Appeal Number: SC/25/2003

Date of Judgement: 27/07/2004

SPECIAL IMMIGRATION APPEALS COMMISSION

Before :

THE HONOURABLE MR JUSTICE SULLIVAN

Mr J LATTER

Mr M JAMES

Between :

S - Appellant

- and -

Secretary of State for the Home Department - Respondent

For the Appellant **Ms G Pierce**

For the Respondent **Mr S Catchpole QC**

Ms L Giovannetti

Special Advocates **Mr N Garnham QC**

Mr D Beard

OPEN JUDGMENT

Introduction

1. S (who is known under many names) is a citizen of Algeria. He appeals under section 2 of the Special Immigration Appeals Commission Act 1997 ('the 1997 Act') against the

Respondent's decision to make a deportation order against him, and under section 25 of the Anti Terrorism, Crime and Security Act 2001 ('the 2001 Act') against the Respondent's decision to certify him as a suspected international terrorist. Both of those decisions were made on the 7th August 2003. On that date the Respondent also issued a certificate under section 33 of the 2001 Act that S was not entitled to the protection of Article 33(1) of the Refugee Convention because Article 1(F) or 33(2) applied to him (whether or not he would be entitled to protection if that article did not apply) and his removal from the United Kingdom would be conducive to the public good.

Immigration History

2. S arrived in the United Kingdom from Pakistan on 4th November 1998 using a forged Belgian passport. The following day he was arrested by Police at Heathrow Airport attempting to board a flight to Canada using the forged passport. He was sentenced to six months imprisonment for fraud and was released on 4th February 1999.

3. He was detained by police in November 2000 and released without charge. When detained he applied for asylum. In his Statement of Evidence Form dated 28th December 2000 he claimed that he had left Algeria in 1993 and travelled to Spain but had not claimed asylum there. He said that in 1994 he spent some months in Switzerland but did not claim asylum there, and that in May 1994 he travelled to Canada where he did claim asylum. He claimed to have left Canada in September 1998 while his asylum application was still pending [it was later rejected] and travelled to Pakistan. He said that in October 1998 he had left Pakistan on a direct flight for the UK.

4. S was arrested on 13th February 2001 and charged with the possession of items (false documents, primarily passports and other forms of false identification) for use for the purposes of terrorism. These proceedings were discontinued by the CPS on 16th May 2001 and S was released from custody, but he was immediately rearrested and detained pursuant to a request for extradition by the French authorities. He has been in custody since February 2001 and is currently detained under the Extradition Act 1989.

5. The Immigration and Nationality Directorate ("IND") had not been informed of S's arrest, and when he failed to attend an interview scheduled for 15th May 2001 his asylum claim was refused on non-compliance grounds. In July 2002 IND indicated that it wished to interview S in relation to his asylum claim. His Solicitors contended that an interview was not appropriate in view of the pending extradition proceedings and asked that the matter be dealt with by way of written representations. IND agreed and submitted a number of questions for S to answer. The representations received from his Solicitors responded to some of those questions, stated that the information provided in the Statement of Evidence Form completed by his previous Solicitors was "unreliable and inaccurate", and set out a somewhat different account of events after S left Algeria. IND submitted a further list of questions which S declined to answer on the advice of his Solicitors.

6. The certificates under sections 21 and 33 of the 2001 Act were issued by the Respondent for the following reasons:

"You are a member of a group of mujahideen engaged in active support for various international terrorist groups, including networks associated with Usama Bin Laden. Your activities on behalf of Islamist networks include:

(a) involvement in criminal activities by the Fateh Kamel network in Canada to raise funds assessed to be for extreme Islamist causes;

(b) training at the Khalden and Derunta terrorist training camps which are associated with Bin Laden;

(c) planning to take part in Ahmed Ressam's terrorist cell which intended to carry out an attack on Los Angeles Airport over the Millenium. You were prevented from joining the cell when you were arrested at Heathrow Airport in November 1998 whilst attempting to board a flight for Toronto on a false Belgian passport;

(d) provision of support for a terrorist cell linked to the Abu Doha group which intended to attack the Christmas market in Strasbourg at the end of 2000; and

(e) the supply of false documents."

