

Appeal Number: SC/18/2002

Date of Judgment: 18th February 2005

IN THE SPECIAL IMMIGRATION APPEALS COMMISSION

Before :

THE HONOURABLE MR JUSTICE NEWMAN

mr P MOULDEN

mr J MITCHELL

Between :

"N"

Appellant

- and -

Secretary of State for the Home Department

Respondent

For the Appellant **Mr C Yeo**

For the Respondent **Mr T Eicke**

Special Advocate **Mr I Macdonald QC**

Mr K Beal

OPEN JUDGMENT ON THE APPEAL

MR JUSTICE NEWMAN :

1. this is an out of country appeal by the appellant against the Secretary of State's refusal to revoke a deportation order. On 9th February 1996 the Secretary of State decided that:

"For reasons of national security, namely activities connected with the proliferation of weapons of mass destruction, your continued presence in the United Kingdom would not be conducive to the public good."

2. In making this decision, the Secretary of State stated he had:

" very carefully considered all the circumstances of [his case] as available to him in relation to paragraph 364 of the Immigration Rules. These include your domestic circumstances, your ties to the United Kingdom, and the length of time you have lived in this country"

and concluded that the interests of national security outweighed the personal considerations touching the appellant.

3. The Secretary of State 's open case against the appellant was first set out in the Home Office Statement attached to the letter of the 9th February 1996. This was:

(a)The appellant was a covert representative of the Khan Research Laboratories (KRL) which is involved in research, development and covert procurement of sensitive equipment which can have nuclear weapons applications;

(b)Since 1991 the appellant had been conducting covert nuclear procurement activities in Britain on behalf of KRL, including one seeking to procure equipment for KRL from UK companies;

(c)Administering KRL's sponsored students in the United Kingdom;

(d)Arranging and overseeing KRL's letters of credit in the United Kingdom;

(e)Acquiring scientific literature for KRL;

(f)Organising the visits of KRL's staff to the United Kingdom; and

(g) Acting as KRL's agent with the UK Patent Office.

4. The Secretary of State concluded that these activities were in clear contravention of HMG's non-proliferation policy and international treaty commitments and the Secretary of State concluded that it was appropriate to make the deportation order against the appellant.
5. In response to the decision to make the deportation order, the appellant appealed against that decision to the "Three Advisors". His grounds of appeal denied that:
 - (a) he was a representative of KRL (covert or overt);
 - (b) he was conducting covert nuclear procurement activities in the United Kingdom;
 - (c) he, at any time, sought to procure equipment for KRL from UK companies;
 - (d) he administered KRL's sponsored students as alleged or at all;
 - (e) he acquired scientific literature or arranged visits of KRL's staff.
6. He asserted that, in the circumstances, it was unlikely that a person recruited locally and performing a relatively humble position at a low salary with the Pakistan High Commission would be engaged in the sort of activities alleged by the Secretary of State. The appellant believed that he must be the subject of mistaken identity and that he had been deported for something he had not done.
7. On 4th April 1996 the Three Advisors, presided over by Lord Lloyd of Berwick, having heard the appellant's evidence and having reviewed the evidence (both open and closed) in support of the Secretary of State's decision, upheld the Secretary of State's decision as being justified on all the evidence.
8. By a decision of 23rd July 1996, the appellant's application for permission to apply for judicial review of the Secretary of State's deportation order was dismissed by Kay J. An application to the European Commission of Human Rights, invoking Article 6 of the ECHR, was declared inadmissible *ratione materiae* by a decision of 4th March 1998. The deportation order became effective and binding. The appellant left the country pursuant to it on 30th July 1996.
9. **The application to revoke the deportation order and this appeal**

The law

10. The rules applicable to the revocation of a deportation order are laid down in sections 390 to 392 of the Immigration Rules:

"390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

- (i) the grounds on which the order was made;
- (ii) any representations made in support of revocation;
- (iii) the interests of the community, including the maintenance of an effective immigration control;
- (v) the interests of the applicant, including any compassionate circumstances.

391. In the case of an applicant with a serious criminal record continued exclusion for a long term of years will normally be the proper course. In other cases revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the court which made the recommendation or the appellate authorities of the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order. However, save in the most exceptional circumstances, the Secretary of State will not revoke the order unless the person has been absent from the United Kingdom for a period of at least 3 years since it was made.

