Neutral Citation Number: [2009] EWHC 902 (Admin)

Case No: PTA/21/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
IN THE MATTER OF AN APPLICATION PURSUANT
TO THE PREVENTION OF TERRORISM ACT 2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2009

Before :

MR JUSTICE MITTING

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Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Applicant**
- and -	
AV	**Respondent**

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- -

LISA GIOVANNETTI AND JONATHAN HALL
(instructed by **THE TREASURY SOLICITOR**) for the Applicant
STEPHANIE HARRISON AND EDWARD GRIEVES
(instructed by **TYNDALLWOODS SOLICITORS**) for the Respondent
MICHAEL BIRNBAUM QC AND MELANIE PLIMMER
(instructed by **THE TREASURY SOLICITOR SPECIAL ADVOCATE SUPPORT OFFICE)** as **Special Advocates**

Hearing dates: 30TH AND 31ST MARCH 2009, 1ST, 2ND AND 3RD APRIL 2009

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Judgment

MR JUSTICE MITTING :

Background

1. AV is a Libyan national born on 15th December 1959. He arrived in the United Kingdom, with his wife and son on 15th September 2002. He claimed asylum on arrival, which was refused on 13th November 2002. He appealed successfully to an adjudicator and was recognised as a refugee and granted indefinite leave to remain on 6th September 2004. He was detained under immigration powers on 3rd October 2005, pending deportation to Libya on the ground that his presence in the United Kingdom was not conducive to the public good for reasons of national security. He appealed to SIAC. He was released on SIAC bail in December 2005. He was re-arrested on 27th March 2006 and charged on 30th March 2006 with two offences of possessing a document containing information of a kind likely to be useful to a person committing or preparing an act of terrorism contrary to section 58(1)(b) of the Terrorism Act 2000. The documents were a file contained on a CD which provided detailed instructions on the preparation of explosives and a handwritten document, of which a reasonable description is a manifesto for the Libyan Islamic Fighting Group. Both documents were recovered from AV's home in Birmingham when it was searched by police on his arrest on 3rd October 2005. After an unsuccessful appeal against a preliminary ruling by the trial judge, AV pleaded guilty to both offences, on a defined basis part accepted by the prosecution, and was sentenced to a total of four years

imprisonment. The custodial element of his term expired on 1st April 2008. He was readmitted to SIAC bail on a 16-hour curfew. On 4th April 2008, he was served with a non-derogating control order, made with the permission of Collins J. The order imposed a 16-hour curfew and a boundary which confined his movement, apart from a weekly visit to a mosque, to parts of Acocks Green, Hall Green and Shirley in Birmingham together with a package of restrictions on visitors, communications equipment, bank accounts, travel and employment of a kind normally contained in a stringent control order. He appealed under section 10(3) of the Prevention of Terrorism Act 2005 against the Secretary of State's refusal to modify the curfew and boundary. I dismissed his appeal in judgments handed down on 31st July 2008. On 16th October 2008, the curfew was reduced to 12 hours. The control order was renewed on 25th March 2009, but with the curfew reduced to 10 hours and the boundary extended southwards, to include much of Solihull. The review of the Secretary of State's decision to make and maintain the control order was due to commence on 11th November 2008. On 7th November 2008, I acceded to AV's application to adjourn the hearing, to permit him, belatedly, to prepare and serve a detailed statement in which he was to explain his activities in the United Kingdom, in response to the Secretary of State's open case. AV prepared a 58 page statement (unsigned in my bundles, but with an origination date of 12th January 2009) and two further shorter statements, dealing, respectively, with the developing political situation in Libya and the documents seized from his home on 3rd October 2005.

2. On 7th February 2006, AV's name was added to the list of those identified by the United Nations 1263 Committee upon whom member states are obliged to implement an assets freeze and travel ban. He has also been designated in the United Kingdom under the Al Qaeda and Taliban (United Nations Measures) Order 2006.

The Libyan Islamic Fighting Group (LIFG)

3. Developments of great potential significance have occurred in Libya in March 2009. They have led me to review, and alter, my assessment about the current state and prospects of the LIFG set out in my generic open and closed judgments. I will analyse these developments below under the heading, Necessity.

