

**IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION
APPEALS COMMISSION**

Royal Courts of Justice
Strand, London, WC2A 2LL

18 March 2004

Before:

**THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE POTTER
and
LORD JUSTICE CLARKE**

Between:

**The Secretary of State for the Home
Department**

Appellant

- and -

"M"

Respondent

**Mr Wyn William QC and Miss Lisa Giovannetti (instructed by Treasury Solicitors) for
the Secretary of State for the Home Department
Mr Ben Emmerson QC and Mr Raza Husain (instructed by Birnberg Solicitors) for the
"M"
Mr Angus McCullough and Mr Martin Chamberlain acted as Special Advocates
Hearing dates : 17 March 2004**

HTML VERSION OF JUDGMENT

The Lord Chief Justice

This is the judgment of the Court.

Introduction

1. This is an application for permission to appeal on behalf of the Secretary of State for the Home Department. His application relates to a decision of the 8 March 2004 of the Special Immigration Appeals Commission ("SIAC"). SIAC was established by the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") in response to a decision of the European Court of Human Rights in *Chahal v UK* 23 ECHR 413 in relation to the procedures which then existed where an individual was to be deported on the grounds that the deportation would be "conducive to the public good as being

in the interests of national security or of the relations between the United Kingdom and any other country or for reasons of a political nature".

2. SIAC is a superior court of record. Its members are appointed by the Lord Chancellor. To be properly constituted to hear an appeal it must consist of three members, one of whom is to be a judge who holds or who has held high judicial office, one of whom has to be either the Chief Adjudicator or a member of the Immigration Appeal Tribunal and one of whom it is intended should have experience of national security matters as we understand was the position in this case although this is not a statutory requirement (see Schedule 1 para 5 of the 1997 Act and Hansard HC vol 299, Col 1055),.
3. The Anti Terrorism, Crime and Security Act 2001 ("2001 Act") was a response by Parliament to the increased threat of terrorist activity. The 2001 Act gave the Secretary of State a power to issue a certificate in respect of a person if the Secretary of State reasonably:
 - i) believes that persons presence in the United Kingdom is a risk to national security, and
 - ii) suspects that the person is a terrorist. (section 21(1) of the 2001 Act).
4. While a person who would otherwise be detained is free to leave this country, the 2001 Act provides that a suspected international terrorist may be detained despite the fact that his safe removal or departure from the United Kingdom is not practical. (section 23(1) of the 2001 Act). An individual who is detained has a right to appeal to SIAC against his certification under section 21.
5. On 8 March 2004 SIAC (the members being Mr Justice Collins, Mr J Barnes and Mr M James) after a hearing lasting three days allowed an appeal against the Secretary of State's Certificate under Section 21 and his decision to make a deportation order in relation to a Libyan national, who for the purposes of these proceedings, is known as "M". SIAC's decision in relation to "M" is the first occasion upon which SIAC has allowed an appeal of an individual detained under the 2001 Act. This is therefore the first occasion upon which the Secretary of State has attempted to appeal to this Court against a decision of SIAC. There have however been a number of appeals in relation to the decisions of SIAC that dismissed appeals by those who have been detained. On 29 October 2003, SIAC, presided over by Mr Justice Ouseley, sitting with Mr Ockleton and Mr Chester, considered 5 appeals (Ajouaou and A B C and D v The Secretary of State for the Home Department SC/1/6/7/9/10 2002; 29 October 2003). In relation to those appeals, SIAC gave a judgment dealing with a number of general issues as to the interpretation and application of the 2001 Act. That judgment is known as the generic judgment. The generic judgment is itself subject to appeal to this Court.

The Legislative Provisions

6. In determining the present application for permission to appeal, the relevant statutory provisions are important.
7. We have already referred to section 21(1). However, it is helpful to set out the relevant provisions of that section in full. They are as follows:

"(1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably –

(a) believes that the person's presence in the United Kingdom is a risk to national security, and

(b) suspects that the person is a terrorist.

(2) In subsection (1)(b) "terrorist" means a person who-

....

....

has links with an international terrorist group.

(3) A group is an international terrorist group for the purposes of subsection (2)(b) and (c) if –

it is subject to the control or influence of persons outside the United Kingdom and

the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.

(4) For the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.

(5) In this Part-

"Terrorism" has the meaning given by section 1 of the Terrorism Act 2000 (c.11), and

"suspected international terrorist" means a person certified under subsection (1)."

