Appeal No: SC/11/2002

Date of Judgment: 29th October 2003

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:
The Honourable Mr Justice Collins
Mr C M G Ockelton
Mr J Daly

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APPELLANT

and

Secretary of State for the Home Department
RESPONDENT

For the Appellant: Mr B Emmerson QC, Mr R Hussain
Instructed by:Birnberg Peirce & Partners
Special Advocate: Mr R Scannell, Ms P Wipple
Instructed by: Mr S Trueman, Treasury Solicitor
For the Respondent: Mr W Williams QC, Mr J Swift
Instructed by: Ms L Smith, Treasury Solicitor

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1. The Appellant is an Algerian national. He originally came to this country, it seems, in 1994 using a false Spanish passport, although the Respondent has doubt about the truth of his account in this respect. In any event, he did not claim asylum but remained in the United Kingdom unlawfully. He began to share a flat with 'Z', who was a young Algerian who held similar beliefs to him and who, like him, was unwilling to return to Algeria. In May 1997, he and 'Z' were arrested and, together with Sofiane Souidi charged with a number of offences including a conspiracy to contravene section 16(a) of the Prevention of Terrorism Act. This related to an attempt to export to Algeria material which was to be used for terrorist purposes. He was (it is alleged although he denies) a member of the GIA (the Algerian Armed Islamic Group). He was also charged in relation to false documents and to those charges he pleaded guilty. He was remanded in custody and in December 1997, he says as a result of the publicity from his arrest, he claimed asylum. He was released on bail in early 1998 because, we are told, the prosecution had failed to comply with the Custody Time Limits. In October 1998 he married his wife, a French citizen who, on 15th October 1999, applied for a residence permit as an EEA national. On 3rd March 2000, the case against the Appellant and his co-defendants was abandoned. The reason was that they wished to call as a defence witness a Security Services agent to confirm that the Algerian Security Services had been involved in committing atrocities in Algeria so that any provision of materials apparently of use to terrorists was in reality to enable the inhabitants to protect themselves against the security forces. Apparently, it was conceded by the prosecution that that could, if established, constitute a defence. The witness was unwilling to give evidence since he feared for his life if he did. We should note that, whereas that was apparently 'Z's defence, it was the Appellant's case that he had not been involved at all in any attempt to export the materials.

2. He had complied with his bail conditions and it has been accepted by the Respondent that

since being granted bail he had adopted a lower profile. But it is said that he did continue his contacts with a number of extremists who have links with the GSPC (which split away from the GIA and which is said to have links with Al Qa'eda). In particular, he is said to have been associated with Abu Doha and with Abu Zubaida. Further it has been an important part of the case against him that he was able to and did provide false documentation to various terrorists and his possession of a blank driving licence, found when his property was searched after his arrest in December 2001, is regarded as significant.

3. On 15th March 2000, the Appellant was granted a right of residence until March 2005 because of his wife's status as an EEA resident. On 30th January 2001 he was interviewed on his arrival in the United Kingdom from Milan. He had an Algerian passport issued on 9th July 2000 in Algeria and failed to explain how he had come to acquire it since he had said that he could not return to Algeria in safety. There is clearly reasonable suspicion about the genuineness of that passport or, if it was genuine, about the credibility of the Appellant's claim for asylum.

4. Following the coming into force of the 2001 Act, the Respondent issued a certificate under section 21 on 17th December 2001. The reasons given were:

> "You have provided active support to the Armed Islamic Group (GIA), which is designated a proscribed organisation under Part 2 of the Terrorism Act 2000. Your activities on behalf of international terrorists include the procurement of terrorism-related materials and equipment and the provision of false documentation".
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> A further certificate was issued under section 33 of the 2001 Act for the same reasons and a decision was made to remove the applicant under Regulation 21(3)(b) of the Immigration (European Economic Area) Regulations 2000, which provides:
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> "A person may be removed from the United Kingdom ? if he is a qualified person or the family member of such a person, but the Secretary of State has decided that his removal is justified on the grounds of public policy, public security or public health".
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> An appeal lies to SIAC because the removal is in the interests of national security: see Regulation 31(1) and (2). In addition, the Respondent decided to make a deportation order for reasons of national security.

5. The Appellant was detained under section 2(2) of the 1971 Act pending his deportation or removal. The Respondent has stated in the amended open statement that he would be unlikely to be able to deport the Appellant to Algeria because "he could not be satisfied that [the Appellant's] right to freedom from inhuman and degrading treatment could be guaranteed there". The Respondent does not seem to have considered whether the Appellant could go anywhere else, in particular to France, of which he had become a national in May 2001. It is, however, fair to point out that the Appellant had not apparently informed the Respondent of his French nationality and in his notice of appeal, which was lodged on 21st December 2001, it was stated that his nationality was Algerian.

