Appeal no: SC/70/2008
Hearing Date: 13th - 14th October 2009
Date of Judgment: 30th October 2009

SPECIAL IMMIGRATION APPEALS COMMISSION

JUDGMENT

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE R CHALKLEY
MR S PARKER

(IR)

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellants: Mr H Southey
Birnberg Peirce & Partners

For the Respondent: Mr A O'Connor & Ms C Owen
Instructed by the Treasury Solicitor for the Secretary of State

Special Advocate: Mr R Clayton QC & Ms M Plimmer
Instructed by the Special Advocates Support Office

MR JUSTICE MITTING :

Background

1. IR is a twenty eight year old single Muslim Tamil and a citizen of Sri Lanka. He arrived in the United Kingdom on 24th February 2001 on a student visa, valid until 31st January 2003. Thereafter he was granted further leave to remain as a student until 29th February 2008. He studied, successfully, an English language and webmaster technology course at the British Institute of Technology. In July 2007 he obtained a BSc in technology and e-commerce at the same institute. While a student, he undertook permitted part time work for Asda plc. When he graduated, he worked as a manager on the graduate programme for Asda. He applied for and, belatedly, on 8th July 2008, was granted leave to remain under the International Graduate Scheme until 8th July 2009. In May 2008, he obtained permanent employment as a graduate network support analyst with Wordbank Limited at a salary £23,000 per year. He has other management and computing qualifications. Two of those who have employed him have provided witness statements in support of his appeal. Dorothy Wright, the Departmental IT Support Manager at the London School of Hygiene and Tropical Medicine, at which he did a one year student work experience placement, describes him as diligent, hardworking, honest, reliable and popular with all of those for whom her department provided a service. Lydia Stone, assistant Director for technical and linguistic services at Wordbank states that he was a highly motivated, dedicated and skilled employee in a crucial job which had been difficult to fill. He was "a great team player with sound judgement", who integrated well with other Wordbank employees of a variety of backgrounds. He describes himself as having good

working relationships and friendships with both Muslims and non- Muslims in the United Kingdom. He says that he deprecates the use of violence for political or religious ends and believes that those who use it cannot justify their actions under Islam.

2. IR has made periodic trips back to Sri Lanka of a few weeks each in length. The last trip was from 15th July until 23rd August 2007, when he returned without incident. On 8th October 2008 he flew from London Heathrow to Sri Lanka, arriving at 1pm on 9th October 2008. On arrival, he was told by an official of the British High Commission that his leave to remain in the United Kingdom had been cancelled on conducive grounds. He appealed to the AIT on 3rd November 2008. On 2nd December 2008 the Secretary of State certified under section 97(1) Nationality Immigration and Asylum Act 2002 that the decision was taken on the ground that IR's exclusion from the United Kingdom was in the interests of national security. By virtue of section 99 of the 2002 Act his appeal lapsed. Section 2(1) of the Special Immigration Appeals Commission Act 1997 gave him the right of appeal to SIAC, which he exercised by a notice filed on 18th December 2008.

Law and procedure

3. It is common ground that we should apply the principles explained in paragraphs 5 and 6 of *EV v SSHD* SC/67/2008 7th April 2009. We do so.

4. Mr Southey accepts that we will apply the principles explained in paragraphs 11 to 20 in *OO v SSHD* SC/51/2006 27th June 2008 and paragraph 14 of *ZZ v SSHD* SC/63/2007 30th July 2008. He reserves the right to argue elsewhere that that reasoning is legally erroneous. Subject to that, he accepts that Article

6 ECHR does not apply to these proceedings. He does, however, make one further procedural submission: that Article 8, like Article 2, contains an implied procedural element which, as a result of an observation by the Strasbourg Court in paragraph 46 of *CG v Bulgaria* 1365/07 24th July 2008, requires that some disclosure of the Secretary of State's case must be given to IR, even though Article 6 does not apply.

5. An essential foundation of his contention is that Article 8 is "engaged". It is common ground that IR has never enjoyed family life in the United Kingdom. He is a single man. His parents live in Sri Lanka and his brothers, like him have travelled abroad for education and work. We are, nevertheless, satisfied that he has established a private life in the United Kingdom. Apart from short trips home, he resided lawfully in the United Kingdom for 7 ½ years. Although his witness statement does not set out in any detail the personal and other relationships which he has established as a student and employee in the United Kingdom, there is undisputed evidence from Dorothy Wright, who supervised his work experience placement for a year from July 2005 that she believes that he made a friend with another placement student and participated in outings with other students. Unsurprisingly, given his short time at Wordbank, Lydia Stone is unable to say more than that he definitely had good working relationships with his team. This may appear to a slender basis upon which to make findings about his private life in the United Kingdom. It is the sort of issue upon which he could have given evidence by television link, probably uncontroversially, if the facility had been available. He was willing to make use of it. The fact that it could not be established was not his fault or responsibility. We consider it would be unjust not to draw the reasonable

inference from the fact that, while aged twenty to twenty seven, he lived for 7 ½ years continuously in the United Kingdom, he must have established social and other ties sufficient to establish a "private life" as understood by the Strasbourg Court in paragraph 56 of *Uner v The Netherlands* [2007] 45 EHRR 14. Interference with that right by the exclusion of IR from the United Kingdom for what is likely to be a long period and may well be indefinite is, in our judgment, a sufficiently serious interference with the right to "engage" Article 8.