392. Revocation of a deportation order does not entitle the person concerned to re-enter the United Kingdom; it renders him eligible to apply for admission under the Immigration Rules.

11. It has not been in issue that the test to be applied on this appeal is whether, on the facts, the appellant can show that "the situation has been materially altered, either by a change of circumstance since the order was made, or by fresh information coming to light which was not before the Secretary of State". There has been a measure of difference between the parties as to the approach the Commission should take to the facts underlying the original deportation order as established by the Secretary of State and upheld by the Three Advisors. The appellant has attempted to challenge the validity and truth of the facts underlying the deportation order. In addition, because of "the passage" of two years between the date of the refusal to revoke and the hearing of the appeal, an issue has arisen as to the approach which should be adopted to the period and to facts which have occurred since the refusal to revoke.

12. **The Commission's approach to facts since November 2002**

13. The appellant's appeal depends, to a large degree, upon "the passage of time since he was deported in itself amounting to such a change of circumstances as to warrant revocation of the order". Since two years have passed since 5th November 2002 to the present date, at the invitation of the Commission, submissions have been made as to: (a) the relevance of the two years which have passed and (b) the relevance of facts occurring since November 2002.

14. The present appeal is governed by the provisions of the **Special Immigration Appeals Commission Act 1997** (the 1997 Act), unaffected by the amendments made to that Act and the **Immigration and Asylum Act 1999** (the 1999 Act) by the **Nationality, Immigration and Asylum Act 2002** (the 2002 Act). The appellant has no appeal rights under the 1999 Act. The governing section is, therefore, section 2 of the 1997 Act which sets out the jurisdiction of the Commission to hear appeals in the following terms:

"1. A person may appeal to the Special Immigration Appeals Commission against a decision which he would be entitled to appeal against under Part IV of the Immigration and Asylum Act 1999 (the 1999 Act) but for a public interest provision.

(a).....

(b) 'public interest provision' means any of the sections 64(1) or (2) of the 1999 Act".

15. Thus it is the exclusion of the appellant's right of appeal under section 64(2)(b) of the 1999 Act which automatically triggers his right of appeal to this Commission.

16. Under section 4(a) of the 1997 Act, the Commission, "on an appeal to it under this Act:

"(a) shall allow the appeal if it considers

(i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or

(ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently, and

(b) in any other case, shall dismiss the appeal."

17. Both sides have referred to paragraph 18.149 of Macdonald's Immigration Law and Practice (5th Edition, 2001) where the position on appeals in deportation cases is stated to be:

"So, in deportation cases, the relevant circumstances that an adjudicator can take into account are those in existence at the date of the decision and events that have happened subsequently (such as a fresh marriage) are not admissible, although new evidence of pre-existing facts is admissible".

18. The learned editors, however, qualify the position by the following:

"However, a number of decisions under the rules involve prediction: whether a business will succeed, whether a couple will live together as man and wife, whether the parties will have accommodation available, whether a student will be able to pursue a course with reasonable success. In these cases, post decision facts that throw light on the decision will be admissible."

The Special Advocates have drawn particular attention to this passage.

19. It seems to us to be unnecessary to examine the extent of the refinements which the cases listed in the footnote to this passage support. The footnote adds:

"The admission of post decision evidence in these cases is, however, strictly limited to that purpose and still looks back to the date of decision."

20. If this case was to be treated as a prediction case, events subsequent to it which proved the prediction wrong would not be admissible to establish the decision was wrong. Subsequent facts which prove the prediction to be correct would also be inadmissible. According to the weight which may have been attached to a prediction, the subsequent events could form the basis for a fresh application to the Secretary of State. The Commission's jurisdiction under section 4(a)(i) of the 1997 Act to consider whether the decision or action was in accordance with law or immigration rules can only take place by reference to the law as it was at the date of the decision, applied to the facts as they were at that date. The appellate review of the Secretary of State's exercise of discretion (section 4(a)(ii)) must take place by reference to the facts as they were at the date when the decision was exercised.