The principal issues

4. The principal issues arise under five heads:

   i) The decision to make the order: did the inclusion of the statement that AV had been found guilty in absentia by a court in Rabat, Morocco, of involvement in the Casablanca bombings on 16th May 2003 in the Security Service submission to the Secretary of State make her decision to make the order flawed?

   ii) Substance: is the Secretary of State's decision that there are reasonable grounds to suspect that AV has been involved in terrorism-related activity flawed?

   iii) Necessity: is the Secretary of State's decision that the making and continuance in force of the control order is necessary for purposes connected with protecting members of the public from the risk of terrorism flawed?

iv) Procedure: has AV been afforded at least the minimum requirements of procedural fairness to which he is entitled in these proceedings?

v) Modification: Is the decision of the Secretary of State that some of the individual obligations imposed continue to be necessary for that purpose flawed?

There are ancillary and subsidiary issues which I will deal with under the appropriate head. I have listed the issues in this order, for reasons which will be apparent.

The decision to make the order

5. It is common ground that the submission to the Secretary of State should not have included the reference to the Rabat conviction. The reason is that, ever since the decision of the House of Lords in *A v Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, it has been the policy of the Secretary of State that she will not generally rely on statements reported to have been made by those detained by the authorities of states with a questionable record of treatment of suspects and detainees. The policy is usually expressed in the shorthand formula: the Secretary of State does not generally rely on detainee reporting. Morocco is such a country. Consequently, once the error was discovered, the statement was removed from the Security Service submission, but not before it had been provided to Collins J, when invited to give permission to make the order. The statement was reflected in the order served on AV, which gave as the basis for the decision four propositions, the third of which was that he had "had significant involvement in terrorist attack planning". That statement, too, was subsequently deleted.

6. I accept that if the Secretary of State had founded her decision to make the control order upon the Rabat conviction, her decision would have been flawed. I also accept that it is arguable that it would have been flawed if she had placed significant reliance upon it in reaching her decision. I am satisfied that she did not. She can safely be taken to have been aware of her own consistently applied policy on this issue and to have applied it, unless there was good reason to depart from it. If there had been, it would have been set out in the Security Service submission (i.e. the first closed submission) and its annexes. I am satisfied that the Secretary of State could not have been under the misapprehension that she was being invited to depart from her settled policy or did so. I am satisfied that the decision to make the control order was not founded, to any extent that might be significant, upon the Rabat conviction. This challenge to the decision, therefore, fails.

7. There is a subsidiary challenge: paragraph 5 of the Security Service submission stated, somewhat inaccurately, that AV had been charged on 30th March 2006 with possession of articles "for use in terrorism". The language suggested a charge under section 16 of the 2000 Act. In fact he had been charged with and convicted of two offences under section 58(1)(b) of possessing documents of a kind likely to be useful to a person committing or preparing an act of terrorism. Paragraph 5 of the submission could have been better worded, but it did not mislead as to substance. It correctly identified the fact that the articles were extremist materials for display on a computer, including recipes for explosives. What mattered for the purposes of the Secretary of State's decision was the fact that AV had been charged with possession of such materials. Miss Harrison submits that the submission was also significantly

incomplete in that it did not refer to the basis upon which AV had pleaded guilty to the two offences or the sentencing remarks of Mackay J. I agree that, where readily available, the observations of a judge passing sentence for a terrorism-related offence which the Secretary of State is invited to take in to account when reaching her decision, should be at least summarised in the Security Service submission. But they did not, in this case (and, I anticipate, would not in most cases) fall into the category of documents identified by Sedley LJ in paragraph 62 of *R (National Association of Health Stores and Anr) v Department of Health* [2005] EWCA Civ 154: "A minister who reserves a decision to himself…must know or be told enough to ensure that nothing that it is necessary, because legally relevant, for him to know is left out of account". The minister did not need to know what view, on the information presented to him, the trial judge took of the extremist materials for her to decide whether there were, or were not, reasonable grounds to suspect that AV had been involved in terrorism-related activity. Still less was she required to take into account the basis upon which he had pleaded guilty to the offences – a basis which was, in any event, only partly accepted by the prosecution. None of these subsidiary criticisms lead me to conclude that the Secretary of State's decision was flawed.

Substantive

8. Even though Miss Harrision does not concede that the Secretary of State had and has reasonable grounds to suspect that AV had been engaged in terrorism-related activities, I can take this issue quite shortly. AV admits that he was a senior member of the LIFG. He asserts that his role was exclusively political, but accepts that it supported the Libyan – oriented military purposes of the LIFG. The intermingling of the two is shown in the "manifesto" which was the subject of one of the two counts under section 58(1)(b). While it is true that it includes an express prohibition on the killing of civilians and foreigners and the infliction of damage on public facilities in Libya, it does call on mujahedin to learn about the handling of weapons and explosives and envisages the undertaking of a martyrdom operation against "a big and important target such as the tyrant Qaddaffi, other prominent tyrants or centres of intelligence service". AV accepted that the draft manifesto, written in his hand, but based on material sent to him by others, represented his beliefs.

