

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: 14/11/2008

Before :

MR JUSTICE MITTING

Between :

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Claimant

- and -

(1) AR

Respondents

(2) AT

(3) AU

(4) AV

(5)AW

MR ANDREW O'CONNOR & MR JONATHAN HALL (instructed by **THE TREASURY SOLICITOR**) for
the Applicant

AR

(1) MR EDWARD GRIEVES (instructed by The Rights Partnership) for the **RESPONDENT**

MR MICHAEL BIRNBAUM QC & MISS MELANIE PLIMMER
(instructed by **THE TREASURY SOLICITOR SPECIAL ADVOCATE SUPPORT OFFICE**) as Special
Advocates

AT

(1) MR EDWARD GRIEVES
(instructed by The Rights Partnership) for the **RESPONDENT**

MR ANDREW NICOL QC & MISS JUDITH FARBEY
(instructed by **THE TREASURY SOLICITOR SPECIAL ADVOCATE SUPPORT OFFICE**) as Special
Advocates

AU

(3) MR MATTHEW RYDER
(instructed by **BIRNBERG PEIRCE SOLICITORS**) for the **RESPONDENT**

MR MARTIN CHAMBERLAIN & MISS CATHRYN McGAHEY
(instructed by **THE TREASURY SOLICITOR SPECIAL ADVOCATE SUPPORT OFFICE**) as Special
Advocates

AV

(4) MR OWEN DAVIES QC & MISS STEPHANIE HARRISON
(instructed by **TYNDALLWOODS SOLICITORS**) for the **RESPONDENT**

MR MICHAEL BIRNBAUM QC & MISS MELANIE PLIMMER
(instructed by **THE TREASURY SOLICITOR SPECIAL ADVOCATE SUPPORT OFFICE**) as Special
Advocates

AW

(5) MR EDWARD GRIEVES
(instructed by The Rights Partnership) for the **RESPONDENT**

MR ANDREW NICOL QC & MR MARTIN CHAMBERLAIN
(instructed by **THE TREASURY SOLICITOR SPECIAL ADVOCATE SUPPORT OFFICE**) as Special
Advocates

Hearing dates: 28th, 29th, 30th & 31st October 2008 and 3rd & 4th November 2008

Judgment

MR JUSTICE MITTING :

Procedure

1. The Secretary of State has served two amended open statements, with open annexes. The open statement sets out, in summary form, the assessment of the Security Service about the origins and recent history of the LIFG and the risk which it is now assessed to pose to the national security of the United Kingdom. On their face, the statements appear to be founded, to a significant extent, upon the open annexes. Some of them are problematical, in particular document 16, a report by Evan F Kohlmann described as “NEFA Senior Investigator”. (NEFA stands for “Nine Eleven Finding Answers” Foundation.) The value of the report is significantly undermined by three factors: it relies on detainee reporting, a source eschewed by the Secretary of State for good pragmatic reasons (the difficulty and expense of investigating claims that detainees were tortured or ill treated); selective quotation from an interview with a valuable source, the former leader of the LIFG in the United Kingdom, Ben Otman, sufficient to distort his views; and the palpable hits secured by defence Counsel in the criminal trial of AV which caused the prosecution to abandon reliance on any expression of opinion by Mr Kohlmann. If the Secretary of State’s case on the generic issues had, in truth, depended upon sources such as this, it would have been in difficulty. In fact, however, as witness AB said in evidence, the conclusions stated in the open statements were not founded on the open source material, but on far more extensive and potentially reliable closed material. I accept that they are and have conducted my own examination of the closed material in the closed Judgment. Contrary to my usual practice, I will state my conclusions about generic issues in the open Judgment, substantially without founding them upon open source material.
2. The way in which the Secretary of State’s open case was presented on paper has had the unfortunate consequence that the respondents’ open advisers and advocates have expended a good deal of forensic effort in seeking to discredit the open source material – with, in the case of document 16, considerable success; but they have been led on a wild goose chase. This should have been avoided. The Secretary of State should have made it clear, when the open source material was served, that it was being used for the purpose explained by witness AB: to place in the open arena things

which the Security Service would not otherwise be able to. If this situation arises in the future, that should be explicitly stated.

