

Appeal No: SC/29/2004

Date: 5 September 2006

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE NEWMAN

Between:

MK

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Redacted version of paragraphs 88 – 104 in the Closed Judgment of MK

Postscript

1. After the preparation of this judgment in its final form (save for editorial changes), the Special Advocates submitted fresh material and submissions to the Commission arising out of the closed material available in Abu Doha's case.

2. The Special Advocates' involvement in the pending appeal of Abu Doha has already been noted, along with the discovery that material disclosed in that case, which is of relevance to this appeal, was not disclosed at the time and in the manner required by the rules.

3. By a letter dated 24th April 2006, with enclosures, the Commission's attention was drawn to the relevant material and submissions.

4. The contents of these documents bear upon the allegation advanced by the Secretary of State that Abu Doha had used the appellant's passport to enter Ireland and/or the Netherlands. This allegation has been withdrawn, but that withdrawal came only as a result of the Special Advocates' intervention, when their attention to the Abu Doha closed material revealed the existence of relevant documents. Had the coincidence of Mr Nicol's instruction in both cases not occurred, the Commission would have been left to determine the question whether Abu Doha used the appellant's passport, on a false basis. As it happens, the Chairman on this appeal is the Chairman of the Commission who will hear Abu Doha's appeal. It is unnecessary to elaborate on the consequences which might have flowed had the Special Advocates not drawn the Commission's attention to the existence of these documents.

5. It is clear to the Commission that inadequate attention was paid to the need for cross referencing between the individual cases of all those said to be members of the Abu Doha group. As the Special Advocates point out in their letter dated 24th April 2006, had proper attention been paid to all the relevant material which was available to the Security Service, the allegation that Abu Doha used the appellant's passport would not have been made. This point was made clear when the Commission reopened the appeal, in closed hearing, in order to consider the "Abu Doha" material.

6. There have been other aspects of this case which give rise to a need for some general comments. The Commission observed in the course of the hearing that the method adopted for the preparation of the Secretary of State's case on these appeals needed reappraisal. The preparation must be more "fact driven". The latest disclosures confirm the view, already expressed by the Commission, that there appears to be more scope for counsel preparing the Secretary of State's case on these appeals to be more directly involved and at an early stage in the formulation of the allegations and the details of the case. The Security Service material amounts to the evidence in the case for the Secretary of State, but is not recorded and prepared for the purpose of being presented and used as evidence in an adversarial hearing. It is significant that the Security Service does not, unless it regards the process as necessary, follow leads or events which the material records, so as to establish an evidential trail. That is not a criticism, but a consequence of its area of responsibility. But that does not mean that the opportunity to follow leads should not be taken, if it is available, by those preparing the evidence for a hearing. The Commission is aware that liaison difficulties can arise, but that does not mean that greater effort to overcome them should not be employed. An uneven approach to the preparation of the case is, in consequence, being adopted by the Special Advocates and counsel for the Secretary of State for the Home Department. At present, reliance is placed upon the refinement and analysis carried out by the Special Advocated for the purposes of the Rule 38 hearings. This puts pressure on the timetable. Next it must be remembered that the Commission's task is to consider the factual basis for the Secretary of State's opinion. The assessments which have been made by the Security Service do not, in themselves, provide a factual basis. The Commission has to decide whether the assessments are reliable having regard to the facts which are available. Counsel for the Secretary of State should consider the material critically adopting, for example, an approach similar that employed in preparing an advice on evidence for a trial. That involves formulating the allegations and then marshalling the material by reference to each allegation. In this way the Commission will, from the outset, have an opportunity of weighing the conflicting arguments about the conclusions which the material can support. The ambit of the

allegations which can be deployed in the open case would consequently become available earlier and the opportunity for the appellant to respond would be heightened.

7. The practice of presenting voluminous documents supported by a statement, carrying detailed footnote references to the documents, lacks focus. It leaves the Commission with the task of carrying out a survey and reconciliation which, to a large part, should have already been done. This process increases the risk that the Commission will not be able to reconcile all the facts without having to re-open the hearing.

