

Appeal no: SC/67/2008
Hearing Date: 24th March 2009
Date of Judgment: 7th April 2009

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE D ALLEN
MR M L JAMES

EV

APPELLANT

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant: Ms Shaista Kalim
Instructed by Sovereign Chambers

For the Respondent: Mr A Payne
Instructed by the Treasury Solicitor for the Secretary of
State

Special Advocate: Mr A McCullough and Mr S Cragg
Instructed by the Treasury Solicitor Special Advocate
Support Office

MR JUSTICE MITTING :

Background

1. EV is a twenty four year old Pakistani national. His parents are medical practitioners in Swabi district in the Northwest Frontier Province of Pakistan. He has three younger sisters. He was studying a computer science course at Iqra University Islamabad, an institution which collaborates academically with Coventry University. One facet of this collaboration is that students at Iqra University can transfer their studies to Coventry University part way through their degree course. EV took advantage of this opportunity in 2006 and intended to complete his degree in software engineering at Coventry University in the academic years 2006/07 and 2007/08. To that end he applied for and, in August 2006, was granted, a multi-entry student visa for 26 months expiring on 31st October 2008. He arrived in the United Kingdom on 18th September 2006. Tuition fees for the first year were paid by two bank drafts, totalling £7,000. He claims, and we accept, that his parents gave him £5,500 in cash to cover his living expenses. At the end of October 2006, he opened a current account at the High Street Coventry branch of Lloyds TSB. He did not pay the cash given to him by his parents into that account. He claims, and we accept, that he paid £2,600 for his accommodation out of that cash sum. He claims, and we are content to accept, that two further sums were deposited in that account by his father's cousin, Mohammed Javid: £1,000 on 26th October 2006 and £480 on 9th May 2007. His earnings at MacDonalDs restaurant, totalling £227.75, were paid into his account on 19th April, 3rd May, 31st May and 14th June 2007. He claims, and we are content to accept, that Mohammed Javid gave him an additional £100 which was not paid into his bank account.

Accordingly, after paying for his accommodation, he had a total available to him of £4,707.75.

2. At the end of the summer term on 6th June 2007, EV flew home to Pakistan from Manchester airport. He was stopped by police officers at the airport and asked if he had any money upon him. He was polite and co-operative and indicated that there was money in the laptop bag which he had with him. At the bottom was a brown envelope. When asked how much was in it, he said £1,700, which was correct: there was £1,700 in a mixture of notes in the open envelope. According to the police officer's note, he said that the money was the proceeds of his work at MacDonalds in Coventry. EV disputes the accuracy of the note and asserts that he told the police officers that it was money which he had brought from Pakistan plus income from work. We address this issue below. The police officers were not satisfied with his account of the origin of the money and exercised their powers under the Proceeds of Crime Act 2002 to seize it. EV was not arrested, but was allowed to board his plane.
3. By two letters dated 23rd August 2007, which were given to EV at the High Commission in Islamabad on 13th September 2007, he was notified that the Secretary of State had personally directed that he be excluded from the United Kingdom on the grounds that his presence in the UK would not be conducive to the public good for reasons of national security because of his support for international terrorism. His leave to enter the United Kingdom was cancelled. EV was notified of his right of appeal under section 82(1) of the Nationality Immigration and Asylum Act 2002. He exercised that right by appealing to

the Asylum and Immigration Tribunal on 2nd October 2007. By a letter dated 21st May 2008, addressed to EV's solicitors, he was notified that the Secretary of State had personally certified that the decision which was the subject of the appeal was taken wholly or partly on reliance on information which in her opinion should not be made public in the interests of national security. Accordingly, under section 97(3) of the 2002 Act and section 2(1) of the Special Immigration Appeals Commission Act 1997, his right of appeal was to SIAC only. This appeal results from his exercise of that right.

4. By an email dated 14th June 2007, EV complained to Greater Manchester Police about the seizure of the cash, but did not exercise his right to participate in the proceedings brought by a West Midlands police officer to forfeit it. A District Judge sitting at Birmingham Magistrates' Court, made a forfeiture order on 1st November 2007, against which there has been no appeal. (The sum forfeited was £1,710, not £1,700, because it included £10 which EV had in his wallet when stopped).

Law

5. Section 3(A) of the Immigration Act 1971 permits the Secretary of State, by order, to make provision with respect to the giving, refusing or varying of leave to enter the United Kingdom. Article 13(7)(a) of the Immigration (Leave to Enter and Remain) Order 2000 S.I. 2000 no. 1161 provides that,

“Where a person is outside the United Kingdom and has leave which is in force by virtue of this article, that leave may be cancelled;

- (a) in the case of leave to enter, by an immigration officer...”.

Rule 321(A)(4) of the Immigration Rules provides,

“The following grounds for the cancellation of a person’s leave to enter...which is in force...whilst he is outside the United Kingdom apply:

(4) where the Secretary of State has personally directed that the exclusion of that person from the United Kingdom is conducive to the public good...”.

Once the Secretary of State has given that personal direction, the immigration officer has no discretion: he must cancel leave to enter under Article 13(7) of the 2000 Order. The Secretary of State’s power to give that direction is not statutory. It must, therefore, be founded on the exercise of prerogative power. Section 82 of the 2002 Act does not confer a right of appeal against the exercise of that power. The only relevant right is that given by section 82(1) and (2)(e): to appeal against the “immigration decision” to vary EV’s leave to enter because, when the variation takes effect, he has no leave to enter. It is common ground that the only ground of appeal available to EV is that afforded by section 84(1)(e) of the 2002 Act: that the decision is not in accordance with the law. The ground set out in section 84(1)(f) – that the person taking the decision should have exercised her discretion differently – is not applicable because it only applies to a discretion “conferred by immigration rules”. The decision made by the Secretary of State was not so conferred.

