Appeal no: SC/86/2009
Hearing Dates: 27th – 30th April 2010
Date of Judgment: 27th May 2010

SPECIAL IMMIGRATION APPEALS COMMISSION

OPEN JUDGMENT

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE WAUMSLEY
MR J LEDLIE CB OBE

(OL)

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellants:	Mr H Southey, QC Fisher Meredith Solicitors
For the Respondent:	Mr J Glasson Instructed by the Treasury Solicitor for the Secretary of State
Special Advocate:	Ms J Farbey & Mr J Hyam Instructed by the Special Advocates Support Office

The Hon. Mr Justice Mitting :

Background

1. The appellant is a 32 year old citizen of Morocco. On 5 October 2000, he was granted a multi-entry student visa to study English at Ealing, Hammersmith and West London College expiring on 5 October 2001. He arrived in the United Kingdom on 8 October 2000. On 23 October 2001, he submitted an out of time application for further leave to remain in the UK as a student – in order to continue studying English at the International College of English and Computing in Oxford Street, London. As he now admits, he never attended that college. It confirmed that he was not registered at the college in February 2002. His application for further leave to remain was refused on 5 March 2002. He was told that he should leave the UK without delay. Instead, at a time about which we cannot be confident, but which he puts at the end of the academic year 2000/01, he began to work in a variety of capacities. We will set out our findings on what he did below.

2. He was introduced to the woman whom he married in an Islamic ceremony on 3 January 2004, by her brother Issa, one week before Ramadan in 2003. She was of Somali origin, but arrived in the United Kingdom, aged 9, with another brother on 10 November 1995. Issa arrived on 28 November 1997. Both claimed asylum and were granted exceptional leave to remain and, subsequently, indefinite leave to remain. Both are now naturalised British citizens. OL and his wife (we will refer to her as his wife, despite the fact that no civil ceremony has been performed) now have 4 children: twin boys, H and A, now 5 and two daughters, S, now 3¾ and Ai, now 2½.

3. On 24 August 2007 OL was arrested, at the flat which he shared with his wife and children, as an illegal over-stayer. Removal directions were set for 29 August 2007. On the same day, he commenced judicial review proceedings, challenging the removal directions. They were withdrawn, pending determination of his application for permission to apply for judicial review. On 29 November 2007 he signed a disclaimer, stating that he wished to withdraw the judicial review proceedings and to return to Morocco. He did so on 1 December 2007. A consent order, formally withdrawing his judicial review claim, was signed on 12 December 2007.

4. On his return to Rabat, he was detained for two days by the Moroccan authorities and questioned. He was released on the afternoon of Monday 3 December. Thereafter, he has lived with his parents. He says that he has not worked since his return. His wife and children travelled to see him in Morocco on 9 December 2007 and stayed for about a month. They visited again in August 2008. He and his wife decided between them that the twins should remain with him in Morocco. They did so until July 2009. His wife and daughters visited him again in May 2009 and stayed until she and all four children left in July.

5. On 5 March 2009, OL applied at the British Consulate in Rabat for a visa to travel to the United Kingdom for settlement as the partner of a person present and settled in the UK, his wife. On 23 June 2009, the Secretary of State

decided that OL should be excluded from the UK on national security grounds. His application for a visa was, accordingly, refused on 25 June. On 22 July 2009 OL's solicitors filed an appeal to SIAC against that decision. The appeal was listed for hearing in the week commencing 26 April 2010. By a letter dated 19 March 2010, the Secretary of State withdrew the decision notified to OL on 25 June 2009 and substituted for it a fresh decision to refuse his application for a settlement visa under paragraphs 295A, 320(6) and 320(11) of the Immigration Rules. We discuss the detailed grounds of refusal below. By a notice dated 29 March 2010 OL's solicitors appealed against the fresh decision. Both parties have, sensibly, agreed that the time set aside for the hearing of the original appeal should be used to hear the new appeal.

National Security

6. Paragraph 320(6) of the Immigration Rules requires an entry clearance officer to refuse leave to enter where the Secretary of State has personally directed that the exclusion of a person from the United Kingdom is conducive to the public good. The Secretary of State's decision was made in the exercise of prerogative power. Accordingly, on a literal reading of section 82 of the Nationality, Immigration and Asylum Act 2002, there is no basis upon which OL can challenge that decision. It is, however, common ground, following the decision and reasoning of SIAC in paragraphs 5 and 6 of *EV v SSHD* CS/67/2008 7 April 2009 that SIAC should, to the extent possible, find the facts – as to past events, on balance of probabilities – and, giving due deference to the view of the Secretary of State that it is conducive to the public good to exclude OL from the United Kingdom, review his decision in the light of the facts which it finds. It is also common ground that we must make our own decision on OL's claim that his rights and those of his family under Article 8 ECHR would be infringed if the decision were to stand.