For the same reasons the Respondent deemed it conducive to the public good to make a deportation order against S for reasons of national security.

7. S appealed against the Respondent's decisions by notice of appeal dated 8th August 2003. His grounds of appeal were as follows:

"1. The relevant provisions of the 2001 Act and the Human Rights Act 1998 (Designated Derogation) Order 2001 are incompatible with Articles 3, 6, 14 and 15 of the European Convention on Human Rights ("ECHR").

2. The circumstances of the Appellant's continued detention are violative of Article 3 and 8 ECHR.

3. (a) There are no reasonable grounds for the belief and / or suspicion that the Appellant's presence in the United Kingdom is a risk to national security and / or that he is an international terrorist – section 25 (2)(a).

(b) In fact on the merits, the Appellant is not such a person; so there is some other reason as to why the Certificate should not have been issued – section 25 (2)(b).

4. The Secretary of State has erroneously certified that the Appellant is not entitled to the protection of Article 33(1) of the Refugee Convention because Article 1(F) or Article 33(2) apply to him.

5. The Appellant's deportation is neither in the interests of national security nor otherwise conducive to the public good and the decision to deport him should be accordingly overturned.

6. The decision to deport the Appellant is in breach of the UN Convention 1951 and / or Articles 2 and / or 3 of ECHR.

7. The decision to deport the Appellant and certify him is in breach of the Appellant's and his family's right to respect for family and private life – Article 8 ECHR."

The Respondent's First Open Statement

8. Pursuant to rule 37 of the Special Immigration Appeals Commission (Procedure) Rules 2003 ('the Rules') the Respondent lodged and served on the 13th February 2004 an Open Statement setting out the grounds for his decision that S should be detained under the 2001 Act, and the evidence that would be relied upon in support of those grounds, supported by a Statement of Security Service witness G. The Open Statement cross referred to the Open Generic evidence originally served in May 2003. This generic evidence was updated in an Updated Open Generic Statement – April 2004, which was supported by a Statement of Security Service witness J.

9. The Open Statement summarised S's immigration history as set out above (paras. 2 – 4) and supplemented it by saying that in April 2000 [subsequently corrected to February 2000 in a Third Open Statement of Security Service witness G] S was arrested for credit card fraud in Germany, served time in prison there, and returned to the UK in Autumn 2000. Having described the Respondent's decisions referred to in paragraph 1 (above), the Statement set out the evidence on which the Respondent relied in support of those decisions.

10. The Statement summarised the evidence as follows:

"10. S is an Algerian extremist, who is the subject of an International Arrest Warrant issued in France on 18 August 2000 pertaining to his involvement with the Fatah Kamel group of Canadian based Armed Islamic Group (GIA) supporters between 1996 and 1998. S provided support to the group which mounted attacks in France at this time.

11. S undertook training in Afghanistan at an Usama Bin Laden / Al Qaida terrorist training camp in Afghanistan in 1998. During his visit he joined a terrorist cell which subsequently

attempted to mount an attack on Los Angeles International Airport in 1999. S was prevented from participating in the planned attack only due to travel difficulties following his arrest in the UK for travelling on a forged Belgian passport. Despite this setback he continued to support the group with the provision of forged travel documents, and intended to assist one of the main protagonists who was to fly to London after planting the device.

12. While in Afghanistan in 1998, S trained with Abu Doha. On his arrival in the UK, he became a member of Abu Doha's UK-based terrorist support network, which includes members of the Algerian terrorist group the Salafist Group for Call and Combat (GSPC). S supported the group, some of whom he trained with in Afghanistan, and during this time he was actively involved in the supply of forged travel document to his terrorist associates. Since S's arrest in the UK on 13 February 2001, members of this network have continued to be involved in terrorist planning, including in the UK.

13. In 2000, S was involved in a plot to mount an attack on the Christmas Market in Strasbourg. The terrorist cell was based in Frankfurt. Members of the group were arrested and their weapons seized by the German police shortly before they intended to mount the attack. They have since been convicted and sentenced in relation to the planned attack."