9. In his sentencing remarks, Mackay J said,

> "The CD "forbidden"…had twenty one files. Some was of a general jihadist nature. It was lurid anti-western material. MEB/6 was a bomb manual. It was accepted the CD ROM was in (AV's) house, he had control of the CD ROM and that (AV) knew that the CD contained islamist material which was likely to include material of this type. (AV) did not create it, supply it or use it. …Mr Robertson (AV's expert) accepted that if the manual fell into the right hands it could be used for terrorism. This is the real seriousness of the charge. It is not suggested that (AV) could begin to use the manual personally."

In his evidence to me, AV said that he could not remember anything about this CD. He said that it was found in a pouch near to a defunct computer in his living room. He suggested that it might have been planted there by agents of the Libyan government. His attempt to distance himself from it was unconvincing and damaging to his

credibility. I do not believe that he told me the truth about it. He has certainly not discharged the burden which section 11 of the Civil Evidence Act 1968 imposes upon him of proving that it was not in his possession when it was seized.

10. Terrorism-related activity is defined by section 1(9) of the Prevention of Terrorism Act as including:

> "(c) conduct which gives encouragement to the commission, preparation or instigation of (acts of terrorism) or which is intended to do so"

I am satisfied, on the basis of the matters considered above alone, that there were and remain reasonable grounds to suspect that he has been involved at least in such terrorism-related activity. The closed material which I have considered supports that conclusion.

11. I am also satisfied , for reasons considered below and in the closed judgment that AV has held a leadership position in the LIFG at a time when it espoused terrorist activity; and, therefore, that he has been involved in terrorism-related activity of the kind identified in section 1(9)(b) and (d) as well.

Necessity

12. The central issue in the case is whether or not the Secretary of State's decision that it was, and remains, necessary to make and maintain a control order in the case of AV is flawed. I propose to consider both issues – the making and maintenance of the order – together, and to do so on the basis of all of the material deployed by both sides at the hearing.

13. I start with AV's 58 page statement. It is a detailed, and in some respects, impressive document. It has been supplemented by oral evidence given by AV which I have found instructive. I accept that a good deal of what I have been told by AV is true. His statement and oral evidence have been significant parts of the material which have enabled me to form a reasonably confident judgment about his activities in the United Kingdom, his motivation, and the necessity, or otherwise, for purposes connected with protecting members of the public from a risk of terrorism, for the making and continuance of the control order. He has been well served by the decision which he made in November to engage constructively in these proceedings.

14. AV has a deep and abiding hatred for the man he describes as "the tyrant Qaddaffi and his clique" (pages 2 and 3 of the "manifesto", 5/132-3). This is founded on a number of strands: the dictatorship imposed on the people of Libya; the persecution of AV's family which has included the killing of a brother and uncle and the imprisonment of his father and, possibly, himself; and Qaddaffi's apostasy. I do not know when or in what circumstances AV left Libya or precisely what he then did. There is no doubt that he was, for many years, a senior member of the LIFG, as he has freely admitted. Its leaders, Sadeq and Mundhir were his longstanding colleagues and friends. He was a member of the Shura Council, the supreme governing council of the LIFG. He claims, and I accept, that he is respected by LIFG members because of the reputation and experiences of his family and because of his own interest in history and politics. He asserts and, again, I accept, that his primary role in the LIFG was

political. He has given a detailed description of the internal structure of the LIFG, emphasizing its division into different sections – political, religious, social, military, security, finance and media. I accept that the activities of the LIFG were conducted by sections of the kind which he describes, but do not accept that there was such a rigid division of members into cells that a senior member, such as him, would not know that another individual was a member at all. In particular, I do not accept that he did not know that AT, a longstanding friend and also a significant and influential member of the LIFG, was such when he met and befriended him in Jordan in the 1990s. I am satisfied that his knowledge of the activities of the LIFG in the United Kingdom and elsewhere is greater that he has admitted.