8. The Commission depends upon the Special Advocates for their assistance in enabling the Commission to be better able to adopt a questioning, inquiring role to the material. Counsel for the Secretary of State should foresee which areas of the case will call for particular attention and, where possible, proof by further material being obtained. It is critical to remember that the case which is presented to the Commission is the Secretary of State's case, not that of the Security Service. The Commission acknowledges that the detail, the facts and the assessments of the Security Service are central, but the Commission's task is to reach a conclusion as to what the facts establish. It is the Commission's conclusion and not the Security Service's assessment which is critical. The Service is the witness on the appeal.

We shall now return to the issues on the latest disclosures.

#### The Submissions

9. The Special Advocates submit that these events, taken with the earlier history, require the Commission to conclude that:

- (1) it is impossible for the appellant to have a fair hearing and /or
- (2) there has been serious fault on the part of the Secretary of State for the Home Department;

AND that, as a result;

- (3) the appeal should be allowed; or
- (4) a fresh hearing should be ordered before a new Commission.

10. We agree that the Special Advocates have grounds for complaining about the adequacy and manner of the disclosure which has taken place in this case. We agree that the tenor and effect of the allegations in connection with the use the appellant's passport went beyond what the available material

could legitimately support, but we are also satisfied that no unfairness has occurred as a result. The Commission has to reach its own conclusions on the facts.

11. In this judgment the Commission has endeavoured, assisted by the Special Advocates' arguments in connection with the material, to appraise and assemble the pertinent facts and to determine for itself whether the facts establish the allegations. The Commission has not relied upon Security Service assessments as such, save in the general sense that it has accorded a measure of respect to the likely accuracy of opinions contained in comments and to the efficacy of the processes adopted for recording and assembling material. We have concluded that nothing would be gained by witness C being cross-examined on the new material. The outcome of the appeal does not depend upon the accuracy of her assessments or her views as to the import of the material.

#### Fault

12. There has been fault on the part of the Secretary of State for the Home Department. Ian Burnett QC represented the Secretary of State at the hearing convened by the Commission when the Abu Doha material was first discovered. As a result of the Special Advocates' intervention, the Secretary of State's legal team carried out a trawl of the Abu Doha material and submitted a supplementary bundle, but the documents enclosed with the letter of 24th April 2006 were not picked up by that exercise. It is not appropriate to respond to that failure by contending, as Mr Wilken has done in his letter dated 25th April 2006, that since the issue as to the passport was no longer live, further disclosure was not required. The Commission should have been made aware of the full extent of the failure to disclose. Mr Burnett's assurance has, within weeks, been undermined. Further, the response fails to appreciate the wider relevance of the material. These documents may have led to the formulation of a more refined issue.

#### Conclusion

13. Having considered the degree of fault and taking account of the absence of bad faith, the Commission has concluded that it would be disproportionate to allow the appeal or to order a fresh hearing. We are satisfied, having regard to the reasons we have given for our decision, that the latest material gives rise to no cause for concern affecting the integrity of our approach, our reasoning or our conclusions. In our judgment, the facts which the Commission has found to be established are firmly supported by the material which we have identified and the conclusions have been reached after an appraisal of all the material in the case.

14. The Commission is alive to the demands which are made by these cases on the legal team for the Secretary of State. However, the administration of justice in the Commission is put at risk if failures in connection with disclosures of documents occur. It is imperative that the need for proper disclosure to take place, if presently it is being compromised by lack of resources, should be brought to the attention of those at the highest level. No comfort should be regarded as being available from the outcome of this appeal. Had it not been for the firm conclusions to which the Commission has felt able to come, after its exhaustive marshalling of the material in the case, the lack of bad faith on the part of the Secretary of State for the Home Department and all the other circumstances which have been taken into account by the Commission, it is fair to say that the failures in connection with disclosure can have a consequence along the lines requested by the Special Advocates in this case.