11. The Statement then set out the evidence in considerable detail, cross referenced to a substantial bundle of documents, under a number of sub-headings including: "[The] Fatah Kamel network in Canada – support for French-based terrorist cell"; "Training in Afghanistan 1998 – S joins a terrorist cell"; "Involvement in the 1999 Los Angeles attack plot"; "Involvement with Abu Doha's terrorist support network"; and "Involvement in the plot to attack the Strasbourg Christmas Market in 2000". Details of the items recovered following S's arrest in February 2001, including a credit card cloner, credit cards and false documentation, were given.

<u>Representations on behalf of S</u>

12. On the 30th April 2004 S's Solicitors served Representations on his behalf. The Representations expressed concern about S's mental state and complained that his continued detention was unfair. The Representations did not directly respond to the material contained in the First Open Statement, but instead criticised at some length:

(a) the request by the French Government for S's extradition; and

(b) the request by the United States Government for the extradition of Abu Doha, another of those who had been arrested and charged in February 2001.

13. The Representations stated that S denied the allegations that were being made by the authorities in those proceedings. It was said that he had never been to France. The Representations also criticised the Respondent's reliance upon the evidence of Ahmed Ressam,

with whom S had shared an apartment whilst he was in Canada. On the 6th April 2001 Ressam was convicted of nine terrorism related charges by a Los Angeles Court. He faced a possible sentence of 130 years, and in return for a substantially reduced sentence of not less than 27 years he entered into a witness co-operation agreement. The Representations contended that in these circumstances Ressam's evidence could not be relied upon against either Abu Doha or S.

14. The Representations denied that S had any involvement with the conspiracy at the end of 2000, but also stated that its focus was not in any event the Strasbourg Christmas Market but some other symbolic target elsewhere. The Respondent had alleged in other appeals before the Commission that there had been a telephone call between Abu Doha and a member of the cell planning the Strasbourg Christmas Market attack. The Representations requested disclosure of the relevant telephone tap.

The Respondent's Second Open Statement

15. On 23rd June 2004 the Respondent served a Second Open Statement supported by a Statement of Security Service witness G to update the material contained in the First Open Statement and to respond to the Representations submitted on behalf of the Appellant. S's immigration history was set out in a Statement of Mr Troake a Grade 7 Civil Servant in the Immigration and Nationality Directorate of the Home Office.

16. The Second Open Statement said that S had informed immigration officials in Canada that he had travelled from Spain to France in 1992 and resided there until moving to Italy in 1993. Given S's differing accounts of his movements the Respondent did not accept that S had never been to France.

17. The Statement set out details of S and Ressam's alleged criminal activities in Canada and reasserted the Respondent's assessment that Ressam's evidence, whilst motivated by a desire for a reduced sentence, was "in the light of all the available material…on the whole accurate". The Respondent's assessment that S was a close associate of Abu Doha and Toufiq was repeated and it was stated that he was also an associate of Abu Qatada and had been an associate of Abu Ja'far (who died in Afghanistan in 2001). The suggestion that the target of the plot in 2000 was not the Strasbourg Christmas Market was refuted.

The Rule 38 Process

18. Both the First and the Second Open Statements were substantially amended following the procedure set out in rule 38 of the Rules. The amendments did not alter the nature of the case against S but they did substantially amplify that case. The Statements as amended together with amended bundles of documents were served on 30th June. The further particulars thereby provided to S were extensive; two examples of paragraphs in the First Open Statement which were substantially amended may serve to illustrate the effect of the rule 38 process.

