

Appeal No: SC/09/2005
Hearing Date: 19 July 2016
Date of Judgment: 12th December 2016

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE FLAUX

BETWEEN:

B

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant:	Ms Stephanie Harrison QC and Mr Anthony Vaughan
Instructed by:	Birnberg Peirce & Partners
For the Respondent:	Mr Robin Tam QC
Instructed by:	Government Legal Department

FURTHER JUDGMENT

JUDGMENT

The Honourable Mr Justice Flaux:

1. At [66] of the judgment of 15 September 2016 dismissing the application of the Secretary of State to strike out the appeal, under the heading: “The outcome of the appeal”, the Commission said:

“Ms Harrison QC urged the Commission, if it did not strike out the appeal, to proceed to determine it in the appellant’s favour on the basis that his case was indistinguishable from that of the other Algerians to whom the principles established in *W and others* would apply. I see considerable force in that submission. However, in fairness, it seems to me that the Secretary of State should be afforded an opportunity to put forward any further submissions as to why the Commission should not apply *W and others* and allow the appeal. I will allow the Secretary of State 14 days from the date of hand down of the judgment in which to put forward any submissions in writing or to indicate that, in the light of this judgment, it is accepted that the appeal succeeds. If submissions are put forward, the appellant’s representatives are to have 14 days thereafter to put in any submissions in response. In that event, I will either convene a further hearing to determine the appeal or, if the parties agree, determine the appeal on paper.”

2. Following the hearing, Mr Tam QC did produce written submissions dated 29 September 2016 on behalf of the Secretary of State. In those submissions at [6], Mr Tam QC accepted that it was not reasonable for the Secretary of State to seek to go behind the views expressed by the Commission (i) in the judgment of 13 February 2014 that B is “*very likely to be an Algerian national*” and (ii) in the ruling at the bail variation hearing on 14 June 2016 that, on the balance of probabilities, B is Algerian. Mr Tam QC submitted that, nevertheless, at none of the hearings had there been a full examination of all the evidence bearing on B’s actual nationality, whilst accepting that, given the context of those hearings, it would not have been reasonable or proportionate for the Secretary of State to ask the Commission to conduct a full-blown examination of all that evidence at any of those hearings.
3. At [7] of his submissions, Mr Tam QC set out in detail a number of matters which he submitted would form part of any full examination of the question of B’s actual nationality. These were in large measure the various false statements made by the appellant historically to which the

Commission has referred in previous judgments and some of which was summarised in [6] of the judgment of 15 September 2016, namely that he is of French nationality and even, on one occasion, that he was a Bosnian national, together with his possession in November 1994 and May 1998 of a French identity card to which he was not entitled and in November 1994 to an Algerian passport in the name “MB”, to which it was subsequently ascertained he was not entitled (see [10] of the judgment of 15 September 2016).

4. At [8] Mr Tam QC submitted that, in the light of those matters B’s assertion that he is Algerian, whilst refusing to disclose his true identity, should not be accepted at face value. Accordingly, it was submitted that B still cannot be taken to be an Algerian.
5. Nevertheless, the written submissions go on to confirm at [11] to [16] that, irrespective of the issue of B’s true nationality, the Secretary of State no longer opposes the appeal in the light of the judgment of 15 September 2016 refusing to strike out the appeal:

“11. Nevertheless, the Secretary of State has reviewed her entire position in relation to B’s appeal in the light of SIAC’s decision and its direction that she should, in effect, do so.

12. The Secretary of State accepts that B is a person who has been established to have been involved in the terrorism-related activities which are the basis for the Secretary of State’s decision to deport him, and that he either is Algerian or is not Algerian.

13. In those circumstances, if SIAC were to conclude after that full examination of the evidence that B is Algerian, the Secretary of State recognises that she would be unlikely to persuade SIAC to distinguish his case from those in *W and others*.

14. Alternatively, if SIAC were to conclude after that full examination of the evidence that B is not Algerian, as things currently stand there is no destination to which B can be deported and it will not necessarily be the case either that SIAC will be able to make a finding about B’s nationality, or that any such nationality will be one which does not present any difficulty for deportation (such as, for example, if B is in fact a French national). In those circumstances, the Secretary of State accepts that it would not be appropriate for her to pursue the deportation action that is currently underway.

