Appeal no: SN/7/2014 & SN/8/2014
Hearing Date: 28, 29 & 30 October 2015
Date of Judgment: 26 November 2015

SPECIAL IMMIGRATION APPEALS COMMISSION

OPEN JUDGMENT

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
UPPER TRIBUNAL JUDGE PERKINS
SIR STEPHEN LANDER

UMAR FAROOQ & RIZWAN SHARIF

APPLICANTS

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellants:	MS STEPHANIE HARRISON QC & MR EDWARD GRIEVES (instructed by Birnberg Peirce & Partners)
For the Respondent:	MR J HALL QC & MS C PALMER (instructed by the Government Legal Department)
Special Advocate:	MR A McCULLOUGH QC & MR Z AHMAD (instructed by the Special Advocates Support Office)

MR JUSTICE MITTING :

1. Umar Farooq ("Farooq") is a 32 year old national of Pakistan. He grew up in his family's home in Karachi and was educated to diploma level. He and Rizwan Sharif ("Sharif") were boyhood friends. He travelled to the UK on a student visa in the summer of 2005. He went to live in London with a friend of his cousin. There he met Shoaib Khan. At the end of 2006 or the beginning of 2007 both moved to Liverpool and began to share a house, together and with others, 47 Highgate Street. In London and in Liverpool he enrolled for courses in various institutions of doubtful repute. As he put it in evidence, his studies were "not very successful". He worked more than he studied.

2. Rizwan Sharif ("Sharif") is a 35 year old national of Pakistan. He, too, was brought up in Karachi. His education concluded with a degree course in commerce at Government City College, a postgraduate diploma and then a master's degree both in economics and finance at the University of Karachi. He travelled to the United Kingdom in July 2008 on a study visa. He went immediately to live with Farooq at 47 Highgate Street, Liverpool. He did not enrol on any course until February 2009 when he was accepted to study for an Association for Certified Chartered Accountants qualification at Kaplan College, beginning on 2 or 3 March 2009. There he met Shoaib for the first time and shared a room with him. The three of them had a common interest in cricket, which they played frequently. All three worked, Farooq and Shoaib as security guards and Sharif in a sports shop and as a security guard.

3. Both Farooq and Sharif soon got to know the occupants of 51 Cedar Grove, Liverpool, Abdul Wahab Khan ("Wahab"), Ahmad Faraz Khan ("Faraz") and Mohammed Ramzan ("Ramzan"). Both met Abid Naseer at a party on the evening of

23 March 2009 at 51 Cedar Grove. In judgments handed down on 18 May 2010 SIAC concluded that Abid Naseer was an Al Qaeda operative who had notified an Al Qaeda associate, by email, on 3 April 2009 of his intention to carry out an attack intended to cause mass casualties between 15 and 20 April 2009 and that Wahab, Faraz and Ramzan were knowing parties to his declared intention. Nothing that we have heard, read or considered in these proceedings has caused us to doubt those conclusions. SIAC also concluded that Shoaib was not a party to their intention and that the reasonable grounds to suspect that he had been had been largely dispelled. Neither the Secretary of State nor we have good reason to question that conclusion; and, despite an apparent retreat from that concession in documents filed in these proceedings, the position of the Secretary of State and of the Security Service remains as stated. Both accept that attendance at the party at 51 Cedar Grove on 23 March 2009 and association with Shoaib are not, of themselves, grounds for reasonable suspicion about the activities of Farooq and Sharif.

4. On 8 April 2009 Farooq and Sharif and nine others were arrested by police in Manchester and Liverpool under Terrorism Act 2006 powers. They were interviewed by police but, on the advice of their solicitor, made no comment in response to police questions. They were released without charge on 18 April 2009 but immediately detained under immigration powers. On 21 April 2009 the Secretary of State served a notice of decision to make a deportation order. They did not file an appeal against that decision to SIAC. On 3 September 2009 they left the United Kingdom. On 18 December 2009 the Secretary of State notified each of them that she had personally directed that they be excluded from the United Kingdom on the ground that their presence would not be conducive to the public good. They did not then seek to

challenge that decision by the only route then available to them, a claim for judicial review.