6. On a literal reading of the statutory provisions, there is no basis upon which EV can challenge the decision to revoke his leave to enter. It is not disputed that the Secretary of State has personally directed that the exclusion of EV from the United Kingdom is conducive to the public good. The immigration officer who exercised the power given to him under Article 13(7)(a) of the 2000 Order to cancel leave to enter was bound to do so. Accordingly, whether

or not the Secretary of State's direction was justified, the decision to cancel leave to enter was in accordance with the law. Mr Payne, for the Secretary of State, does not support that proposition. He acknowledges that, if it were right, there would be no purpose in granting a right of appeal to SIAC or deploying, as the Secretary of State has done, evidence and information to justify the decision. He accepts that it is open to challenge on the merits. He submits that an approach very similar to that adopted in appeals against a notice of intention to deport on conducive grounds should apply to this appeal: SIAC should, to the extent possible, find the facts – as to past events, on balance of probabilities – and, giving due deference to the view of the Secretary of State that it is conducive to the public good to exclude EV from the United Kingdom, review her decision in the light of the facts which it finds. This submission accords with SIAC's practice in determining appeals in both deportation and refusal of leave to enter cases and with the guidance given by the Court of Appeal to the AIT when determining an appeal against a notice of intention to deport on conducive grounds: see, most recently, *OP (Jamaica) v Secretary of State for the Home Department* [2008] EWCA (Civ) 440. Mr McCullough, special advocate, and Miss Kalim, for EV do not disagree with this approach. We are content to adopt it.

7. No civil or Convention right of EV is in issue in this appeal. Accordingly, it is to be determined only in accordance with SIAC's procedural rules.

Facts

8. The Secretary of State's case against EV is that the money seized from him was not his money but was carried by him in the full knowledge that it was

intended for extremists in Pakistan or elsewhere. The information upon which that proposition is based is principally contained in the closed material which we have considered. The Secretary of State's open case consists primarily of a refutation of EV's claim that the money was his. His account of it has varied, but we are content to analyse his current case to see whether or not it could be true. We accept Miss Kalim's point that EV cannot reasonably be criticised for errors in the reconstruction of his finances between September 2006 and June 2007.

9. EV's current account as explained and advanced by Miss Kalim at the hearing, is that he had £1,790 on him when he was stopped at Manchester airport, made up as to £950 saved from the cash given to him by his parents, plus the £100 cash from Mohammed Javid and £840 saved by him out of cashpoint withdrawals from his bank account. The first part of the explanation cannot be true and the second part is wholly implausible.

10. After deducting the cost of his accommodation, he had £3,000 in cash left. He made the following cash payments: £700 into his account on 24th January 2007, £900 into his account on 21st February 2007, £450 for his airline ticket and £468.83 for the purchase of a laptop computer on 25th September 2006. These payments totalled £2,518.83. In addition, EV claims that two transfers into his bank account - £500 on 13th November 2006 by S Naqvi and £150 on 6th February 2007 by S Quresh – were repayments of loans made by him out of his cash. Accordingly, a further £650 must be deducted. Total deductions, therefore, amount to £3,168.83 – more than the cash sum he started with. This is clearly impossible. The explanation is that he has wrongly claimed to have

paid his airfare out of cash. A debit entry on 11th May 2007 for £256.66 must be the price of his air ticket: it was payable, in Pakistani currency, to Air Blue (PVT) Ltd, a name which suggests an airline or travel agency. Deducting £450 from his cash expenditure leaves total cash payments of £2,718.83. That would have left him with £281.17 – well below the £950 claimed. It is, in fact, very unlikely that he had even that sum left. He arrived in the United Kingdom on 18th September 2006, but did not open his bank account until 27th October 2006. He must have had living expenses between those dates, which he met out of cash. His bank account shows that in the month of November he drew or spent £253.93. Expenditure of that order in the first five weeks would account for the balance. This reconciliation of his available cash and expenditure shows that he cannot have had £950 cash remaining out of the sum given to him by his parents, plus £100.

11. After discounting failed withdrawals, the bank statements record a total of £1,345 of cashpoint withdrawals between the end of October 2006 and 5th June 2007. There are 115 effective withdrawals, all for small sums, typically £5, £10 or £20. EV has never explained why he would make multiple small withdrawals of cash from his bank account and save about sixty percent of the sum withdrawn while he had (on his account) £950 in cash on him. His only explanation (in paragraph 14 of his witness statement dated 20th October 2008) is that he did not like using the ATM machine near his hostel – a fact belied by his repeated use of it and other cashpoint machines. The picture shown by the bank statement is typical of that of a student making frequent small withdrawals for day to day use. We do not accept his claim that he withdrew money to save.

12. That analysis of his finances by itself would cause us to reject his account of the source of the seized cash as false. That conclusion supports the finding which we have made, on the basis of closed material, about the true source of the money. We are also satisfied that EV did tell the police officers at Manchester airport that the seized cash was derived from his MacDonalds earnings. Those conclusions do not, by themselves prove that the money was intended for extremists in Pakistan or elsewhere or that EV knew that it was. Our reasons for reaching that conclusion, which we do at least on balance of probabilities, are set out in the closed judgment.
13. We acknowledge that our conclusions will be incomprehensible to EV's parents, who have each written letters dated 12th October 2008 in support of his appeal. We accept, without reservation, that they are respectable professional people of moderate views who have no reason to believe that their son has undertaken the activity which we are satisfied that he has.

Conclusion

14. For the reasons which are more fully set out in the closed judgment, we are satisfied that it is conducive to the public good for reasons of national security that EV should be excluded from the United Kingdom. We dismiss this appeal.