7. The Secretary of State's open case is encapsulated in three propositions: OL was closely associated with UK based Islamist extremists, he was involved in fraudulent financial activities, possibly to fund terrorist-related activity overseas; he has expressed Islamist extremist beliefs, in particular about participating in terrorist fighting abroad. The majority of the material upon which the first proposition is based and all of that upon which the third is based are set out in the closed material and have been considered in the closed hearing. Our detailed findings about them are set out in the closed judgment. Much, though not all, of the material supporting the second proposition was deployed in the open case. We are, accordingly, able to set out detailed conclusions about it in this judgment.

8. OL admits that he was a longstanding friend of Mohammed Azzaoui, a man arrested, but not charged, in 2005, for terrorist offences: he first met him a few weeks before his marriage and saw him 2 or 3 times a week. He said in paragraph 57 of his witness statement of 15 December 2009 that he had "recently" found out that Azzaoui had been questioned by anti-terrorism police for two days and was surprised to find out that he had been. He reiterated that account in his oral evidence. For reasons which are entirely set out in the closed judgment, we reject that account as untrue. We are satisfied, at least on balance of probabilities, that Azzaoui was an Islamist extremist,

that OL knew that he was and that Azzaoui was engaged in extensive financial fraud at least in part for terrorism-related purposes. That fraud included the running, as a director, of a company engaged in substantial MTIC fraud, East West Connections Ltd. OL's nominal involvement in that company, as company secretary, from 1st June 2004 to 2 February 2005 is the only proven link between him and it. We have been unable to reach any firm conclusion about what, if any, part he played in it during that time. He maintains that he did not agree to be appointed its secretary, signed no document to that effect and was unaware that his name had been entered on the Companies House register as secretary. There is no reliable direct evidence to refute his account; but the manner in which he dealt with this issue has assisted us to reach a firm conclusion about his general truthfulness. On the last day of the open hearing, he put in an email from Azzaoui dated 15 December 2009 (the same date as his own witness statement), addressed to his solicitor. We are satisfied that, in providing it, Azzaoui was not seeking to damage OL's case, but to assist it. He said that before 1 June 2004, OL approached him about any jobs or employers he might know. He said that the position of secretary in East West Connections – a company then dormant – might be available in the future. OL gave him his details. When the previous company secretary, Jason Waldron resigned, he passed OL's details to Companies House. East West Connections did not start trading until late December 2004, so OL never did any work for the company for almost six months. Once it started to trade, he needed OL's National Insurance number, but OL did not have one and so had to resign. A Muslim woman, Zainab El Biati, approached him (Azzaoui) in the Ladbroke Grove area one evening. She had nowhere to live and no job and was separating from her husband. He took her details and mentioned her situation to OL, asking him if she could use his place at a "care of" address. OL, who had not met her, agreed and then resigned as secretary to be replaced by her. He sold the company on 12 July 2005. OL never played any part in the running of the company. Azzaoui's account of the company's trading activity – which gives the impression that it was substantial and genuine – is false and his explanation of the appointments and resignations of its secretaries is absurd. It was run from a run-down flat and had only one purpose – participation in an MTIC fraud. That fraud would have required banking facilities, though not necessarily in the United Kingdom, so that it is possible that Azzaoui sought and obtained OL's consent to his appointment as company secretary; but nothing turns on the issue and, as we have stated, we are unable to form any firm conclusion about it. What was more revealing was OL's answers to Mr Glasson, when recalled to deal with Azzaoui's email. He said that he had called a lot of people to ask who had Azzaoui's telephone number (before he called him to ask what had happened). When Mr Glasson asked whom he had called, he fenced. First, he said that he did not need to know their names; then that one was Yussef and one Mustapha; then that he did not know their surnames; then that Yussef was (Yussef) Boumenar. He then said that he did not say that and that there was more than one Moroccan named Yussef. The purpose of this prevarication can only be inferred. We can discern two motives: to attempt to show that he did not know Azzaoui's current telephone number and whereabouts; and, after a false start, to put distance between Yussef Boumenar, the estranged husband of Yasmin Boumenar (who offered to support him financially at the rate of £50 per week

if he were permitted to return) and Azzaoui. It was an unimpressive performance.