21. The Secretary of State refused to revoke the deportation order in November 2002 because he was satisfied that there had been no material change of circumstances which demonstrated that the appellant had ceased to present a threat to national security. Given that his conclusion was that the appellant posed a continuing threat, it obviously involved an assessment of how, if the

appellant re-entered, he could threaten national security. In one sense therefore the overall decision involved an assessment of future risk, but the core of the decision turned upon the attributes and disposition of the appellant and his purpose in seeking to re-enter. Save in the limited sense we have indicated, this is not a prediction case. In any event, no facts have been relied upon to illuminate the decision to refuse to revoke the order.

22. We have concluded that the jurisdiction of the Commission is limited to an examination of the facts as they were at the date of the decision. The Immigration Rules, and in particular the need for regard to be paid to the passage of time, cannot be taken as extending the statutory jurisdiction of the Commission.
23. Our primary concern in raising the question with counsel had been to consider whether the mere passage of two calendar years since the decision, rather than facts or events, could be considered as included in the "passage of time" to which the immigration rule refers. We have concluded that the period since the decision to the date of the appeal cannot be taken into account. However, even if it was open to us to include the two years, their inclusion would make no difference to the result, because the appeal turns upon other considerations which we must now consider.
24. **The appellant's case**
25. Mr Colin Yeo of the Immigration Advisory Service, who appeared for the appellant submitted, as follows:

(1) That when considering the concept of the passage of time envisaged by HC 391, some assistance can be gained from the guidance contained in the Immigration Directorate Instructions ("the Instructions") which suggest that three years is the normal period for which a deportation order will be maintained. Further assistance can be derived from the indication that in cases in which a "serious offence has been committed" the deportation order will be maintained for ten or more years. The Instructions suggest that the serious offences under contemplation include those which involve serious violence, drugs or sexual offences.

(2) That the Commission's approach should be guided by the House of Lords decision in **Rehman** [2003] 1 AC 153 where their Lordships stated that SIAC's jurisdiction enabled a full review of the evidence and the law and a review of the question whether the discretion should have been exercised differently. Their Lordships stated that the Commission should give "commonsense" deference to the Secretary of State's view of what constitutes "national security" and that a broad meaning should be given to the term "national security". It could include activities that were not directly targeted against the United Kingdom but were considered by the Secretary of State to threaten, for example, reciprocal co-operation between states in combating international terrorism.

26. Significantly, on this appeal, no challenge has been advanced to the Secretary of State's conclusion that national security was threatened by the various activities he identified in connection with the proliferation of weapons of mass destruction. The appellant's case has been that he was not involved.
27. The submission of the appellant was:
- (i) The Secretary of State had wrongly concluded that he played a part in the procurement of nuclear weapons material; and
 - (ii) By implication, that, after the passage of time since his deportation (1996-2002), the assessment made in 1996 was no longer a sufficient foundation for him to conclude that in 2002 there was any risk that, if the appellant returned to the United Kingdom, he would engage in such activities.
28. In summary, it was submitted that:
- (1) The appellant did not do the things he was alleged to have done.
 - (2) If he did do something, as alleged, it was inadvertent and he personally did not and does not represent a threat to national security.
 - (3) In any event, he was certainly not a risk to national security in 2002, there had been a material change in circumstances and since the normal course is to revoke a deportation order after three years, unless a serious violent or sexual offence was committed, the order should have been revoked.
29. So far as the closed evidence was concerned, it was submitted that the Commission should approach the evidence with some caution, as the appellant had not had an opportunity to respond to it and to explain any apparently detrimental evidence or inferences.
30. Rule 390 requires an application for revocation to be considered in the light of all the circumstances including "the grounds on which the order was made". The requirement to consider the original grounds does not mean that the facts giving rise to the grounds must be re-opened and reviewed, save where, for example, fresh material has come to light to cast doubt upon the factual basis for the original deportation order. It is not open to an appellant to seek to persuade the Secretary of State (or this Commission on appeal) that the original deportation order should not have been made. Nor where the original order has been appealed, to seek to re-open the facts in further proceedings. In this case there was a review by an Advisory Panel, a challenge in the Administrative Court and an application to the European Court of Human Rights in Strasbourg. The principle of finality which applies to litigation precludes the appellant pursuing

submissions (1) and (2) in paragraph 20 above.