15. The LIFG has not undertaken any military activity in Libya since 1998/9. Nevertheless, after his arrival in the United Kingdom in 2002, AV received, he says from Mundhir, the draft of the manifesto referred to above. He wrote it out in his own handwriting and modified it. He stated in evidence that he believed in it "as an announcement of the optimal way of defeating a tyrant". As I have already noted, it includes a call for mujahedin to train in the handling of weapons and the preparation of explosives and for them to inflict destruction and damage on "the headquarters of the revolutionary committees, the centres of the intelligence and the places of the revolutionaries and corrupters" (page 16, 5/146). When asked by Miss Harrison whether he agreed with attempts to assassinate Qaddaffi, his reply was equivocal: "One hundred percent no. My wish was that he should stand trial, but if he had been killed, I would have been happy for that". I am satisfied that, when he was arrested in October 2005, the manifesto represented his settled view – which included the overthrow of the tyrant and his clique, if necessary by terrorist means, including assassination. In a revealing passage about a discussion which he says he had with a Security Service officer in September 2005, he refers to his answer to a question posed to him: "he also asked me: "are you still in opposition to the Libyan government and do you want to kill Gadaffi?" I said yes. All Libyans would like to see the back of Qaddaffi….Is it only the UK government (which) has the right to use force to remove a dictator?" I am satisfied that this represented his true view, then. I set out my assessment of his current views below.

16. The assessment of the Security Service is that AV "does not seriously disagree with AQ ideologiy". (1/3B/69). In an extended passage of evidence, AV vehemently asserted that he did differ fundamentally from AQ. He asserted that there were clear distinctions between his own Libyan – focused views and the pan-islamist anti-western ideology of AQ. He asserted that the "manifesto" demonstrated the difference. The disavowal, by the leadership of the LIFG of the AQ inspired attack on the twin towers on 11th September 2001 emphasized it. I found this part of AV's evidence to be convincing. Whatever may have occurred to him in the years after he left Libya, I am satisfied that his attention and activities have always been focused on the overthrow of the Libyan regime. I do not believe that there is any reasonable basis to suspect that he would now and in current circumstances provide encouragement or practical support to those engaged in terrorist activities with a different aim.

17. AV says that, in September 2004, he agreed to pass on a message to a contact with a view to persuading the captors of Kenneth Bigley not to kill him. I accept that he did so and that it was not his fault that nothing came of this initiative. The attempt stands

to his credit and is concrete support for his claimed disavowal of the most violent jihadist outlook.

18. The Security Service maintains two assessments with which AV disagrees: that he held a leadership position periodically; and that he remains a member of the LIFG (1/3B/69 & 68). AV asserts that he left the LIFG in January 2005 with a view to taking up independent political activity focusing on the human rights of Libyans. He says that he sent an email to some of the LIFG's leaders announcing his decision. I accept that he did, in early 2005, withdraw from active participation in the running of the LIFG in the United Kingdom. I have no reason to disbelieve his statement that he sent an email to some of the leaders of the LIFG to that effect or something like it. I also accept that part of his motivation for doing so was to take up independent political activity, for which he was not accountable to others. I do not, however, accept that that was his only or even principal motive. I am satisfied that, as he told me, he feared genuinely, and for good reason, that the British government intended, if it could, to deport him to Libya and that he feared what would happen to him if it succeeded in doing so. His principal motive for withdrawal was to minimise the chance of that occurring. Nevertheless, I doubt that he has formally severed links with the LIFG or that it would greatly matter if he had done so. He remains committed to the principal objective of the LIFG: the overthrow of the Libyan regime. Subject to the recent developments considered below, I am satisfied that he would wish to achieve that end by any necessary means, including violence, if practicable. By virtue of the extended definition of terrorism in section 1 of the Terrorism Act 2000, which is incorporated by section 15(1) of the 2005 Act, that would be terrorism-related activity as defined by section 1(9) of that Act.

19. One of the means by which AV sought to persuade me that he had left the LIFG was to give and call evidence about what he says he told AT while the latter was in prison. In paragraph 6.32 of his lengthy witness statement, he said that he visited AT in prison several times: "they were purely visits to a friend in prison and I did not visit him alone but went with other members of the community." In evidence, he said that he had visited AT on his own on one occasion and that it was on that occasion that he told him that he had left the LIFG. He could not remember when that was. AT said that he was sure that AV had visited him in October 2004 and told him that he had left the LIFG. In response to a question from me, he said that AV had told him that he had left the group because it was finished, not merely that the group was, in his view, finished. I found the evidence of both AV and AT on this issue wholly unconvincing. I am prepared to accept that AT did discover that AV no longer played an active part in the group and, in June 2005, told AW that he had left it. I did not disbelieve AW's evidence. In the end, my disbelief of the account given about this issue by AV and AT is of marginal relevance. To the extent that it is relevant at all, it provides some support for the finding set out in paragraph 18.