9. OL says that he supported himself and his family by market trading and by buying and selling international telephone cards. He accepts that he did not have permission to work and paid no tax or National Insurance contributions. He also accepts that, for much of the time, his wife claimed income support as a single parent whilst he was living with her. When he was detained on 24 August 2007, and his home and belongings searched, £3000 in cash and a number of documents in the names of other men were seized. The documents included two Barclay's chequebooks, a Barclay's debit card, a National Insurance card and correspondence in the name of Sofian Benaouda; an expired freedom pass in the name of El Biati; and an NTL account statement addressed to H Assad. A variety of explanations has been given for the cash and documents. He told the police that the cash was his and had been earned by selling phone cards. He said in paragraph 36 of his witness statement that the money had come from his wife's Post Office savings account and was intended to be used to fund his return to Morocco and to make an entry clearance application from there. He reiterated that account in his oral evidence adding, bizarrely, that because of ill-health, his wife drew out the money in stages. He told the police that he had bought the Sofian Benaouda documents and cards from their genuine owner in 2002 for £2000. In paragraph 37 of his witness statement, he confirmed this account, without reference to the date of purchase, and said that he had paid Mr Benaouda with money saved up from his "wages". In his oral evidence, he said that he had bought them in 2004. He had undoubtedly used the name when stopped by the police while travelling in a van on 25 January 2007. The police noted that a fixed penalty notice had been seized. The legal clerk then acting for him at interview noted in a handwritten note, whose authenticity and accuracy we accept, that the "FPN" was not a fixed penalty notice, but a "stop slip". We do not know exactly what a "stop slip" is, but accept that it could have been issued to OL as a passenger in the van (it is very unlikely that a fixed penalty notice would have been issued to him as a passenger). He said that he gave the police the name Sofian Benaouda because he panicked. In paragraph 40 of his witness statement, reiterated in his oral evidence, he explained that the NTL statement was addressed to H Assad because he was worried about being arrested by immigration officials – i.e. to disguise his identity for immigration purposes. He was unable to explain why, if that was so, other bills, including a BT account dated 13 March 2007 was addressed to him in his real name.

10. Save that we accept that OL was trading in the black economy, we do not accept that he has told us the truth about these matters. In the context of a family surviving on state benefits and what could be picked up by low-level market trading, the cash sum seized on 24 August 2007 and that which he claims he paid for the Sofian Benaouda documents - £2000 – are substantial. We are satisfied, on balance of probabilities, and on the closed material, that they were wholly or in substantial part the product of fraud. We are satisfied to the same standard that OL made use of the identities of others, including Sofian Benaouda and H Assad for fraudulent purposes. We reject OL's explanation of what he intended to do with the Sofian Benaouda documents –

to give them back to him on his return at some unspecified future date and demand the return of his money – as a lie. These conclusions, about the open material, are consistent with the closed material and our overall finding about OL's economic activity while in the United Kingdom: that he was extensively involved in financial fraud.

11. Our findings of fact in the open and closed judgments lead us to conclude that at the time of his departure from the United Kingdom in December 2007, it was conducive to the public good, for reasons of national security, that he should be excluded from the United Kingdom.

12. The Security Service's open assessment is that, if OL were permitted to return to the United Kingdom, he would re-engage in what is described as "Islamist extremist related activity". This assessment is based on his past conduct, about which we have stated our open findings above, on the risk that he personally would resume those activities and assist or encourage others, notably Azzaoui to do so as well. The approach which we must take to this issue was set out by Lord Slynn and Lord Hoffmann in *SSHD v Rehman* [2003] 1 AC 153:

> "The Secretary of State, in deciding whether it is conducive to the public good that a person should be deported, is entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned. He is entitled to have regard to precautionary and preventative principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in this country. In doing so he is not merely finding facts but forming an executive judgment or assessment. There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all material before him is proved, and his conclusion is justified, to a "high civil degree of probability". Establishing a degree of probability does not seem relevant to the reaching of a conclusion on whether there should be a deportation for the public good…
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> 25. In conclusion, even though the Commission has powers of review both fact and of the exercise of the discretion, the Commission must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities…".

Per Lord Slynn at p.184 a-f.

> "But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking

> each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability and prejudice to national security but also the importance of the security interests at stake and the serious consequences of deportation for the deportee."

Per Lord Hoffmann at p. 194 c-e.

Identical principles apply in an exclusion case, such as this, as in a deportation case, such as *Rehman*.

13. On his return to Morocco, OL states that he was detained by the Moroccan authorities for two days and questioned intensively by them; but that since then, he has had no further contact with them. We accept that part of his evidence. We have no reason to believe or suspect that, since his return, he has done anything which would be of adverse interest to them. We accept that his application for leave to enter and this appeal are motivated in substantial part by his wish to be reunited with his wife and children in the United Kingdom – a circumstance which would be of benefit to them and to him, as we set out below. We also accept that the risk that he would engage in terrorism-related activity if he were to return to the United Kingdom is not high. Nevertheless, for the reasons set out in this judgment and in the closed judgment, we are satisfied that it is a real risk. In reaching that evaluative judgment, we have relied principally on three factors: our findings as to past fact, which we have made on balance of probabilities; the assessment of the Security Service; and our own lack of trust in OL. As we have explained above, we are satisfied that he has not told the substantial truth about past events and has withheld information from us about them. We have no real confidence in his promise of future good conduct.