6. On 12th March 2002, the Appellant decided that he could face detention no longer. He went to France the next day. He was escorted by two police officers and was interviewed on arrival by French security officials. In the course of that interview he says he was asked about a number of people he knew including Hocine Ben Abdul Hafid, B and G. He was also asked about Rachid Ramda, whom the French are trying to have extradited to face terrorism charges. The

Appellant says he had met him in Belmarsh. The upshot of the interview was, he says, that he was told he was free to go and would not have any problem in France. He is still in France.

7. The result of his leaving the United Kingdom was that his appeals to SIAC were to be treated as abandoned: see section 7A (4) of the Special Immigration Appeals Commission Act 1997 as applied by section 27(1)(c) of the 2001 Act. One other of those detained in December 2001 following section 21 certification had left the country, being able to return in that case to Morocco. He had sought to pursue a fresh appeal from outside the United Kingdom against the certification, which still remained in existence. On 20th March 2002, the Commission decided that an appeal could be pursued, although he could not pursue an appeal against the decision to deport him. Section 25(5) enables an appeal against certification to be brought within three months of the issue of the certificate and so his fresh appeal was within time. Once he was aware of that decision, the Appellant sought to lodge a fresh appeal. Although it was one day out of time, no objection was raised and the Commission exercised its power to extend time under section 25(5)(b). The certification remained in being.

8. During the course of the hearing it was noted that the certification had since been revoked by the Respondent, exercising his powers under section 21(7) of the 2001 Act. This was said to be backdated to the day he left the United Kingdom in March 2002. The main reason, it seems, for the decision to revoke was the belief that certification was not a proper course for someone not in the United Kingdom. Section 21(1)(a) of the Act enables a certificate to be issued if the Appellant reasonably "believes that the person's presence in the United Kingdom is a risk to national security". It is implicit in that, the Respondent believes, that a certificate cannot properly be maintained against someone who is not in the U.K. We do not need to decide the point, but we recognise the force of the argument. However, section 21(1) refers to the issue of the certificate when clearly the person must be in the United Kingdom. It is by no means so clear that he must remain here for the certificate to continue in being. The revocation led us to question whether the appeal could continue, since the right of appeal under section 25(1) is "against his certification under section 21" and, if there is no longer any certification, there is nothing left to appeal against.

9. All counsel, including the special advocates (the possible impact of the revocation was first appreciated in the closed session), argued that the appeal could properly continue. We confess that we were somewhat surprised to find the Respondent's counsel supporting the argument. What is said is that it is unfair to and potentially damaging for an Appellant to be unable to establish that he never should have been certified in the first place because he was not someone who could properly be regarded as an international terrorist. SIAC provides the only way in which certification and any actions taken wholly or in part in reliance on it can be challenged (see section 21(8) and (9)).

10. Mr Husain for the Appellant referred to matters which he submitted were powerful reasons for construing the Act in such a way as would provide for the appeal to continue. Since absence from the United Kingdom was regarded as a reason why certification could not continue, the right of appeal from abroad was he submitted rendered worthless. But if a person such as the Appellant wishes to be able to return to the United Kingdom, he must apply to the Respondent to set aside the deportation or removal order and can then appeal against any refusal to do so. Thus the issue of whether he is to be regarded as a danger to national security can be considered. It is further submitted that revocation would prevent a person certified from challenging his detention since section 21(9) applies to prevent the certification and so the detention from being challenged except under section 25 (appeal) or section 26 (review) of the Act. This, it is said, cannot be right and very clear statutory language is needed to produce this result. While we recognise the force of that submission, it is to be noted that the detention is technically to be regarded as pending removal. If the person certified leaves voluntarily and the certificate is revoked, he can appeal against a refusal to set aside the deportation or

removal order and the detention can be challenged in such an appeal. If the person certified does not leave, the appeal will continue. Further, there is no breach of Article 5(4) since it requires only that there be a means of challenging and obtaining release from existing detention.

11. Section 25(2) sets out the Commission's obligations on an appeal under section 25. It provides:

> "On an appeal the Commission must cancel the certificate if ?
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> (a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or
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> (b) it considers that for some other reason the certificate should not have been issued."
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> Section 25(4) provides that where a certificate is cancelled it shall be treated as never having been issued. Section 25(2)(a) clearly looks to the situation at the time of the appeal. It does not say, as it could have done, that "there are or were at the time it was issued" no reasonable grounds etc. It therefore clearly in our view presupposes that the certification is still in being at the time of the hearing. It is, perhaps, somewhat curious that Parliament should have set out the effect of cancellation as it has in section 25(4) since it is possible to imagine a case where there were reasonable grounds for the belief when the certificate was issued but are none at the time of the hearing. We suspect that Parliament did not envisage that these appeals would take so long to be heard and we note that in section 26 on a review where identical language to section 25(2)(a) is used in section 26(5)(a) the effect of cancellation is that the certificate ceases to have effect from the date of the Commission's order. It is, incidentally, clear that the obligation to hold a review "of each certificate issued under section 21" cannot be construed to refer to certificates which have been revoked nor did anyone suggest that it should. But Parliament could have made it clear that an appeal could be made against the issue of the certificate rather than, as section 25(1) provides, against the certification.