6. That conclusion requires us to consider whether or not the interference is justified. We will do so. Mr Southey's purpose in advancing the argument is, however, not principally directed at that issue. His purpose is procedural: to achieve under Article 8 something at least of the disclosure that would be required (subject to the Secretary of State's election not to rely on undisclosed material) by Article 6. His submission is founded on paragraph 46 of CG,

> "Against this background, the court finds it particularly striking that the decision to expel the first applicant made no mention of the factual grounds on which it was made. It simply cited the applicable legal provisions and stated that he "presented a serious threat to national security"; this conclusion was based on unspecified information contained in a secret internal document…lacking even outline knowledge of the facts which had served as a basis for this assessment, the first applicant was not able to present his case adequately in the ensuing appeal to the Ministry of Internal Affairs and in the judicial review proceedings".

In paragraph 49, the court concluded "in view of the foregoing considerations" (i.e. including those set out in paragraph 46) "the court concludes that despite having the formal possibility of seeking judicial review of the decision to

expel him, the first applicant did not enjoy the minimum degree of protection against arbitrariness on the part of the authorities."

7. CG was alleged to be a drug trafficker. Bulgarian law provided for the expulsion of an alien if his presence in the country puts national security or public order in serious jeopardy. The order for expulsion was made administratively. Until *Al-Nashif v Bulgaria* 50963/99 20th June 2002, an expelled alien had only an administrative right of appeal. Judicial review was barred by statute. Following that decision, the Regional Court assumed jurisdiction to conduct a judicial review of the decision; but it was very limited in scope. As far as can be discerned from the report, the court was informed that CG had been expelled on the basis of information gathered by the use of secret surveillance measures, but was not shown and did not examine the product of those measures. It simply observed "the nature of the source of information which led to the issuing of the impuned order makes it impossible to adduce further evidence relating to the facts". It did not conduct a review of the impact of the order on CG's family life, let alone reach any decision about its proportionality. CG's complaint was that the court had not properly scrutinized the decision and examined its proportionality. The primary material from the surveillance had not been made available to the courts, which had surrendered their function of reviewing the exercise of the executive discretion: see paragraph 33. The Strasbourg Court made a number of criticisms of the law applied and approach adopted by the Bulgarian courts. First, "it can hardly be said, on any reasonable definition of the term, that the acts alleged against the first applicant… were capable of impinging on the national security of Bulgaria or could serve as a sound factual basis for the

conclusion that, if not expelled, he would present a national security risk in the future" (paragraph 43) accordingly, the court did not subject the executive's assertion that he presented such a risk to meaningful scrutiny (paragraph 44). An expulsion designed to forestall "run of the mill criminal activities" may have to be reviewed in proceedings providing a higher degree of protection of the individual than actions taken in the interests of national security (paragraph 45). It was against that background that the court found it "particularly striking" that no mention of the factual grounds for the decision was made (paragraph 46). The Bulgarian Court did not examine the specific facts serving as the basis for the assessment and so confined itself to a "purely formal examination" of the decision to expel (paragraph 47). In those circumstances, it is unsurprising that the Strasbourg Court concluded that the applicant did not enjoy the minimum degree of protection against arbitrariness on the part of the authorities so that the interference with his family life was not in accordance with "a law" (paragraph 49).

8. When properly analysed the Strasbourg Court's reasoning provides no support for the proposition that, in a case in which national security is truly in issue and the factual basis for the decision to exclude is fully scrutinised by the domestic court, the rights under Article 8 of the individual excluded will be infringed unless he is provided with an undefined minimum of information about the facts grounding the decision to exclude. The Strasbourg Court's procedural requirements in a true national security case are those set out in paragraph 57 of its judgment, cited in paragraph 14 of ZZ. SIAC's procedures satisfy that test and have done so in this appeal.

Facts

9. IR has been told very little about the national security case against him. Its essence, stated in the most general terms, is set out in paragraph 6 and 7 of the second open statement:

> "The Security Service accepts that (IR) was not involved in any terrorism-related activity which could have directly harmed members of the public in the UK or overseas. However, the Security Service assesses that (IR) may have been involved in the facilitation of terrorism-related activity whilst based in the UK, of which logistical support could be considered a part.
>
> The Security Service accepts that such involvement in terrorism-related activity would be unlikely to have an immediate impact on members of the public in the UK and overseas. However, the Security Service assesses that left un-checked (IR's) facilitation of terrorism-related activity could contribute to the effective threat of action in the UK and may increase the likelihood of successful attacks."

These statements can be summarised by reference to a phrase used at another time and in a different context: IR is a fellow traveller with active Islamist extremists who may be willing to assist them. For the reasons which are wholly set out in the closed judgment, we are satisfied that that assessment is justified. We have reached the conclusion that he is a fellow traveller on balance of probabilities. We are also satisfied, for reasons wholly set out in the closed judgment, that he does not truly espouse the moderate views stated in his witness statement but does, in the words of paragraph 5 of the first open statement "adhere to an Islamist extremist agenda".

10. We are also satisfied that the decision to exclude is proportionate. It is sanctioned by law. The interest sought to be protected – the national security of the United Kingdom and the public security of its inhabitants – is of the highest importance. The measure of exclusion is calculated to protect and

enhance those interests and will do so. It is no more than is reasonably required to achieve that end. Mr Southey did not suggest that any alternative measure, such as re-admission and the imposition of a control order or extensive covert surveillance could effectively do so. We are satisfied that it could not. Against that, IR can re-establish a private life in Sri Lanka or elsewhere. No family relationship has been permanently disrupted. The balance lies heavily in favour of upholding the interests of national security.

11. Mr Southey also submitted that because a file or files might be held by UK authorities upon IR, his rights under Article 8 would also be "engaged". Whether or not that proposition is well founded, SIAC has no jurisdiction to determine it. If it had, it would have made no difference to the outcome.

12. For those reasons and for the reasons set out in the closed judgment, we uphold the decision to cancel leave to enter and dismiss this appeal.