5. On 1 August 2011 the Applicants' solicitors in these proceedings invited the Secretary of State to reconsider her decision. After an exchange of correspondence, a claim for judicial review filed on 9 August 2012 and a consent order made on 4 October 2012, the Secretary of State reviewed her direction of 18 December 2009. She did so on the basis of a letter of recommendation dated 22 November 2012 submitted by the Security Service. By a letter dated 13 December 2012 she stated her intention to maintain that direction. A further claim for judicial review was filed on 11 March 2013. The claim was stayed by consent after the Secretary of State had certified on 24 February 2014 that the direction had been made wholly or partly in reliance on information which in her opinion should not be made public in the interests of national security. By notices dated respectively 21 and 10 March 2014 Farooq and Sharif applied to SIAC to set aside the direction. This is the open judgment on both applications.

6. There is a fundamental difference between the appeal determined by SIAC on 18 May 2010 and this application. The former was a decision on the merits: was it conducive to the public good for reasons of national security to deport or exclude the individual concerned? SIAC was the fact-finder and was entitled to, and did, reach its own conclusion about that issue. In these proceedings, SIAC is not the primary fact-finder. Nor is it the body which decides the underlying question, whether or not it is conducive to the public good that Farooq and Sharif should be excluded. Our task is set out in Section 2C(3) and (4) Special Immigration Appeals Commission Act 1997:

> "(3) In determining whether the direction should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings.
>
> (4) If the Commission decides that the direction should be set aside, it may make any such order, or give any such relief, as may be made or given in judicial review proceedings."

Our task is to judge the lawfulness and rationality of the direction of the Secretary of State. Our inquiry into the facts is limited to determining whether there was a proper factual basis for the direction. It is rightly common ground that if there was not, we can and, subject to the recently inserted Section 31(2A) Senior Courts Act 1981, should, quash it.

7. The application of Section 31(2A) to these proceedings raises difficult questions of statutory construction, both of the new sub-section itself and of the exclusion of its application to a "Claim Form" filed before 13 April 2015 by paragraph 6 of schedule 2 to the Criminal Justice and Courts Act 2015 (Commencement No. 1 Saving and Transitional Provision) Order 2015. It is unnecessary for us to decide these questions because Mr Hall QC has conceded, for reasons explained in the closed judgment, that if we would have quashed the direction, but for the existence of Section 31(2A) we should remit it to the Secretary of State to make a fresh decision. It therefore follows that unless, as Miss Harrison QC contends, we are satisfied that the direction should simply be quashed, with no opportunity to the Secretary of State to make a fresh decision, the outcome of these applications, if successful, will be that the direction is quashed and the matter remitted to the Secretary of State to make a fresh decision.

8. For reasons explained in the closed judgment we have decided to quash the Secretary of State's direction in both cases and will remit the matter to her to reach a fresh decision. In this open judgment, we can explain the nature of the reasons for that decision, but can say little about the underlying facts.

9. Where the Secretary of State intends to oppose an application for review of a direction to exclude Rule 10B of the SIAC Procedure Rules 2003 requires her to file with the Commission

> "a) a statement of the evidence on which (s)he relies in opposition to the application for review and
>
> b) material relevant to the issues in the application for review."

The obligation imposed upon her in the case of an appeal by Section 10A(2)(a) to "make a reasonable search for exculpatory material" does not apply. The rules do not, however, relieve her of the obligation to inform herself of the information relevant to the decision. In all cases, "the question for the Court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?" per Lord Diplock in *Secretary of State for Education and Science v Thameside Metropolitan Borough Council* [1977] AC 1014 1065B. In almost every case, that will require officials or officers to provide to her the relevant information which will permit her to answer the right question correctly. Thus, by way of example, in challenges to decisions of the planning committee of a local planning authority, the Court routinely examines the officers' submissions to the committee to ensure that they have set out fully and accurately all of the relevant information upon which the committee is invited to make its decision. In the field of counter-terrorism, a failure to do so has resulted in the quashing of a control order: *Secretary of State for the Home Department v AT and AW* [2009] EWHC 512 (Admin). Nothing in the open or closed judgment of the Divisional Court in *Secretary of State for the Home Department v SIAC and AHK* [2015] EWHC 681 (Admin) calls this principle into question. All that it does is to define and limit the extent of disclosure required to fulfil the public law duty of the

Secretary of State in cases of this kind. In paragraph 34 of the judgment of Sir Brian Leveson P, the extent of the duty of disclosure is made plain. It is not "everything known about the relevant interested party", because that would take the investigation far beyond "an analysis of the facts and the basis for the facts which led to the recommendation or conclusion together with the decision and reasoning". What is required is disclosure which "must be sufficient to permit challenge, if it is appropriate, to the underlying rationality of any part of it". It is axiomatic that, as Mr Kovats QC for the Secretary of State in *AHK* conceded, "Where the material is materially incomplete, inaccurate or misleading, this will vitiate the decision because the decision-maker will either have failed to take account of relevant considerations or will have taken account of irrelevant considerations, thereby acting irrationally". He cited *AT* and *AW* as authority for that proposition.