15. For those reasons, in all these circumstances (including the fact that SIAC has dismissed the Secretary of State’s strike-out application for the reasons given by SIAC on 15 September 2016) the Secretary of State would now no longer oppose a decision of SIAC allowing B’s appeal against the Secretary of

State's decision to deport, even though she does not agree that B's analysis is correct or appropriate.

16. In these circumstances, when SIAC has made that decision (which will constitute a final determination of B's appeal for the purposes of section 7 of the Special Immigration Appeals Commission Act 1997) the Secretary of State will then give consideration to what further steps she will take in relation to B's case."

6. In her written submissions in reply on behalf of the appellant dated 10 October 2016, Ms Harrison QC notes that the Secretary of State no longer opposes the appeal in the light of the judgment of 15 September 2016 on the basis that, whilst the Secretary of State still does not accept that B is an Algerian, she accepts that the full examination of all the evidence to which Mr Tam QC's submissions referred would not have been reasonable or proportionate prior to the 15 September 2016 judgment and is not inviting the Commission to embark on such an examination now. Ms Harrison QC also notes that the Secretary of State accepts that, even if the appellant is not Algerian or his nationality cannot be ascertained, he is not removable in any event and the appeal must be allowed.
7. Ms Harrison QC submitted that, given the acceptance by the Secretary of State that the appeal must be allowed, it is not strictly necessary to deal with what she describes as "a number of contentious points" arising from the written submissions of Mr Tam QC of 29 September 2016. Nevertheless Ms Harrison QC does deal with the points raised. First she submitted that the various evidential points raised by the Secretary of State in [7] of those submissions are entirely irrelevant to the issue in the appeal which is whether the appellant is at real risk of harm within the meaning of Article 3 of the ECHR if deported to Algeria, which did not require a finding that he was in fact an Algerian national, since the destination in the deportation notice was, and always had been, Algeria. That seems to me to be a perfectly valid point and, in any event, given the acceptance by the Secretary of State that whatever his nationality, there is no destination to which the appellant can be deported, the appeal must be allowed.
8. Second, Ms Harrison QC took issue with Mr Tam QC's assertion that: "*at none of the hearings to date in B's case has there been a full examination of all of the evidence bearing on B's actual nationality...*" She pointed out that until the judgment of the Commission in *W and others v SSHD* [2016] UKSIAC SC/39/2015 on 18 April 2016, the case of the Secretary of State had always been that B is an Algerian national.
9. I accept that submission. The consistent position of the Secretary of State that the appellant is an Algerian national is reflected in and confirmed by the various judgments and rulings of the Commission. Thus, in 2003 the Commission found that B had been an active member of two Algerian terrorist organisations (the GSPC and the GIA) and had not denied associations with two Algerian terrorism suspects (known as U and Z, two

of the successful appellants in the *W & Others* case), concluding: “*B is a citizen of Algeria*”.

10. In its judgment of 30 July 2008 on the issue posed by the appellant to national security (referred to in [11] of the judgment of 15 September 2016), the Commission found that B was an Algerian national engaged in activities linked to Algerian terrorist groups, concluding at [1]: “*The Appellant is an Algerian national*” and at [27]: “*The Commission regard it as significant that, whilst labouring under mental health difficulties, the appellant played a leading role in facilitating communications equipment for Algerian terrorists...*”
11. The contempt proceedings were all based upon B’s refusal to comply with orders to disclose his identity so that his Algerian nationality could be confirmed and assurances given, enabling him to be deported (see [12] to [14] of the judgment of 15 September 2016).
12. As set out in [18] of the judgment of 15 September 2016, at a hearing on 28 and 29 January 2014, the Commission considered issues as to the prospects of the appellant’s removal to Algeria and whether the bail conditions imposed upon him constituted a deprivation of his liberty. As Ms Harrison QC correctly submits the issue as to whether the appellant was an Algerian was directly in play. The Commission had before it detailed evidence on the issue, including a language analysis report commissioned by the Respondent indicating to a “high” degree of certainty that B is a Berber from Algiers. As Mr Tam QC accepted, in its judgment of 13 February 2014, the Commission concluded at [2] that B is: “*very likely to be an Algerian national*”.
13. As recorded in [20] of the judgment of 15 September 2016:

“the basis upon which the Commission struck out the appeal in July 2014 was that the appellant’s deliberate refusal to identify himself, in contempt of court, meant that he would have been able to manipulate the result of his appeal in his own favour. This was because, in the absence of evidence as to his identity, the Algerian government would not recognise him as Algerian and thus would not give the assurances in relation to this appellant which they had given in relation to others concerning safety on return.”
14. I agree with Ms Harrison QC that the finding made by the Commission at the bail variation hearing on 14 June 2016 that, on a balance of probabilities B is Algerian, was necessary to determine the issue then raised, which was the likelihood of B absconding in circumstances where in the light of the judgment in *W and others* he was highly likely to win his appeal.
15. The Commission confirmed those findings made in February 2014 and June 2016 at [5] of the judgment of 15 September 2016. It was on that basis that the Commission concluded at [62] to [64] of the judgment that

it would be disproportionate to strike out the appeal. At [62] the Commission held:

“In the circumstances, if I considered that the appellant’s continuing and deliberate refusal to disclose his identity was still operating to any extent in determining the outcome of this appeal, I would have no hesitation in striking out the appeal, particularly in circumstances where, as I have found, there is no evidence of a fear of reprisals against his family, which might have gone some way towards justifying the appellant’s position. However, it seems to me that his refusal to disclose his identity will no longer have any effect on the outcome of the appeal. Irrespective of that refusal, he is clearly an Algerian and, as such, cannot be returned to Algeria for exactly the same generic reasons as the appellants in *W and others* (and the other Algerian appellants in relation to whom the secretary of state has accepted that those reasons would apply).”

16. In the circumstances, I agree with Ms Harrison QC that the Secretary of State has had every opportunity in this lengthy process to advance a case that the appellant is not in fact an Algerian, but far from doing so, has positively asserted the contrary, that he is Algerian, from 2003 up until the judgment in *W and others* in April 2016. Since then the Secretary of State has not advanced any positive case to the effect that he is not Algerian. The reason for that is not difficult to discern. There is no evidential basis for the conclusion that the appellant is anything other than Algerian.
17. Furthermore, the matters raised by Mr Tam QC in [7] of his written submissions are all matters that have been before the Commission on the previous occasions when this appellant’s case has been considered. They have never been considered sufficient to displace the conclusion that the appellant is very likely to be or on a balance of probabilities is an Algerian national, nor has the Secretary of State ever sought to argue on the basis of those matters that he was not.
18. In my judgment, there is nothing in any of the matters raised by Mr Tam QC in his written submissions which could shake the firm conclusion reached in the judgment of 15 September 2016 that the appellant is an Algerian national and nothing which requires further investigation. Indeed, it is striking that the Secretary of State does not in fact invite the Commission to conduct that further investigation. In all the circumstances, given the conclusion already reached by the Commission that the appellant is Algerian and on the basis that his case is indistinguishable from that of the appellants in *W and others*, the appeal is allowed.
19. Quite apart from the fact that the Secretary of State is not inviting the Commission to conduct some further investigation, to do so would be a futile exercise in the present context, not just because the overwhelming likelihood is that the Commission would still reach the conclusion that the appellant is Algerian, but because, even if the Commission concluded that

the appellant was not Algerian, as the Secretary of State accepts in [14] and [15] of Mr Tam QC's written submissions quoted at [5] above, as matters currently stand, there is no destination to which the appellant could be deported, so that, in any event, the appeal would have to be allowed.

20. In the circumstances and on the basis of the conclusion already reached by the Commission that the appellant is Algerian and therefore cannot be returned to Algeria for exactly the same generic reasons as the appellants in *W and others*, the appeal is allowed.