8. It is to be noted that the power of the Secretary of State to certify, contained in section 21(1), refers to the Secretary of State's reasonable belief and suspicion. That section has to be contrasted with section 25 of the 2001 Act which deals with the right of the person who is the subject of a certificate to appeal. Section 25 provides, so far as relevant, as follows:

"(1) A suspected international terrorist may appeal to the Special Immigration Appeals Commission against his certification under section 21.

(2) On an appeal the Commission must cancel the certificate if-

it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or

it considers that for some other reason the certificate should not have been issued.

(3) If the Commission determines not to cancel a certificate it must dismiss the appeal.

(4) Where a certificate is cancelled under subsection (2) it shall be treated as never having been issued."

9. It will be observed that section 25 refers to what the Commission considers the position to be. If the Commission considers that "there are no reasonable grounds for a belief or suspicion" then the Commission must cancel the certificate. Similarly, it must do so if it considers that the certificate should not have been issued.

10. The Appeal to this Court is governed by section 7 of the 1997 Act. Section 7(1) provides:

"Where the Special Immigration Appeals Commission has made a final determination of an appeal, any party to an appeal may bring a further appeal to the appropriate appeal court on any question of law material to that determination."

This is the only way in which a decision of SIAC can be questioned in legal proceedings. (Section 1 of the 1997 Act as amended by section 35 of the 2001 Act.)

11. Although the definition of a terrorist in section 21 of the 2001 Act is in general terms it is common ground that the Secretary of State's powers under the 2001 Act are limited by the terms of the Human Rights Act 1998 (Designated Derogation) Order 2001, by which the United Kingdom derogated from Article 5 of the ECHR. Accordingly, those powers cannot be exercised (except in accordance with the derogation) in respect of someone whom he does not reasonably suspect or believe to be a risk to national security because of his connection to the public emergency threatening the life of the nation – namely the threat posed by Al Qa'ida and its associated networks. Thus it is not enough that the person detained may have had connections with a terrorist organisation. It must be a terrorist organisation which has links with Al Qa'ida.
12. Section 5 of the 1997 Act contains a wide power for the Lord Chancellor to make rules. Those rules are required to provide that an appellant has the right to be legally represented. Section 6 of that Act also provides that a law officer "may appoint a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded". A person so appointed is usually known as a special advocate. This provision reflects the fact that it was appreciated that in many of the appeals which are heard by SIAC, it is necessary for evidence to be given in closed session without the appellant or his lawyers being informed of the nature of the evidence.
13. In this situation individuals who appeal to SIAC are undoubtedly under a grave disadvantage. So far as it is possible this disadvantage should be avoided or if it cannot be avoided minimised. However, the unfairness involved can be necessary because of the interests of national security. The involvement of a special advocate is intended to reduce (it cannot wholly eliminate) the unfairness which follows from the fact that an appellant will be unaware at least as to part of the case against him. Unlike the appellant's own lawyers, the special advocate is under no duty to inform the appellant of secret information. That is why he can be provided with closed material and attend closed hearings. As this appeal illustrates, a special advocate can play an important role in protecting an appellants interests before SIAC. He can seek further information. He can ensure that evidence before SIAC is tested on behalf of the appellant. He can object to evidence and other information being unnecessarily kept from the appellant. He can make submissions to SIAC as to why the statutory requirements have not been complied with. In other words he can look after the interests of the appellant, insofar as it is possible for this to be done without informing the appellant of the case against him and without taking direct instructions from the appellant.
14. The legislation to which we have been referring, represents the attempt made by Parliament to protect national security, while at the same time safeguarding the interests of individuals against whom the powers contained in the 2001 Act have been exercised. The responsibility for exercising the powers in the first instance is that of the Secretary of State. The responsibility of SIAC and this Court on appeal is to ensure that the powers exercised by the Secretary of State are not exercised in cases where it is inappropriate or unlawful for this to happen. The Secretary of State, SIAC and this Court in the present day situation have very heavy responsibilities to fulfil in order to achieve the purpose of the legislation.

