreign affairs and communications with foreign governments must all be conducted under the authority of Ministers of the Crown. The responsibility of furthering the foreign policy of the country and of safeguarding its national security rests on Ministers and could not conceivably rest upon this Commission or, for that matter, any other court. Only Ministers and those who report to them can have the whole picture available to them. Only Ministers and those who report to them can make decisions in the sometimes short time frame allowed. Although the possibility is clearly theoretical, the suggestion which, arises from Ms McGahey's proposition that the Commission should first be approached for permission to do anything in relation to communication about the judgment to the Pakistani authorities, is simply impractical.
8. Accordingly, and for those reasons, I reject the proposition that the Commission has jurisdiction under Rules 4 or 47 to forbid any agency of the United Kingdom Government from disclosing to any counterpart agency of a foreign government the outcome of its proceedings or the reasons for the outcome.

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