10. A decision by the Secretary of State to direct that it is conducive to the public good for reasons of national security that a person be excluded from the United Kingdom is ordinarily preceded by and founded upon a letter of recommendation from the Security Service setting out the grounds upon which it recommends that the direction be given. It is axiomatic that that letter should not be materially incomplete, inaccurate or misleading. If it is, and the error or errors are not corrected before the Secretary of State makes her decision, that decision may well be vitiated. The redacted parts of the letter of recommendation in this case were materially incomplete and in one or more respects inaccurate and misleading. In consequence, the Secretary of State did not have all of the relevant information to enable her to answer the right question correctly. For that reason, and for that reason only, her decision must be quashed.

11. Farooq and Sharif have both made a detailed witness statement and have been cross-examined via a television link to Karachi by Mr Hall. Their purpose was to attempt to demonstrate that they do not pose, and have never posed, any threat to the national security of the UK; and, in particular, knew nothing of the nefarious activities of Abid Naseer and the occupants of 51 Cedar Grove. Mr Hall's purpose in cross-examining them was to attempt to demonstrate that their evidence was not reliable and, in certain respects, not credible. If and when the Secretary of State makes a fresh decision, she will be entitled to take into account the evidence which they have given to SIAC, for or against them. Miss Harrison submits that, in the light of the evidence which they have given and SIAC's conclusions about Shoaib, we should conclude that their position was no different from his, so that the grounds for excluding them have gone. In that event, she submits that we should simply quash the direction of the Secretary of State. For reasons explained in the closed judgment we decline to do so. We have considered whether or not to express our views about the evidence of Farooq and Sharif. Mr McCullough QC, as special advocate for both of them, submitted to us during the closed hearing that, if we were to remit the matter to the Secretary of State, we should express no view about the content of their evidence or the manner in which it was given. For reasons explained in the closed judgment, we accept that submission and do not intend to say any more about their evidence.

12. This case has been bedevilled by a number of problems, which are not to any extent the fault or responsibility of Farooq or Sharif or their legal representatives. Written open explanations have been provided by counsel for the Secretary of State and the special advocates which are appended to this judgment. Two significant mistakes were made in the preparation of the Secretary of State's case. The first is the omission, until 29 October 2015, the second day of the hearing, to disclose to the open

advocates, in redacted form, the Security Service letter of recommendation dated 22 November 2012 that the direction to exclude be maintained. The second is that the Secretary of State's amended first open statement materially misstated the terms of that letter by including in it statements of fact and assessments which either were not, or almost certainly were not, taken into account by the author of the letter of recommendation. As to the first error, it is axiomatic that in judicial review proceedings, the material considered by the decision-maker must be disclosed – in SIAC, in open to the extent that it can be without infringing Rule 4(1) of the SIAC Procedure Rules 2003 and in closed to the extent that it cannot be. In consequence of the omission to disclose a redacted version of the letter of recommendation to the open representatives, Miss Harrison was understandably misled into believing that the amended first open statement was a redacted version of the submission of the Security Service to the Secretary of State. It contained some of the assessments noted in the letter of recommendation, but also assessments that were not referred to which are unlikely to have been in the mind of the author, notably an assessment, in part tentative, about the purpose of a trip to Wales on 27 January 2009 in which Farooq and Sharif participated. This had been abandoned as an indicator of nefarious activity by the Secretary of State in the appeals of Abid Naseer and others. The first amended open statement also included comments on the apparent differences between the cases of Shoaib and Farooq and Sharif, whose purpose was to rebut their assertion that their cases were in principle the same. The consequence was that Miss Harrison, Mr Grieves and their instructing solicitors devoted some time and forensic effort to demolishing grounds on which the Secretary of State did not ultimately rely. This is plainly unsatisfactory, but in the event has caused no injustice. By itself, it would not

have been a ground for quashing the direction or remitting it to the Secretary of State to decide afresh.

13. For reasons which are fully explained in the closed judgment, this statutory review succeeds. The Secretary of State's direction will be quashed and an order will be made for the matter to be determined afresh by her within a period which we will set after hearing representations from the parties.