19. Paragraph 15 of the Amended First Open Statement was one of the paragraphs which described S's alleged activities in Canada; the underlined passages were added following the rule 38 process:

"15. Four members of Fatah Kamel's group in Canada were convicted by a French Court in April 2001 of trafficking documents for the benefit of the international Islamist movement from 1996 to 1998 and of criminal conspiracy for a terrorist purpose. S's case was interrupted because of his arrest in London (see below). S's associate Ressam had entered Canada from France in 1994, using a false French passport and sought political asylum, which was rejected. He liven in Montreal between 1994 and 1998 and during his time there lived with S, Adel Boumezbeur and Said Atmani. During a period in 1995 and 1996, S lived in Montreal with Ressam and the two also resided with Atmani and Adel Boumezbeur. S and Ressam were involved in criminal activity. This included the trafficking of fraudulent passports and other identity documents, as well as trading in stolen goods such as credit cards, telephone cards and computers. In 1995 S had been caught attempting to cross the border into the US using a false French passport in the name of Bruno Antoine Aldo Fratellia. A search of Boumezbeur's Montreal flat in 1999 revealed a letter written by S shortly after his imprisonment in the UK in late 1998. The letter contained messages addressed to various people including Atmani and warned them not to say too much in their letters. He wrote that he did not want people to know he had been in 'Rio de Janeiro' with 'Monika'. In the letter S also provided a contact number for Toufiq in the UK and personally addressed Atmani (also known as Karim). During this time Ressam lived on welfare and theft with S and supplied Canadian passports to terrorist associates around the world."

20. Paragraph 29 of the Amended First Open Statement was one of the paragraphs which described S's alleged involvement in the plot to attack the Strasbourg Christmas Market in 2000:

"29. On 23 December 2000 members of the cell had reconnoitred the Christmas market by Strasbourg Cathedral across the French border, making a video of the area and the route to it from Baden Baden, where members of the cell had rented two flats. It has been reported that the men contacted Abu Doha by telephone to ask for money to fund their activities: on 24 December, Abu Doha received a call from a member of the cell in Frankfurt who asked for more German currency. The caller indicated that a mission would be carried out in the near future. A call between Adam and Touriste (@Slimaine Khalfaoui) on 25 December 2000 was intercepted by the German Federal Criminal Office. Adam and Touriste discussed a "pressure cooker", which Adam later confirmed at trial was to be used to build an Improvised Explosive Device (IED). The content of that call demonstrates the Touriste had intimate knowledge of the material in Adam's possession."

The Respondent's Skeleton Argument

21. On 8th July the Respondent served a lengthy Open Skeleton Argument, in Part III of which the Respondent's case against S was set out in considerable detail. Paragraph 18

summarised the Respondent's case against S as follows:

"(1) S had received mujahideen training in Afghanistan;

(2) S was a member of a terrorist cell that was formed in Afghanistan in 1998 which intended to relocate to Canada and conduct terrorist attacks on targets in the USA;

(3) One member of the cell, Ressam, successfully relocated and planned with, amongst others, Dahoumane and Meskini to construct and detonate a large improvised explosive device at Los Angeles International Airport in December 1999. S provided support to Ressam an his co-conspirators;

(4) S was a senior and active member of the Abu Doha group;

(5) S was involved in criminal activities on behalf of the Abu Doha group including producing, procuring and using false documents and cloned or stolen credit and bank cards;

(6) S provided support to a cell based in Frankfurt at the end of 2000 who were planning an attack on the Strasbourg Christmas Market;

(7) S was an associate of a number of other extreme and senior terrorists. His association with these individuals was consistent with S himself being a part of the networks who posed the threat giving rise to the present public emergency;

(8) The networks within which S operated were still engaged in active terrorist support and planning. S would resume his various activities in support of those networks if he were at liberty in the UK.

The Hearing

22. S did not attend the hearing of his appeal, nor did he amplify or amend his grounds of appeal. In a letter dated 8th July 2004 Ms Pierce stated that, for the reasons set out in the letter she was not able to commence S's appeal on the 12th July. On the 12th July she requested an adjournment until the following day to enable her to confirm S's instructions. We granted the adjournment. Having obtained confirmation, Ms Pierce made a brief statement at the start of the hearing on the second day to explain why S had decided that neither he nor she as his Solicitor would play any part in the proceedings.

23. She said that S denied that he was a terrorist: he had never been a terrorist. He would welcome a trial before a jury where he would be able to see the evidence and know the case against him. In such a trial right would prevail. S asked "where was the evidence" that he was a terrorist.