31. In our judgment the deportation order is not open to challenge. Its legality cannot be questioned and, there being no fresh evidence, the facts cannot be challenged. It follows that it is open to the appellant to submit that he was not a risk to national security in November 2002, because there had been a change in circumstances and/or due consideration of the grounds upon which he was deported and the passage of time since his deportation should have led the Secretary of State to conclude that he was no longer a risk to national security. From that conclusion (if right), if he were to return to the United Kingdom, he would not be a risk to national security. The error of law alleged is that there has been a departure from the Immigration Rules and/or it is alleged the Secretary of State should have exercised his discretion differently.
32. Mr Yeo submitted that the principal change in circumstances which had occurred and to which inadequate regard had been paid was that the appellant lost his employment at the Pakistan High Commission and it could not be suggested that if he returned to the United Kingdom he would be employed there again. Mr Yeo emphasised that the appellant's association with KRL developed whilst he was employed at the High Commission. That connection having been uprooted, the facts were materially different because there was no reason to conclude the activities would arise in any other context. Further, there was no evidence of any continuing links to KRL. He submitted that the very fact the appellant had been deported was capable of being a relevant change in circumstances.
33. The appellant has submitted a body of material disclosing the details of his finances since he returned to Pakistan in 1996, in order to demonstrate that he has independent assets which are derived from a legitimate source and not from KRL. Additionally he has emphasised his genuine family links in the United Kingdom, as well as his loyalty based on many years' residence here. It has been submitted that there are no grounds for concluding that the reason for the appellant's desire to return to the United Kingdom is other than a wish to lead a law abiding life in the country of his choice.
34. Mr Yeo submitted that, since a consideration underlying the original order was that HMG wished to give a clear warning to Pakistan and KRL that the activities were unacceptable and would not be tolerated, the Secretary of State should have taken account of the efficacy of his own action and should have operated on the assumption that the warning had been taken account of by the government of Pakistan and KRL. In those circumstances, no likelihood existed that on his return to the United Kingdom he would engage in any activity inimical to the United Kingdom's commitment to the prevention of nuclear proliferation.
35. **The Secretary of State's open response on the appeal**
36. The Secretary of State submitted that the appellant had not produced any fresh information, which was not before him in 1996 and which would lead him to reconsider the original

deportation order. Further, he submitted that no substantial change in circumstances had been made out. In particular, it was emphasised that, so far as the grounds for the original order are concerned, the appellant's own case amounted to a reiteration of his denial of any involvement in nuclear procurement activities. As a result, the original facts stood to be considered in the very same circumstances in which he had first considered them. Further, the threat presented by Pakistan's nuclear procurement was more firmly established by events since 1996.

37. We regard the appellant's continued denial of his involvement in the activities which grounded his deportation to be a significant feature in the case which is adverse to his appeal. Since the Commission must proceed upon the basis that the original grounds stand, as established, for the purposes of this appeal, the appellant's outright denial and his alternative explanation of inadvertent participation cannot assist him. On the contrary, they redound against him. The appellant's assertion of complete innocence has to be weighed against the facts which have been established. The conclusion we have reached is that the appellant has not told the truth. The absence of the truth in connection with activities which touch national security must weigh heavily against an applicant who seeks to have a discretion exercised in his favour.
38. The case for the Secretary of State is that the proliferation activities of Pakistan and KRL are presently of great concern to the security service but, more importantly and relevantly, it is said they were of concern in November 2002. We are only concerned to consider the validity of the assessment he made in 2002.
39. As to the 2002 assessment, in addition to the events set out in the statement attached to the original deportation order, the following matters are relied upon.

(1) In May 1998 the Pakistani authorities, having always protested up to that date that they did not possess and had no intention of possessing nuclear weapons, conducted their first nuclear test.

(2) KRL's proliferation activities have not ceased. It continues to be a substantial participant in Pakistan's nuclear weapons programme to an extent which is very difficult to ascertain.

(3) Pakistan has remained, at all material times, outside the international nuclear non proliferation regime.

(4) The United Kingdom's concern in connection with nuclear proliferation activities was highlighted in early 2002 when it appeared that a nuclear war between Pakistan and India was highly likely.

(5) Pakistan's undoubted possession of a nuclear capability which has emerged between 1998 and 2002 must be seen in a wider context than its possession by

Pakistan. Continuing proliferation in Pakistan outside a non-proliferation regime, creates the risk of wider proliferation.