3. The open advocates submit that the proceedings to determine generic issues do not satisfy the minimum procedural requirements of fairness required by Article 6(1) ECHR. They do so on the familiar ground that, unless the open advocates have the opportunity of examining and challenging the material upon which the Secretary of State's conclusions are founded, they cannot mount an effective challenge to her case. The nature of the closed material is such that it cannot be disclosed for one or more of the reasons identified in CPR Part 76.1(4). Detailed scrutiny of the material must be conducted by the Special Advocates. They have performed that task with their customary skill and rigour. While it would be invidious for me to comment on the relative abilities of advocates, I cannot conceive that it would have been better done by open advocates. Further, the essence of the adversarial system has been substantially preserved in the generic part of these proceedings: the gist of the Secretary of State's case has been set out in the open statements; and the respondents have had the opportunity to give and call evidence about generic issues. They have not taken it, but, instead, have chosen to put in fairly general critiques of the Secretary of State's case prepared by their solicitors: 1/243 – 252. On one significant issue – the “merger” between the LIFG and Al-Qaida (AQ) - they rely on a piece of evidence of some significance: an answer by Al Zawahiri to a question posed by NEFA, of which a transcript or summary was released on 17th April 2008: 1/254. Once it is accepted, as it must be in the light of the Judgment of the Court of Appeal in *Secretary of State for the Home Department v AF & Others* [2008] EWCA Civ. 1148, that procedural fairness does not require any minimum standard of disclosure, I am satisfied that the minimum standard of fairness has been amply surpassed in this generic hearing save in one respect, to which I refer below.
4. In the closed hearing I have, of necessity, considered material which relates to the claimed activities of individual respondents. To permit conclusions to be drawn about significant generic issues, I have analysed, and where appropriate, relied on this material. The Special Advocates have made express reservations in relation to some of it, which they propose to explore in individual cases. I am conscious, therefore, that I have not heard the last word on these issues and may need to revise the conclusions which I have stated in the closed and open Judgments. If, when I have heard individual cases, I consider it right to do so, I will revise those conclusions. To that extent, the conclusions expressed in the open and closed judgments are provisional.
5. The open advocates criticise the thoroughness, and so, reliability, of witness AB. She acknowledged that she was unaware of a speech delivered on 26th July 2008 by Saif al-Islam, Colonel Gaddafi's eldest son, which touched upon the LIFG, stating that it had “ended also” and that those who had been returned were being helped by his foundation, and the Al-Zawahiri interview of 17th April 2008. She was criticised for failing to assess the reliability of the open sources, in particular by obtaining and examining transcripts of the examination of Mr Kohlmann in the criminal case against AV. Al-Zawahiri's answer is a significant piece of material and it would have been better if witness AB had been aware of it before the hearing; but the fact that it was not picked up by her or her colleagues does not undermine the reliability of her evidence. Even a service with resources far greater than the Security Service could

not reasonably be expected to pick up every piece of information relevant to its task. Saif's speech adds nothing to the information about his views and the matters of which he spoke already available to the Security Service. It is understandable that witness AB did not waste time on exploring the reliability of the open sources, because she did not rely on them. I heard her give evidence over the course of three days. She was an impressive witness. Her knowledge of her subject was encyclopaedic and her judgments balanced and shrewd. I have no doubt about the reliability of her evidence and have placed considerable reliance upon it in reaching the conclusions which I have expressed in both judgments.

Substance

6. From the public announcement of its existence on 18th October 1995, to at least March 2004, the LIFG was not regarded by the Security Service as a threat to the national security of the United Kingdom: see the open concession made to the Special Immigration Appeals Commission in *M v Secretary of State for the Home Department* SC/17/2002. Its objective was the overthrow of the Libyan government. To that end, it made several attempts to assassinate Colonel Gaddafi, the last reported attempt being in 1998. Vigorous repression by the Libyan government resulted in the death, arrest or dispersal of its membership in Libya. As witness AB accepted, there is no evidence of any attack attributed to the LIFG within Libya since 1998. A number of LIFG members settled in the United Kingdom in and after the late 1990s. Their principal activity has been fundraising. On 7th February 2006, a number of LIFG members and the Sanabel Relief Agency, a non-trading private company with charitable objectives, were added to the United Nations 1267 committee's list, and on 8th February 2006 designated by the US Treasury Office of Foreign Assets Control and their assets frozen. On 3rd October 2005 a number of individuals, including the five respondents, were detained with a view to deportation. The resulting appeals in two lead cases, AS and DD, to the Special Immigration Appeals Commission succeeded on safety on return grounds on 27th April 2007. Following an unsuccessful appeal by the Secretary of State to the Court of Appeal in AS and DD, all deportation notices were withdrawn.
7. The Security Service has assessed that the LIFG has facilitated the support of the insurgency in Iraq. I am satisfied that there are reasonable grounds for believing that that is so, but not more.
8. For many years prior to the joint announcement of the "merger" between AQ and LIFG made by Al Zawahiri and Abu Laith on 3rd September 2007, LIFG members, including Abu Laith and Abu Yaha shared facilities and fought with AQ in Afghanistan and Waziristan. Abu Laith and Abu Yaha were not simply independent Libyans fighting under the command of AQ. The announcement of the "merger" was the culmination of a relationship between AQ and elements of the LIFG which went back many years. The wording of the announcement of the merger is significant. Al Zawahiri said:

"A group of men who initiated Jihad, took the path of struggle, hoisted the flags of the call for Islam and Jihad, and took the lead in patience and steadfastness of the Libyan Islamic Fighting Group, has announced joining Al Qaida of Jihad in order to continue the march of their brothers who sacrificed

their souls in battlefields and spent their lives in prison of their own accord to satisfy their God”

and

“Dear brothers, his eminence the Mujahid scholar Abu Al Munzir Al Said, the emir of Mujahidin, the patient and steadfast Abu Abdalla Al Sadiq, and the rest of the captives of the Fighting Islamic Group in Libya, here is good news for you: your brothers are continuing your march after you, following in your footsteps, holding the flag that you hoisted, and escalating their confrontation with the enemies of Islam: Al Qadhaffi and his masters the crusaders of Washington. Be patient and steadfast, do not feel sad, and be strong with your faith against the affliction of captivity and the cunningness of US slaves, who are trying to repeat the experiment of Mubarak’s executioners through unsuccessful and scandalous retreat and concessions in Libya. Tell Al Qadhaffi’s dogs, agents of the world crusade, that here are our brothers who have confronted your futile cunning by stabbing you and your masters in the chest.”

I am satisfied that Al Zawahiri’s reference to “a group of men” was deliberate and intended to signify that something less than a full-blown merger with the LIFG had occurred. Further, the exhortation to the imprisoned LIFG leaders (they were extradited to Libya in March 2004) Sadeq and Mundhir would not have been made if the merger had already received their express blessing. Abu Laith’s response was less explicit, simply stating that,

“We have announced that we have joined Al Qaida of Jihad so that we may, with the grace and support of God, be faithful soldiers, gentle to Muslims but fierce against apostates...”.

9. Al Zawahiri’s intention was made plain in his response to a question noted by NEFA on 17th April 2008:

“I did not say that the Libyan Islamic Fighting Group has joined the Al Qaida organisation. What I said was that a delegation of distinguished members from the LIFG has joined the Al Qaida organisation – and by this, I sought to bring happiness to the Muslims and shatter the moral of the enemies of Islam.”

10. It is significant that the LIFG has not been renamed; nor has it joined an organisation whose name suggests that it might have been intended to become an umbrella organisation for all AQ linked organisations within the Maghreb: Al Qaida of the Islamic Maghreb.
11. Abu Laith was killed by an American air strike at the end of January 2008.

12. Negotiations have begun between the Libyan government and imprisoned LIFG leaders, with a view to persuading them to renounce violence. The negotiations are continuing. Their outcome is unknowable.

Conclusions

13. (i) The LIFG has been, in the past, a unified group whose principal objective was to overthrow the Gaddafi government and replace it with an Islamist government.
- (ii) For many years, a group of LIFG members has acted in co-operation with AQ in eastern Afghanistan and Waziristan
- (iii) The imprisonment of its leaders, Sadeq and Mundhir, and the disruption of its UK activities by detention, SIAC bail conditions and control orders, have reduced its cohesion and effectiveness
- (iv) There has been no complete or full scale merger between AQ and the LIFG. All that has occurred is the beginning of a process which AQ leaders and LIFG members in Waziristan hope and anticipate may ultimately lead to a full scale merger
- (v) It is simply unknowable whether the LIFG can be persuaded to make peace with the Libyan government or to undertake a full blown merger with AQ
- (vi) It is in the interests of all concerned in these developments that the LIFG should remain a single entity: for AQ, it is likely to gain more recruits and funding if it does; for the imprisoned leadership, their bargaining power will be reduced if the LIFG fractures; for the government of Libya, a united LIFG is more likely to marginalize those who reject reconciliation than if it splits; and for those members who retain as their primary objective the removal of the Gaddafi government, their aim is more likely to be achieved if the allegiance of all members, including those in Waziristan, is retained
- (vii) What would happen to that portion of the membership of the LIFG in the United Kingdom which remains committed to the violent overthrow of the Gaddafi government or to global jihad or both, if the imprisoned leadership were to reach agreement with the government of Libya and renounce violence, is unknown
- (viii) Until events unfold and the picture becomes much clearer – unlikely to occur within the near future – the LIFG remains, as it was found by the Special Immigration Appeal Commission in March 2007 to be, a risk to the national security of the United Kingdom.