He did not know what evidence would be produced in closed session, and believed that it would be wrong to participate in a process which included secret hearings. The Commission's procedures were unjust, and were merely an attempt to oppress and punish Muslims. Ms Pierce reiterated S's request for the telephone tap evidence of the conversation that was alleged to have taken place between the German cell and Abu Doha in relation to the Strasbourg Christmas Market plot (para. 14 above). Having confirmed that she did not wish to cross-examine the security service witnesses or Mr Troake, all of whom were tendered for cross-examination, Ms Pierce withdrew from the hearing.

24. In the circumstances we did not invite Mr Catchpole QC to make any submissions on behalf of the Respondent. The Respondent's case had been set out in detail in his Skeleton Argument and since we had no questions to ask of the Security Service Witnesses or Mr Troake, we said that we proposed to determine the open case against S upon the basis of the written material which had been disclosed to him.

25. In response to Ms Pierce's submission that the proceedings were unfair Mr Catchpole submitted that S had had an opportunity to deal with the matters alleged in the Open Statements (by reference to the dates on which the documents were served, see above) and had failed to do so. The open hearing was concluded.

The Open Case – Discussion and Conclusions

26. We can understand that an appellant who is not able to see the whole of the case against him may well have a sense of grievance and feel that the proceedings are unfair. While S's perception is understandable, whether an appellant has a legitimate grievance will depend upon the particular circumstances of his individual case. An appellant who has been confronted with generalised assertions which he has answered to the best of his ability, and who then discovers that his appeal has been dismissed on the basis of material that was presented in closed session may be entitled to feel aggrieved.

27. The present case, however, is in a very different category. Ms Pierce told us that S had asked "where was the evidence" (para. 23). One does not have to look far for the answer to that question. S has not simply been provided by the Respondent with generalised assertions. The First Open Statement set out the Respondent's allegations, and the evidence on which he relied, in considerable detail, giving particulars of names, dates, places and documents relied upon (paras. 10 and 11). As explained above, the Second Open Statement (paras. 15 – 17) and the rule 38 process (paras. 18 – 20) provided S with further particulars at each stage. The Respondent's position was explained in a comprehensive Open Skeleton Argument (para. 21) with copious cross-references to the documents relied upon.

28. There was, therefore, placed before S a great deal of open material to which he could have responded, had he chosen to do so. S has not provided us with a witness statement, so we do

not have his account of his whereabouts and activities between his departure from Algeria and his arrest in February 2001. The Representations submitted on his behalf made criticisms of the extradition proceedings being pursued by France (against S) and the United States (against Abu Doha) but did not make any real attempt to engage with the detailed allegations made against S in the First Open Statement. Despite the fact that further particulars were provided in the Second Open Statement and as a result of the rule 38 process the Representations were neither amended nor amplified.

29. While it is submitted on behalf of S that Ressam's evidence is unreliable, the Respondent does not rely upon his evidence alone and (to put it at its lowest) the information provided by Ressam in relation to S would appear to be consistent with other evidence relied upon by the Respondent. Apart from recording S's general denials, the Representations submitted on his behalf do not gainsay Ressam's evidence in detail and it is notable that they do not put forward any alternative version of events.

30. Save in one respect (the tap of the telephone calls between the German cell and Abu Doha) it has not been suggested that S required more documents or information in order to be able to understand, and refute, the open case made against him (paras. 14 and 23). The gist of the telephone calls made on the 24th and 25th December has been provided as a result of the rule 38 process (para. 20). While the precise terms of these conversations might be relevant from Abu Doha's point of view, it has not been suggested that the calls were made to S, and it is difficult to see how he could have been disadvantaged by being given the gist rather than the full text of these particular calls.

31. While we do not draw any adverse inference from S's failure to give evidence or otherwise participate in the hearing of his appeal, we do not feel able to place any weight upon the general denials of guilt, and the bald assertions of innocence, contained in the Representations submitted on his behalf. We have to determine his appeal on the evidence and we are left with the position that there has been no challenge by way of evidence, cross examination or submission, to the open material produced by the Respondent.