12. Reliance is particularly placed on section 25(2)(b). This is historical and, it is submitted, enables the Commission to see whether the certificate should have been issued. One difficulty with that submission is the words "for some other reason", which suggest that section 25(2)(b) is looking to matters other than reasonable grounds for suspicion or belief under section 21(1)(a) or (b). No doubt it can be said that, since section 21(1)(a) looks to the present, "some other reason" could properly look to the past. There is a more fundamental difficulty in that the Commission can only cancel or determine not to cancel the certificate. In our view, that is not apt to describe the position where there is no certificate to cancel. It may be said that there was a certificate in being between December 2001 and March 2002 and that can be cancelled. But that construction in our view does violence to the language used.

13. The revocation of the certification has been backdated to 22nd March 2002 when the Appellant left the country. It was not suggested that that backdating was unlawful. This means that when the Appellant lodged the appeal with which we are now dealing he must be regarded now as a person who was not then certified. It follows that he was not then an "international terrorist" within the meaning of the Act because that expression can only apply to one who is currently certified. This is made apparent by, for example, section 23 which empowers the Respondent to detain an international terrorist and that cannot conceivably be construed so as to give a power to detain a person who had been but was no longer certified. At the time the appeal was lodged, the Appellant was certified, but the subsequent backdating of the revocation means that he must now be regarded as someone who was not certified and such a person cannot

appeal.

14. For all these reasons, we are satisfied that the revocation (whether or not backdated) of a certificate precludes the continuation of an appeal. We would therefore dismiss the appeal on that ground.

15. We should, however, consider the matter on the basis that we are wrong in that view. It was submitted by all counsel that, if there was jurisdiction, we should apply the tests in section 25 (1)(a) and (b) on the basis that we were considering the position as at the date of the Appellant's departure from the United Kingdom. This does great violence to the language of section 25(2)(a). But section 25(2)(b) can be used on the assumption that "some other reason" can refer to lack of reasonable belief or suspicion at the time of issue. Having regard to the three month time limit in section 25(5), it is unlikely that there will be any significant change in any case (and there is none here) between certification and leaving the country and so consideration of the situation at the date of certification as opposed to the date of leaving the country is unlikely to create any problems.

16. It is now apparent that there was no reason why the Appellant should not have been removed from this country to France of which he was a national. Thus the condition precedent to the use of the power to detain under section 23 could not in fact be met. Equally, the decision to deport and to remove could not be justified by reference to the provisions of section 22(1), but could be justified on the basis that the Appellant's presence in the United Kingdom was a risk to national security ? see the terms of the decisions to remove and to make a deportation order. Thus, as has now become clear even though the Respondent was not aware of the position at the time, certification under section 21 was unnecessary.

17. We have had to consider whether in those circumstances it should not have been issued. Mr. Williams recognised that there was no implication of the need to find that the Respondent was in any way to blame or guilty of some misconduct for section 25(2)(b) to bite. The Commission's task is to consider all the evidence put before it and to decide if the facts show that the certificate should not have been issued for whatever reason. Mr. Williams submits that section 21 is free standing. It is open to the Respondent to issue a certificate but not to detain and there is nothing in the wording of section 21 which suggests that the power is limited to cases where detention is to follow. The fact that a certificate is unnecessary does not mean that it should not have been issued.

18. There can be no doubt from the Act read as a whole together with the associated derogation that the purpose behind it was to enable non-nationals who were thought to be irremovable to be detained. That was why there was a derogation from Article 5(1)(f) of the European Convention on Human Rights and why the Act the three monthly review requirement in section 26. It is therefore wholly artificial to seek to divide the issue of the certificate from detention, albeit the scheme is to focus the appeal process on certification rather than detention. We recognise that a person certified may not be detained or may be granted bail, but that does not mean that the power to certify can be exercised whether or not there is to be a detention. The power is only needed if detention is to be at least an option and so certification must be limited to cases where detention could not otherwise be achieved. That is not the position here. The Appellant could have been removed and so there was no need to issue a certificate.

