

Appeal No's: SC/77/81/82/79/80/2009
Hearing Date: 27th, 28th & 29th July 2009
Date of Judgment: 14th August 2009

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE G WARR
MR J DALY

'XC', SHOAB KHAN, ABDUL WAHAB KHAN, 'VE' AND 'UF'

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

MR R HERMER QC (instructed by Birnberg Peirce Solicitors) appeared on behalf of 'XC'

MR S KADRI (instructed by Amjad Malik Solicitors) appeared on behalf of A W Khan

MR A MALIK (of Amjad Malik Solicitors) appeared on behalf of S Khan

MR S JACKSON (instructed by Khan Solicitors) appeared on behalf of 'VE' and 'UF'

MR R TAM QC, MR A O'CONNOR and MR GREY (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State

MR C CORY-WRIGHT QC and MR K BEAL (instructed by the Special Advocates' Support Office) appeared as Special Advocates for 'XC'

MS C McGAHEY (instructed by the Special Advocates' Support Office) appeared as Special Advocate for S Khan and A W Khan

MR A McCULLOUGH and (instructed by the Special Advocates' Support Office) appeared as Special Advocates for 'VE' and 'UF'

OPEN JUDGMENT

MR JUSTICE MITTING :

1. All five appellants are citizens of Pakistan. They were arrested, together with seven others, on 8th April 2009 in Manchester or Liverpool on suspicion of having committed an offence under the Terrorism Act 2006. All were released without charge on 21st April 2009. Each was served with a notice of intention to deport on conducive grounds founded on national security. Each has exercised his right of appeal to SIAC. All five are detained under immigration powers and have applied to SIAC for bail. After hearing open submissions by Mr Tam QC for the Secretary of State, Counsel for four appellants and Mr Malik, solicitor advocate for one, and closed submissions by Mr Tam QC and special advocates, we announced on 29th July 2009 that the applications for bail were refused. These are the open reasons for that decision.

2. We have applied the same tests for the grant or withholding of bail as those applied in our earlier decision on bail in the case of three of the appellants on 21st May 2009. They are those explained in U, Y, Z, BB and VV v Secretary of State for the Home Department as qualified in pre-hearing applications in LO v Secretary of State for the Home Department. We have taken into account significant closed material in the case of each appellant which has not been gisted to them in reaching our decision. For the reasons explained in paragraph 3 of our judgment of 21st May 2009, we continue to apply to the assessment of the security advisers to the Secretary of State the tests set out

there: unless that assessment is clearly wrong we must, for present purposes, accept it. We have, however, now had the opportunity to scrutinize the foundation for the assessment, with the assistance of open and closed advocates, on the basis of more extensive material than that considered at the earlier hearing. We have also considered the factors relevant to each individual appellant, which are not identical.

3. Since 21st May 2009, the following has occurred:

- i) the Secretary of State has served his open and closed national security statement in the case of each appellant
- ii) a series of seven emails exchanged between an email address attributed to XC, humaonion@yahoo.com and an email address attributed to an Al Qaeda associate identified as Sohaib, sana_pakhtana@yahoo.com have been set out verbatim. They appear to refer to XC's interest in named girls and to a nikah (wedding) after 15th and before 20th April 2009 with one of them, Nadia. The assessment of the Security Service is that references to named girls could be to ingredients from which an explosive device could be made and that the reference to the nikah is "most likely" a reference to an intended attack
- iii) notices of intention to deport against two of those arrested on 8th April 2009, WD and MN, have been withdrawn.

4. The emails are central to the open case against the appellants. Mr Tam QC concedes that if the assessment placed upon them by the Security Service is plainly wrong, bail could not be withheld from any appellant. (He did raise as

a separate ground, the risk of absconding, but that risk would be negligible if the assessment is wrong: no appellant would have an incentive to abscond if there was no basis upon which he could be considered to pose a threat to national security.) The first, and ultimately determinative issue is, therefore: is the assessment of the Security Service plainly wrong?

5. Mr Hermer QC for XC submits that it is – that the assessment is far fetched and that when the emails are examined in the context of all others stored on the hard drive of XC’s computer, they will be shown to be no more than innocent social discussions. The Secretary of State has agreed to provide an image of the hard drive to XC’s advisers for examination, but that task has not yet been performed. In a belated, as yet unsigned, statement dated 29th July 2009, XC makes the same claim and suggests that the emails refer to girls, though not by their own names, and that he hoped to marry in April 2009. He does, however, acknowledge that a detailed account of what he describes as a sensitive situation involving another young person is required. Final interpretation of the emails must await the hearing of the appeals. On the information, open and closed, which we have now, we are not satisfied that the assessment by the Security Service of their likely meaning is clearly wrong.

6. All appellants point to the undisputed fact that no explosive materials have been recovered and that there is nothing physically to link any of those arrested with explosives. Self evidently, this is at least a significant gap in the Secretary of State’s case. Ultimately, it may prove to be more than that. On any view, it assists the appellants in their denial of participation in attack planning. But at present it does no more than that. It does not so undermine

the Security Service's interpretation of the emails as to demonstrate that it is clearly wrong.

7. The open statements assert that the other four appellants attended one or both of two meetings, held on 23rd March and 1st April 2009, with XC, at which, in the assessment of the Security Service, was discussed the "nikah" to which reference was made by XC in his outgoing email to Sohaib at sana_pakhtana@yahoo.com on 3rd April 2008. We are not satisfied that this assessment is clearly wrong.
8. All open advocates refer to the withdrawal of the notices of intention to deport against WD and MN and ask rhetorically: what is the difference between them and the remaining appellants? Mr Tam QC gave a general explanation of the reason for that decision in the open session and a more detailed explanation in the closed session. We are satisfied by his explanations that there are significant differences between the cases of WD and MN and the remaining appellants and that the withdrawal of the notices of intention to deport against them does not undermine the case against the other appellants.
9. The Secretary of State's case on the issue of safety on return is far from complete. All that we can say, for present purposes, is that it is not clear that the Secretary of State will not be able to demonstrate that it is safe to return the appellants to Pakistan.
10. We have no reason to doubt that, as is submitted on behalf of all appellants, each comes from a respectable family and is of good character (in the sense that none has been convicted of any criminal offence in any country). Each was undertaking a course at a bona fide educational institution for which they

or their families have paid which has been disrupted by their detention. Additionally, in the case of Shoaib Khan, we have no reason to doubt Mr Malik's submission that he and his family come from an area of Pakistan not directly affected by current disturbances. But for the seriousness of the allegations against the appellants, their claim to bail would be compelling. It is the nature and seriousness of the threat which, in the assessment of the Security Service, they posed and pose to national security, which requires us to refuse bail.