40. **The appellant's continued denial of any connection or any knowledge of and/or connection with KRL**

41. The Secretary of State emphasised that the appellant's continuing denial of any involvement or connection with KRL (other than inadvertently) should be assessed in the light of the open material which, by way of example, shows:

(1) That in the course of the second FCO demarche, the Deputy High Commissioner for Pakistan reported to the Foreign and Commonwealth Office that:

(i) the appellant acknowledged to him that "he was only sending magazines at the request of KRL"; and

(ii) that A Q Khan (the head of KRL) was astonished and upset at the 'singling out' of the appellant. At the very least it is said this implies that the appellant was an employee of KRL.

(2) In his second interview, when asked about KRL, he admitted knowing of KRL and said: "He once went to Jamil's house in Islamabad when visiting Pakistan". He said he had never visited KRL's offices. He knew of Dr A Q Khan as a well-known scientist and had seen his photograph in a newspaper and a television interview with him.

42. We accept the force of the submissions and we have concluded that the appellant's attempts to distance himself from Mr A Q Khan are, in the light of the open material, disingenuous. The material shows that he acted as a sponsor for an entry clearance application by Dr Javad Mirza, a prominent figure in KRL, who replaced A Q Khan as chairman of KRL, when the latter stepped down in March 2001, in order to join President Musharraf's cabinet as an adviser on science and technology.

43. Further, his denial in having any role in arranging or sponsoring visits by KRL's staff and his role in KRL's contacts with the UK Patent Office lack credibility when considered against the documentary evidence comprising the relevant entry clearance form and the two official Patent Office certificates. The suggestion that these matters must have been done without his knowledge and/or agreement are not credible.

44. Yet further the Commission is not impressed with the broad denials and explanations which have been advanced in connection with his contact with students when these are tested in the light of the interviews which were carried out with a number of KRL's sponsored students.

45. Having reviewed all the open material and considered the submissions the Commission concludes that his attempts to contest the facts which gave rise to his original deportation, the absence of any reasonable or credible explanation for such contact as, on the evidence, he did have with KRL and senior figures within KRL, are capable of giving rise to significant doubt and positive concern as to the true measure of control which KRL exercised over him in 1996 and might have continued to exercise over him in 2002.
46. Further and more importantly, the Commission notes that at no stage has the appellant stated that he was ideologically opposed to the proliferation of weapons of mass destruction or shown any insight into the damage his activities occasioned.
47. **Compassionate circumstances**
48. The appellant has laid before the Commission various circumstances including:
- (1)the fact that he has already lived in the United Kingdom for 25 years and developed a vast social relationship and friendship;
 - (2)his high cholesterol level;
 - (3)the fact that his elder brother, now a British citizen, has been living in the United Kingdom for 40 years;
 - (4)his brother's children's presence in the United Kingdom;
 - (5)his youngest sister's presence in the United Kingdom with her children for 20 years
49. Having regard to those circumstances, it is submitted that the Secretary of State should have exercised his discretion to revoke the deportation order.
50. The Commission is satisfied that all these matters have been considered by the Secretary of State. They are not new and they existed at the time of the original deportation order but, more than that, the Secretary of State, having concluded they are not capable of outweighing the interests of the community and national security which led to the deportation order being made in the first place, in our judgment, they are insufficient, in all the circumstances, to render unjustifiable the continuation of the deportation order.

51. **Conclusion**

52. We are satisfied on all the open material before the Commission that the Secretary of State

properly considered the weight and factors set out in paragraphs 390-392 of the Immigration Rules and that he was entitled to come to the conclusion that the deportation order should not be revoked. The appellant did not provide any evidence to support his case that there had been a change of circumstances sufficient to warrant the revocation of the deportation order. Having regard to the risk which was originally found, the Secretary of State was entitled to conclude that the return of the appellant to the United Kingdom, albeit not as an employee of the Pakistan High Commission, was, by reason of his familiarity with the United Kingdom, his contacts within the United Kingdom and his past history, including in particular his close contact with KRL and its senior personnel and the extent of his activities for KRL, sufficient to make him a risk to national security and to give rise to a real risk that he would become engaged in activities in connection with nuclear procurement and proliferation should he return.

53. **Further conclusion**

54. For completeness, we should state that there is nothing in the closed material which the Commission has reviewed which supports the appellant's case in any way or which in any way undermines the Secretary of State's decision.
55. For the above reasons this appeal is dismissed.

MR JUSTICE NEWMAN

Chairman