15. SIAC's task is not to review or 'second guess' the decision of the Secretary of State but to come to its own judgment in respect of the issue identified in section 25 of the 2001 Act. The task of this Court on an appeal is limited to questions of law. However, the power of this Court to determine questions of law enables the Court (among other grounds) to set aside a decision of SIAC if that decision is unsupported by any evidence or if it is a decision to which a tribunal cannot properly come on that evidence so that it is perverse.
16. SIAC is required to come to its decision as to whether or not reasonable grounds exist for the Secretary of State's belief or suspicion. Use of the word "reasonable" means that SIAC has to come to an objective judgment. The objective judgment has however to be reached against all the circumstances in which the judgment is made. There has to be taken into account the danger to the public which can result from a person who should be detained not being detained. There are also to be taken into account the consequences to the person who has been detained. To be detained without being charged or tried or even knowing the evidence against you is a grave intrusion on an individual's rights. Although, therefore, the test is an objective one, it is also one which involves a value judgment as to what is properly to be considered reasonable in those circumstances. The nature of the task which SIAC has to perform no doubt explains why the members of SIAC have the qualifications already indicated. The tribunal is a specialist one so that it can appropriately perform the role which it has been given. Collins J who was the Chairman of SIAC that gave the decision in favour of "M" is a judge who was particularly well equipped by experience to be a party to that decision. He was until recently President of the Immigration Appeal Tribunal and now is the judge in charge of the Administrative Court. The other two members by their experience were also equipped to assist in reaching an appropriate decision.

Preparation for the Hearing of this Appeal

17. Before SIAC in "M"'s case, evidence was given in closed session. He was given an indication of the general nature of the case against him but he did not know the detail. In those circumstances, although he submitted a statement in support of the appeal, he himself took no part in the appeal because he did not consider that he could obtain justice from such a procedure. However, special advocates were appointed, Mr Angus McCullough and Mr Martin Chamberlain. From the material which is before us, it is clear that they performed their role in the most commendable way and they certainly ensured all steps which a special advocate could take were taken on behalf of "M".
18. Because there was a closed hearing, SIAC gave two judgments, an open judgment and a closed judgment. Prior to the hearing of this application the members of the court were provided with not only those judgments but also the open and closed material and open and closed skeleton arguments by Mr Wyn Williams QC who appeared on behalf of the Secretary of State and the submissions on behalf of the special advocate. The material with which we were provided, which we read prior to the hearing, enabled us to fully consider the issues on the appeals. So far as was possible, we heard the argument in open court. There came a stage however when we had to adjourn to closed court if we were to do justice to the Secretary of State's application. In open court Mr Emmerson QC addressed us on behalf of "M". In closed court we had the advantage of the submissions of Mr McCullough as special advocate. It is not necessary for us to give a closed judgment. In his submissions, Mr Emmerson asked us to protect the identity of "M" and we make the appropriate Orders.

The Facts

19. It is necessary next to turn to the facts. "M" is a Libyan national who was born in April 1966. He was brought up in Sibrata. He went to university and obtained a degree in

geology and geological engineering with a view to working in the oil industry. According to his statement he went subsequently to Medina University in Saudi Arabia to concentrate on Islamic studies. In 1992 he went to Pakistan and fought with the Arab mujahidden against the communist regime in Afghanistan. In 1994 he arrived in this country and claimed asylum. It appears that he had been detained by the Ghadafi regime because he had shown opposition. On 18 November 1994, his claim to asylum was refused. It was said that the Libyans were not likely to be interested in him as he had been away from Libya from 1992 and in any event there was doubt as to whether he was really involved with an anti-Ghadafi group. He came to the attention of Special Branch and it was noted that it was his contention that he was part of an anti-Ghadafi organisation involved in illegal arms, demonstrations and general stirring of anti-Ghadafi feelings in mosques. Despite this a further application for asylum was rejected in July/July 1997. SIAC had no doubt he had been "actively involved in the provision of false documents". He was also involved in the provision of money to Fahdel Saadi who is suspected of having links to Al Qa'ida.

20. Despite the rejection of his asylum claims, the appellant was not removed from the United Kingdom and it came to be accepted that he could not be returned to Libya. On 23 November 2002 the Home Secretary issued certificates under Section 21 and 33 of the 2001 Act. The reasons given were:

"You are a member of a group of mujahideen engaged in active support for various international terrorist groups, including networks associated with Usama Bin Laden. Your activities on behalf of these networks include the provision of material support."