19. The logical result of that conclusion may be thought to be that the appeal has to be allowed. But it is not in our view as simple as that. In deciding whether a certificate should have been issued, we must see what information the Respondent had or ought reasonably to have been aware of. He believed that the Appellant was an Algerian national who could only be removed to Algeria and that removal was impossible for the reasons he gave. He was unaware that the

Appellant could return to France. His last contact with the immigration service was in January 2001 when he produced an Algerian passport. In his notice of appeal it was stated that he was Algerian. He never disclosed that he had obtained French nationality. In all the circumstances, we are satisfied that the Respondent neither knew nor ought to have known of the Appellant's French nationality. Accordingly, we cannot say that the certificate ought not to have been issued. It ought, however, to have been revoked once the ability to remove was appreciated, although that would not have affected the detention since it would then properly be pending removal. It follows that the appeal will not be allowed merely because it now transpires that the certificate was unnecessary.

20. That leaves the issue whether there was a reasonable suspicion or belief within the meaning of section 21(1). The approach we have to adopt (since we should consider it for the sake of completeness) is somewhat artificial, since following all counsels' submissions we have only to consider whether there was at the time of certification (since nothing material occurred so far as the Appellant was concerned while he was detained) a reasonable belief or suspicion which justified certification.

21. The material which led to the Appellant's arrest in May 1997 with 'Z' in our view quite clearly justified suspicion that he was involved with the GIA. His friendship and association with a number of extremists, some of whom had links with the GIA, could also be relied on to support that suspicion. The Appellant says that he was not involved in 'Z's activities and in any event regarded him as an immature na young man who was involved in fraudulent activities and whose attempts to send materials to Algeria (of which he was unaware) were done to try to help the inhabitants. His association with so-called extremists was either because they were friends, sharing a similar background or of the same nationality, or because he had met them through other friends. He had never done anything to assist any terrorist activities (and he was aware of none) in which they may have been involved. He had a van which he used for time to time to transport things and had on occasions transported items which were for relief for Chechnya. This was the sort of support provided by hundreds of Muslims who were concerned at what happening in Chechnya.

22. We appreciate that he would have defended the prosecution on the basis that he had not been involved at all in any terrorist activities (if any such were established). Nonetheless, the evidence against him raised a prima facie case and entirely justified a reasonable suspicion of involvement with the GIA and support for its terrorist activities. However, those activities were not within the terms of the derogation since there was then no real knowledge of Al Qa'eda as a distinct entity and the GIA was not itself linked to it. It follows that as at May 1997 there would have been no basis for a certificate being issued and there was nothing done by the Appellant while he was on bail to indicating any change. The question therefore must be whether his activities since March 2000, when the prosecution collapsed, seen in the light of what was known against him could establish the necessary suspicion and belief to justify certification. In this context, we note the assessment of April 2001 that "in recent years he has not been actively involved in Islamic extremists' activities". In reaching our decision, we will have to consider not only the open but also the closed material. The Appellant appears to have suspected that he was the subject of surveillance over much of the relevant period.

23. We are conscious of the need to be very careful not to assume guilt from association. There must be more than friendship or consorting with those who are believed to be involved in international terrorism to justify a reasonable suspicion that the Appellant is himself involved in those activities or is at least knowingly supporting or assisting them. We bear in mind Ms Peirce's concerns that what has happened here is an attempt to resurrect the prosecution with nothing to add from his activities since. Detention must be regarded as a last resort and so cannot be justified on the basis of association alone and in any event the guilt of the associates has never been established. This applies particularly, she submitted, to Abu Doha, but also to

Abu Qatada, whose preachings might well seem extreme to some but whose interpretation of the Koran is stimulating and for many regarded as consistent with modern life.

24. Nonetheless, continued association with those who are suspected of being involved in international terrorism with links to Al Qa'eda in the light of the reasonable suspicion that the Appellant was himself actively involved in terrorist activities for the GIA is a matter which can properly be taken into account. The GSPC, which broke away from the GIA, has links to Al Qa'eda and the Appellant has continued to associate with those who took to the GSPC rather than the GIA. We are in fact satisfied that not only was the Appellant actively involved initially with the GIA and then with the GSPC but also that he provided false documentation for their members and for the Mujahaddin in Chechnya as is alleged in the open statement. But we accept that his activities in 2000 and 2001 justify the use of the expression that he had been maintaining a low profile, and we make that observation having regard to both open and closed material. Nonetheless, a low profile does not mean that he is not properly to be regarded as an international terrorist within the meaning of section 21. An assessment has to be made of what he may do in the light of what he has done and the fact that he has shown willingness and the ability to give assistance and support in the past and continues the associations and to provide some help (eg the use of his van) is highly relevant.

25. We have not found this aspect of the Appellant's case at all easy. We have given full weight to all Ms Peirce's submissions which were so persuasively put before us but in the end have reached the view that, looking at the evidence as a whole, the decision to issue a certificate was not wrong. Accordingly, we would not have allowed the appeal on the facts.