32. We have considered the detailed material relating to S in the amended First and Second Open Statements against the background of the material contained in the Amended Open Generic Statement – April 2004, and in the light of the Commission's decision dated 29th October 2003 in Ajouaou and A, B, C and D ('the generic judgement'). Since there was no challenge to the generic material we do not need to repeat those generic assessments and conclusions in this judgement.

33. We have to consider the evidence, both open and closed, as a whole. Thus far in this judgement we have confined our attention to the open material. We accept the, unchallenged, evidence within that material, and for the reasons set out above, we are satisfied upon the basis of that material alone that there are substantial grounds for believing that S was a senior and trusted

figure in the Abu Doha group in the UK and in other terrorist networks linked to Al Qaida, and that he played a significant role in their terrorist activities. Applying the test contained in section 25(2) of the 2001 Act, there are reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) and (b), and no other reason has been advanced as to why the certificates should not have been issued.

34. For the sake of completeness, we note that insofar as S's Grounds of Appeal (para. 7 above) relate to the substance of the Respondent's case against him, they amount to nothing more than bare denial. Insofar as they relate to the fairness of the procedures under the 2001 Act generally, and the extent to which the Act is incompatible with the European Convention on Human Rights, those arguments were considered, and rejected, in the derogation proceedings, and the decision of the Court of Appeal in A, X and Y and Others v. Secretary of State for the Home Department [2002] EWCA Civ. 1502, [2003] 2 WLR 564 ('the derogation decision') is binding upon us, although we are aware that the appeal to the House of Lords is due to be heard in October.

35. It has not been suggested on behalf of S that his appeal under the 1997 Act against the Deportation Order raises any separate or distinct issues in addition to those raised in his appeal against the decision to certify him as a suspected international terrorist under the 2001 Act. Article 8 of the ECHR is mentioned in S's Grounds of Appeal, but the point was not further developed on his behalf. S has not given any details of his private or family life but we do know that he married on 2nd January 2001 and that he and his wife have a son, born on 2nd August 2001. However, he is separated from his wife who (as at 19th November 2003) was an asylum seeker from Slovakia. She is said to have experienced mental health problems. Their son has been in care since August / September 2003 and care proceedings in the Family Division of the High Court have recently concluded. We were told in the letter dated 8th July 2004 from Ms Pierce that the practical choice in those proceedings was either to place the son with a family friend of S, living in London, or with his wife's mother living in Slovakia.

36. The letter dated 8th July also expressed concerns about S's mental health, and enclosed a report from Dr Taylor, a Consultant Forensic Psychiatrist. We have also seen a report from Dr Ian Cumming, a Consultant Psychiatrist at HMP Belmarsh. These reports which reached different conclusions as to S's fitness to plead, were prepared in connection with an unsuccessful application for bail in the extradition proceedings. They were produced as background material in relation to Ms Pierce's application for a short adjournment (para. 21 above) but were not otherwise relied upon or referred to by the parties. In making her application for an adjournment Ms Pierce did not submit that S was not fit to confirm his earlier instructions. In these circumstances, S has not provided us with sufficient information to enable us to assess the extent of any likely interference with his private or family life. We are satisfied , however, that there is nothing in the material before us which suggests that any such interference might be disproportionate bearing in mind the need to protect national security.

37. It follows that upon consideration of the open material S's appeals must be dismissed.

The Closed Material – Discussion and Conclusions

38. A detailed discussion of the closed material in this Open Judgement is neither appropriate nor is it necessary. At the outset of the closed session Mr Garnham QC explained that the Special Advocates had concluded that they did not intend to ask questions of the closed witnesses or make submissions in the closed proceedings. Mr Garnham made it clear that in reaching that conclusion the Special Advocates had proceeded upon the basis that their statutory duty was to form their own independent judgement as to how the interests of the Appellant were best promoted in closed session, paying great weight to the position adopted by the Appellant (that he did not wish to participate in the proceedings), but not being bound by it if they concluded that a different approach would be in the Appellant's best interests.