20. Since I last considered the state of negotiations between the Libyan government and the imprisoned leadership of the LIFG in February 2009, in the case of AT and AW, there have been very significant developments, which require me to re-examine the cautious view which I expressed in my generic judgments. Between 11th and 14th March 2009, a clearly co-ordinated series of announcements was made. Sadeq was reported by Reuters on 12th March 2009 to have published a letter printed in a daily newspaper, said to be close to Saif Al Islam, which stated: "More than two years of

talks have created trust so that the dialogue could bear fruit". According to a statement published on the Almanarh website on 11th March 2009, Sadeq stated that the dialogue between the Libyan government and the leaders of the group was going positively, making good progress, and had overcome a number of obstacles which had hindered its progress in the past. A statement published by Dr Alssalabi, a participant in the talks, published on the same website asserted that, Saif Al Islam had announced that the Libyan authorities intended to release all members of the LIFG remaining in Libyan prisons soon; and that Saif Al Islam had personally overcome hurdles and deadlocks early in the negotiations. Dr Alssalabi noted that the LIFG's prisoners were carrying out a fundamental review of their ideology, including the carrying of arms and the use of violence against the Libyan state. In a broadcast interview on 13th March 2009, Dr Alssalabi repeated those claims and stated that Sadeq had made the statement (by implication, that published on 11th or 12th March 2009) of his own free will and conviction. He expressed optimism that the remaining problems would be surmounted. An interview with Dr Al Fatouri who, from the context of the discussion appears to be at least associated with the Libyan authorities, expressed a positive view of the negotiations. Witness ZA accepted that some, but not all, obstacles to an agreement had been overcome. Her view, and that of her service, remained cautious.

21. In evidence, AV said that he was hoping that there would be a light at the end of the tunnel and that if the Libyan government respected human rights, "we will try to forget our sacrifice". He said that he agreed with the position taken by the LIFG leaders in negotiation and that, if it was true that the LIFG was abandoning its armed struggle, it would be a good thing. Part of his evidence which rang true was that he had recently had information about his family in Libya. The good news was that his sister's husband, who had been in jail since 1995, was released in February 2009. The bad news was that some members who had been thought to be in prison were now known to be dead. Nevertheless, he thought that for the parents who had been told about the death of their children, it was a good gesture, because now they knew. I believe that on this topic, AV can be taken at his word: if a deal is done, he will accept it. I do not believe that there is a real possibility that his hatred of the Libyan regime would cause him to repudiate the deal or to resume terrorism-related activity targeted at Libya or elsewhere.

22. These developments pose the critical question in the case: is the decision of the Secretary of State that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to continue the control order in force, flawed? For the reasons already explained, the only section of the public which it may be necessary to protect from a risk of terrorism associated with AV is that identified in the "manifesto": the Libyan government and its security organs. The public announcements, by Sadeq, Dr Alssalabi and Saif Al Islam, about the good progress which they believe has been made in the negotiations and of their hopes for a concluded agreement in the near future do not rule out the possibility that the talks may fail; but they do rule out the possibility that the LIFG will prepare for or mount a terrorist attack on members of the Libyan government or security organs while the talks continue. The announcements also give rise to the reasonable expectation that the talks will not fail. Nothing in the material which I have considered could lead to the reasonable conclusion that a longstanding and senior colleague of Sadeq and Mundhir, AV, would frustrate their attempts to negotiate an agreement – and so ensure their continued imprisonment – now that they have reached the point at which

public announcements have been made about their good progress. There is no real risk that AV would independently, or with dissident members of the LIFG, re-launch a terrorist campaign in Libya. In those circumstances, there is no reasonable basis for the conclusion that, for purposes connected with protecting members of the public from the risk of terrorism, it is necessary to continue to impose a control order on AV, while the talks continue and/or if they succeed. If they fail, the Secretary of State would be entitled to review the position at that time. Unless they do, there is no need for an order.

23. When the order was made, these developments had not occurred. Even when it was renewed, a proper assessment of their impact could not immediately be made. It is a combination of their effect and my judgment of the evidence and intentions of AV which has permitted me to reach the conclusion expressed above. I am satisfied that when the order was made and renewed, the decision of the Secretary of State that a control order was necessary was not flawed. I therefore do not quash the original or renewed order, but propose to direct under section 3(12)(c) of the 2005 Act that the order be revoked. I will hear Counsel on the mechanism for achieving that end.

Procedure

24. The procedural issues canvassed in argument are now academic and I propose to make no ruling upon them.

Modification

25. Because I will direct the control order is revoked, these issues, too are academic and I make no ruling upon them.