Article 8 and related issues

14. We approach these issues on the following principles: we must answer the five questions posed by Lord Bingham in *Razgar* [2004] 2 AC 368 paragraph 17; we must do so by reference to the circumstances of the whole family, not just OL; we must treat the best interests of the children as a principal consideration; and, in answering Lord Bingham's fifth question, we must consider whether or not it would be reasonable to expect OL's wife and children to enjoy family life with him in Morocco rather than in the United Kingdom. We do not understand any of these principles to be controversial.

15. It is common ground that the answer to Lord Bingham's first three questions is affirmative. If it were only the interests of OL personally which were in issue, our answers to Lord Bingham's fourth and fifth questions would also, unhesitatingly, be affirmative. The maintenance of national security including the protection of the public, in the United Kingdom and elsewhere, from threats to public safety is an interest of the highest concern, expressly recognised in Article 8(2) ECHR. The exclusion of a Moroccan citizen, who has no right to enter the United Kingdom, would plainly be justified even

where the risk which he posed to those interests was small. When the interests of a wife and children are involved, there is, as Lord Bingham observed in paragraph 12 of *EB (Kosovo) v SSHD* [2009] 1 AC 1159, no alternative to making a careful and informed evaluation of the facts of the case. In making that evaluation, we must, and will, take into account all of the relevant factors, as the Strasbourg Court did in the seminal case of *Boultif v Switzerland* [2001] 33 EHRR 50 paragraph 48. As in most cases, the factors which we must evaluate point in different directions.

16. Those which support exclusion are: the interests of national security, already referred to; the fact that when OL married his wife, he had no lawful right to be or remain in the United Kingdom and had attempted to use deception to remain here; the family support for OL's family available in Morocco – his parents and two brothers, who have three young children between them, live there and have met OL's wife; the fact that OL and all four children have spent over 4 months in Morocco since OL's departure; the fact that the twin boys lived with their father in Morocco from August 2008 until July 2009; the young age of the children and their apparently limited integration into society in the United Kingdom – of which an example is the comment by the early years foundation stage coordinator at the Globe Academy that, at age 5, the twins are making good progress "towards their acquisition of English"; the poor circumstances in which OL's wife and children now live, as described by Jane McClelland in her report dated 6 April 2010, as being in "a deprived area of a deprived borough, where racism is a fact of life".

17. The factors which tend against exclusion are: the evidence of OL's wife, which we have no reason to disbelieve, that she did not know that OL had no lawful right to remain in the United Kingdom when she married him; the fact that she is a refugee and may, therefore, be more affected by a second relocation to Morocco than would a woman born and raised since birth in a secure family in the United Kingdom; the British citizenship of OL's wife and children; the enhanced level of educational, health and social provision for the children in the United Kingdom, by comparison with that which would be available in Morocco – we accept the thrust of paragraphs 38-53 of Professor Joffé's report of 2 April 2010; OL's wife's declared reluctance to resettle in Morocco.

18. One factor of great importance is neutral: both Jane McClelland and Dr Saleh, in their reports, state, incontrovertibly, that it is imperative that the family should be reunited; but it does not follow that reunion must take place in the United Kingdom. Most of the benefits which would flow from it would occur in Morocco too.

19. The issue in this case is more finely balanced than in most cases in which SIAC has found that an appellant, with a family including young children, poses a risk to national security. In other cases SIAC has found that the nature of the risk was such that permanent separation of a husband and father from his family was justified. It is not necessary to go that far in this case. If OL and his wife choose to do so, they can live, with their children, as a family, in Morocco. Given the risk which he does pose to national security and balancing the other factors identified above, it is not unreasonable to expect them to do

so. There are no other effective means of controlling that risk. We are satisfied that OL's exclusion is a proportionate means of doing so.

Other grounds of refusal

20. Given the conclusions expressed above, we can deal with these summarily. The grounds of refusal under paragraph 320(11) of the Immigration Rules are fully made out, but would be subject to Article 8 considerations in any event. It is unnecessary to set out what the balancing exercise would have produced but for our conclusions on national security. But for the offer of financial support by OL's wife's brother, Issa and Yasmin Boumenar, both of whom we accept to have been truthful witnesses, we would have concluded that refusal under paragraph 295A(vi) of the Immigration Rules was justified: OL has not worked in Morocco and had never been able to maintain himself lawfully in the United Kingdom. Their evidence does, however, satisfy us that, with their assistance, he would have been able to maintain himself without recourse to public funds.

21. In the light of our findings on the national security issue, it is unnecessary for us to answer the difficult questions, thoughtfully addressed in the written and oral submissions of Mr Southey QC about the substantive and procedural difficulties which would have arisen if we had concluded that the only risk was of the resumption by OL of fraudulent criminal activity.

Conclusion

22. For the reasons given, we dismiss this appeal.