39. We recognise that the late confirmation of S's unwillingness to participate in the hearing placed the Special Advocates in an invidious position. Had S presented an effective challenge to any part of the open material the Special Advocates would have been able to pursue that challenge in closed session, to ascertain whether, and if so to what extent, that part of the open material was supported, or negated, by any of the closed material. In a case such as this, absent any challenge to the open material by an appellant it will be difficult (though not always impossible, see the Commission's decision in M v. Secretary of State for the Home Department dated 8th March 2004) for the Special Advocate to make any effective challenge to the closed material.

40. The Special Advocates having explained their position, the closed session was concluded. We did not hear any submissions from Mr Catchpole on the substantive case nor did we hear any 'live' evidence. We have considered the written material in the closed statements and accompanying documentation and are satisfied that it supports, and does not in any way detract from, the open material discussed above.

41. The standard of proof prescribed by section 25(2) of the 2001 Act is relatively low: are there reasonable grounds for belief or suspicion. As explained above, we are satisfied that this low threshold is crossed by a substantial margin on the basis of the open material alone. If the totality of the material, both open and closed, is considered, there can be no real doubt that S was a senior member of the Abu Doha and other terrorist groups linked to Al Qaida and directly involved in planning terrorist attacks as described in the Respondent's evidence.

No Need for a Closed Judgement

42. Rule 47(4) of the Rules requires us to serve a Closed Judgement upon the Respondent and the Special Advocate if this Open Judgement does not contain the full reasons for our decision. We did not find it necessary to rely on the closed material in reaching our conclusion that

S's appeals must be dismissed (para. 37 above), and since there was no challenge to the closed material there are no issues that need to be resolved in a Closed Judgement.

Procedural Considerations

43. The hearing date for this appeal with a time estimate of 1 week was fixed six months ago, on 14th January 2004. The Respondent was ordered to serve his open evidence by 13th February. This direction was complied with. S was ordered to serve his evidence in reply by 12th March 2004. Ms Pierce requested an extension of time of at least a month and her representations on behalf of S were not served until 30th April 2004. No witness statement was served and the representations did not make it clear whether S proposed to give and / or call evidence, and if so what that evidence would be.

44. This is yet another case where the Commission has been given no advance warning by or on behalf of an Appellant that he would not be participating in the proceedings. Such conduct inevitably results in costs being wasted, and more importantly, in a considerable waste of the Commission's time, thus delaying its consideration of other appeals / reviews. One solution to this problem would be to include in any directions under rule 39 a requirement that an appellant's response to the Respondent's open evidence must include the following information:

(a) A statement that he does / does not intend to give and / or call evidence

(b) If he intends to give and / or call evidence, witness statement(s) from those persons who are to give evidence.

(c) A statement as to whether any (and if so which) of the Respondent's witnesses are required to attend for cross-examination.

Such information would provide the Special Advocates with a focus for their consideration of the closed material and should thereby assist and expedite the rule 38 process.

45. The Respondent's practice is to voluntarily serve a Skeleton argument shortly before the hearing. Service of the Respondent's Skeleton Argument may (as in the present case) be held up by delays in the rule 38 process. The Respondent's practice of serving a Skeleton Argument is of considerable assistance to the Commission and there is a powerful argument for including in directions under rule 39 a requirement that Skeleton Arguments be served sequentially by all three parties. If the Respondent's Skeleton Argument was served at an earlier stage (this should be possible if the Appellant's position has been clarified as set out in para. 44 above), there would be sufficient time for the Appellant to serve his Skeleton Argument in response; this would then enable the Special Advocates to consider and give advance notice in their Skeleton Argument of their position in the light of the Appellant's response. We recognise that intentions may change, and an appellant who intended to give evidence may decide not to do so in the light of the

Respondent's response to his evidence. Information revealed as a result of the rule 38 process may also cause an appellant who did or did not intend to give or call evidence to change his mind. Even if it was not possible to give earlier notice of such a change, at least the parties' Skeleton Arguments would set out their up-to-date positions in advance of the hearing.

Conclusion

46. For the reasons set out above S's appeals are dismissed.

The Honourable Mr Justice Sullivan