



7 March 2012

PRESS SUMMARY

W (Algeria) (FC) and BB (Algeria) (FC) (Appellants) v Secretary of State for the Home Department (Respondent)

PP (Algeria) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)

Z (Algeria) (FC), G (Algeria) (FC), U (Algeria) (FC) and Y (Algeria) (FC) (Appellants) v Secretary of State for the Home Department (Respondent) [2012] UKSC 8

On appeal from [2010] EWCA Civ 898

JUSTICES: Lord Phillips (President); Lord Brown; Lord Kerr; Lord Dyson; Lord Wilson

BACKGROUND TO THE APPEALS

The appellants, all Algerian nationals, were suspected terrorists whom the Secretary of State proposed to deport to Algeria. It was common ground that Algeria was a country where torture was systematically practised by state officials and no state official had ever been prosecuted for it. The Secretary of State obtained assurances from the Algerian Government that the appellants' rights not to be tortured or subjected to other ill-treatment would be respected on return to Algeria.

The Special Immigration Appeals Commission Act 1997 established an appeal system which allows where necessary for 'closed material procedures' and the appointment of special advocates. If the Secretary of State wishes to adduce evidence which, for reasons of national security or other sufficient public interest reasons, cannot safely be communicated to the other party, SIAC's rules and procedures provide for this to be done.

In this case, however, it was one of the appellants who wished to adduce evidence from a witness ("W"), who had inside knowledge of the position in Algeria and asserted that, notwithstanding the Algerian Government's official assurances, those in the appellants' positions were in fact likely to be subjected on return to torture or other ill-treatment. W was prepared to give evidence in the appellants' appeals to SIAC only on one unalterable condition: that his identity and evidence would by order remain absolutely and irrevocably confidential to SIAC and the parties to the appeals. W was concerned that the Secretary of State might otherwise seek to communicate his evidence to the Algerian authorities, if only to assess its veracity and reliability, and that her doing so would place him and/or his family in peril. The Secretary of State had two main objections to such an order being made. First, she would be unable to participate effectively in the conduct of the appeals before SIAC, being unable to test either the validity of the reasons asserted by W in support of his claimed need for confidentiality or the substance of W's evidence itself. Secondly, the Secretary of State may find herself in possession of information pointing to the existence of a terrorist threat abroad or some other risk to national security, yet, bound by SIAC's order, unable to alert the foreign state to the risk. This could gravely imperil future diplomatic relations with foreign states.

The question in the appeals therefore was whether it was open to SIAC to make an order for an absolute and irreversible guarantee of total confidentiality in respect of W's identity and evidence before the same were disclosed to the Secretary of State (in circumstances where it would nevertheless remain open to the Secretary of State to challenge the admissibility or weight of that evidence before SIAC in its determination of the substantive appeals).

JUDGMENT

The Supreme Court unanimously allows the appeals. Lord Brown gives the leading judgment of the Court; Lord Dyson gives a concurring judgment.

REASONS FOR THE JUDGMENT

The fundamental objection of the Secretary of State to the proposed order, based on her concerns about being obliged to withhold vital information relating to national security from a foreign state, thereby imperilling future diplomatic relations, is unpersuasive [11]-[13]. It must surely be a substantial defence to any diplomatic complaint by a foreign state that the Secretary of State is subject to a final and absolute court order prohibiting her from acting differently [14]. A number of recent international instruments are replete with statements urging states to ensure that witnesses are protected against ill-treatment or intimidation, particularly in a human rights context [15].

The imperative need here is to maximise SIAC's chances of arriving at the correct decision on the issue before them concerning the safety of the appellants on return to Algeria and, therefore, for SIAC to obtain all such evidence as may contribute to this task [18]. Accordingly, it is open to SIAC to make absolute and irreversible ex parte orders of the kind sought in this case and on occasion it may be appropriate to do so [19].

The power to make such orders should however be used most sparingly [19]. Before making one of the proposed ex parte orders, SIAC should require the very fullest disclosure from the applicant ("A") of (a) the proposed evidence from A's proposed witness ("W"), (b) the particular circumstances in which W claims to fear reprisals, and (c) how A and his legal advisers came to hear about W's proposed evidence and what if any steps they have taken to encourage W to give that evidence in the usual way subject to the usual steps generally taken to safeguard witnesses in such circumstances (e.g. anonymity orders and hearings in private) [20]. SIAC should only then, in the interests of justice, grant such an order if it (1) is satisfied that a witness can give evidence which appears to be capable of belief and which could be decisive or at least highly material on the issue of safety of return and (2) has no reason to doubt that the witness genuinely and reasonably fears that he and/or others close to him would face reprisals if his identity and the evidence that he is willing to give were disclosed to the relevant foreign state [34].

Notwithstanding the absolute and irreversible nature of the order, it should in addition be open to the Secretary of State, upon such order being made, to try to persuade SIAC either to seek from A and W a sufficient waiver of the ex parte order forbidding any further communication of the information, or, if such waiver proves unobtainable, to exclude or regard with additional scepticism the evidence submitted [21].

The Court, in permitting the making of such ex parte orders in the circumstances of this case, has in no way been influenced by the circumstances in which the Secretary of State is on occasion entitled to adduce evidence in closed proceedings divulged only to a special advocate and not to A. The scope of the orders sought here should not be regarded as 'levelling the playing field' between the parties: the Secretary of State in cases before SIAC acts in the wider public interest and not as an interested party [22].

The same considerations and the same result would follow if the case – engaging as it does here the rights of the appellants under article 3 of the ECHR – raised a question under article 2 of the same. However, if the ground on which an appellant is resisting deportation is an alleged risk of breach of some other article of the ECHR (e.g. article 8), the balance will almost certainly be struck the other way. In those circumstances it would be inappropriate to make an ex parte order to protect the confidentiality of a witness [38].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html