21. A deportation order was made on the same grounds. "M" was then detained. After this he was served with the open statement indicating the case relied upon by the Home Secretary but this made no reference to some of the supporting material because this was regarded as being secret material which would be damaging to the public interest if it was revealed. It was in response to the open statement that he made his statement on 8 August 2003.
22. At the opening of the appeal before SIAC, "M" was represented by Mrs Peirce. She explained why "M" did not want to take any further part in the proceedings. She did however go on to indicate that "He wanted it to be made clear that it was not to be taken that he was involved in or supported terrorism. He did not. He had been involved only in assisting fellow refugees and those who were like him, supporters or members of the Libyan Islamic Fighting Group (LIFG) which is not a proscribed organisation and is not linked to any Al Qa'ida network". It was suggested that some of the material which had been disclosed, in particular a confused and contradictory report in an Italian newspaper, was wholly unreliable and should not have been used to justify detention. He believed the appeal was a foregone conclusion and his inability to deal with the closed material made the whole process unfair. He did not want to lend it any credence by further participation. He did, however, wish his appeal to be considered and it was not withdrawn.
23. Having set out the facts in the open judgment, SIAC indicates its general approach. "Each case has been and is considered on its own facts against the tests and legal background which have been set out in the generic judgment." SIAC says that they have reminded themselves of paragraph 48 of the generic judgment and then continues:

"We recognise that we must be careful not to place undue weight upon any particular piece of intelligence or assessment, since each must be looked at in the context of the whole. Equally, individual pieces of evidence looked at in isolation may seem to show little or nothing adverse to the appellant. But we must not discard them merely because of that. When the whole picture is considered, they may properly be given some weight. Equally, there may be innocent explanations for individual pieces of evidence relied on against the appellants. But we are concerned to decide whether

reasonable suspicion is established and so the existence of an innocent explanation may not prevail. The question always is whether the suspicion was reasonable. We can only answer that question by submitting all the evidence to a close and penetrating analysis and then deciding whether it does establish a reasonable suspicion notwithstanding that there might be an innocent explanation."

24. The judgment then continues by setting out "M"'s contention that his only interest was in opposing the Ghadafi regime in Libya and the Secretary of State's position that some members of the LIFG have supported and have links with Al Qa'ida and the appellant is one such. Having identified this conflict of views, it is explained why it is important for there to be reasonable suspicion either of assistance or support of Al Qa'ida or those with whom that group is associated or linked. Echoing paragraph 115 of the generic judgment it is added:

"The Secretary of State "alleges and must establish albeit to the low standard of reasonable suspicion that the appellant has links to Al Qa'ida or has knowingly provided support to extremists who belong to loosely affiliated Al Qa'ida networks. We recognise that it is enough that he has supported one who in fact belongs to such a network if he has turned a blind eye. He does not have to know; it is sufficient if he ought to have known in all the circumstances."

25. The use of the expression "ought to have known" is criticised by Mr Wyn Williams. However, far from being unduly favourable to "M" the test of whether "he ought to have known" in this judgment and in paragraph 115 of the generic judgment is unduly favourable to the Secretary of State. The earlier reference to turning a "blind eye" identifies the correct approach. If a reasonable suspicion of actual knowledge is not established what is required is a reasonable suspicion that "M" has closed his eyes to the obvious.

26. SIAC then criticises certain of the material relied on by the Secretary of State while making it clear that it does not doubt the good faith of those responsible for making the assessments on which the Secretary of State no doubt relied. SIAC also acknowledges the heavy responsibility that those persons have of trying to ensure that this country is safeguarded from acts of terrorism. SIAC add:

"We have no doubt whatever they were entitled to be suspicious of the appellant's activities and to question whether they were limited to the promotion of the LIFG cause alone or to assistance of its members or supporters in a way which showed that the appellant did not know nor should have known that the assistance would benefit al Qua'ida linked extremists."

27. The fact remains however that the SIAC finds "as a result of Mr McCullough's rigorous cross examination in the closed session", that "the assertions made in the statements provided by the respondent are not supported by the evidence". It is pointed out that in some cases assertions are found to be misleading when the source documents are looked at. In other cases that there had been insufficient effort made to ensure that they were accurate. As against this SIAC also accepts that "M" has played down his involvement in the provision of false documentation. Insofar as it can do so, in the open judgment, SIAC gives examples.

28. The conclusions of SIAC are set out in the following terms:

"We do not doubt that the respondent was entitled to suspect that the appellant is a terrorist within the meaning of the 2001 Act. Much of the material upon which the respondent relies could point in that direction, but only if a generally adverse view is taken of everything. Such a view is in our judgment not reasonable and, as we have said, we are concerned that too often assessments have been based on material which does not on analysis support them. We have thought long and hard before

deciding on this appeal since we are conscious of the heavy responsibility that is placed upon us where the safety of the citizens of this country is at stake. There can be no doubt that Al Qa'ida and those who support its aims do constitute a very real threat. However, although we pay the greatest respect to the views of the respondent and those who advise him, we would be failing in our duty if we did not act on our own judgment. We believe that the assessments placed before us and the respondent are not reliable and that reasonable suspicion is not established. It follows that we must allow the appeal against certification and cancel the certificate.

There is also an appeal against the decision to make a deportation order. We recognise that the interests of national security as a ground for deportation may go beyond what is required to justify certification under the 2001 Act. But the reasons for the decision to make a deportation order were precisely the same as those which had led to the decision to certify. Accordingly, since we have not accepted that those reasons have been established, we must also allow the appeal against the decision to make a deportation order."

The Contentions of the Secretary of State

29. It is accepted by Mr Wyn Williams on behalf of the Secretary of State that before this Court could allow an appeal from the decision of SIAC, it would be necessary to show that the decision of SIAC was one to which no reasonable tribunal, in the position of SIAC, could have come. Supporting arguments are advanced that SIAC cannot have looked at the circumstances as a whole as they are undoubtedly required to do. It is also contended that SIAC has not explained why the evidence, which it is accepted that the Secretary of State was entitled to take into account, does not give rise to a reasonable suspicion that "M"'s activities include the provision of false documents and money to known supporters of Al Qa'ida.

Our Conclusions

30. We accept that, particularly in the closed session, Mr Wyn Williams was able to point to evidence which raised suspicions. However, as the paragraphs from the open judgment to which we have referred make clear, this was also accepted by SIAC. As SIAC points out, the fact that there are suspicious circumstances does not mean that, when all the circumstances are looked at, the suspicious circumstances establish that there is a *reasonable* suspicion. As Mr Wyn Williams contends, it is essential to look at all the circumstances and circumstances which in isolation may or may not look suspicious can when looked at in context create a different impression.
31. Despite Mr Wyn Williams' contention to the contrary it is clear beyond doubt that SIAC did look at the matters relied on by the Secretary of State as a whole. SIAC also dealt in one or other of the judgments with each of the matters on which particular reliance was placed and assessed their individual merit without losing sight of the need to have regard to the whole picture.
32. The case which was being put forward by the Secretary of State at the outset of the appeal before SIAC was not the same case as remained at the end of the appeal. For example, at the outset, Mr Wyn Williams had to concede that the manner in which reliance was placed on "M"'s membership of LIFG was inappropriate. The cross-examination by the special advocate which obviously impressed SIAC weakened the case further.
33. What is critical was the value judgment which SIAC had to make as to whether there was reasonable ground for the belief or suspicion required. As to this question SIAC was the body qualified by experience to make a judgment. SIAC came to a judgment adverse to the Secretary of State. It has not been shown that this decision was one to which SIAC was not entitled to come because of the evidence, or that it was

perverse, or that there was any failure to take into account any relevant consideration. It was therefore not defective in law. It follows that there is no prospect of an appeal succeeding and accordingly we refuse permission to appeal.

34. However, before we depart from this case, we would make the following comments:

i) Having read the transcripts, we are impressed by the openness and fairness with which the issues in closed session were dealt with by those who were responsible for the evidence given before SIAC.

ii) We feel the case has additional importance because it does clearly demonstrate that, while the procedures which SIAC have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to undervalue the SIAC appeal process.

iii) While the need for society to protect itself against acts of terrorism today is self evident, it remains of the greatest importance that, in a society which upholds the rule of law, if a person is detained as "M" was detained, that individual should have access to an independent tribunal or court which can adjudicate upon the question of whether the detention is lawful or not. If it is not lawful, then he has to be released.

iv) This is not a case in which SIAC overruled a decision of the Secretary of State. SIAC had to come to its own decision on the material which as we have indicated was tested in a way which it could not be tested before the Secretary of State.

35. It is because of the importance of the issues to which we have referred, that this application has been heard and decided expeditiously