Neutral Citation Number: [2009] EWHC 1572 (Admin)

Case No: CO/4851/2009 & PTA/38/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
IN THE MATTER OF SECTION 10(1) OF
THE PREVENTION OF TERRORISM ACT 2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2009

Before :

MR JUSTICE MITTING

- -

Between :

BM	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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- -

MISS DINAH ROSE QC & MR DANIEL SQUIRES
(instructed by **BIRNBERG PEIRCE & PARTNERS SOLICITORS**) for the Appellant
MR JONATHAN HALL & MISS KATHERINE GRANGE
(instructed by THE TREASURY SOLICITOR) for the Respondent
MR MOHAMMED KHAMISA QC
(instructed by **THE TREASURY SOLICITOR SPECIAL ADVOCATE SUPPORT OFFICE)** as Special Advocates

Hearing dates: 12th & 22nd June 2009

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APPROVED OPEN JUDGMENT

MR JUSTICE MITTING :

Background

1. BM is a 36 year old British citizen. He is married and has five children aged from four to eleven. His wife has undertaken divorce proceedings against him, but they are on amicable terms and share the upbringing of their children. Until his removal to Leicester on 21st May 2009, BM divided his time between his mother's home in Ilford – a house owned by his brother Daniel Adam – and a house in Ilford formerly owned by BM, but now transferred into his wife's name and divided into flats. When residing there, he occupied a ground floor flat. His wife and children live in the first floor flat.

2. On 2nd August 2007 BM was designated under the Terrorism (United Nations Measures) Order 2006. His designation is currently the subject of an appeal to the House of Lords. On 30th April 2009 Ouseley J gave permission to the Secretary of State to make a non-derogating control order in respect of BM. It was served on 1st May 2009. On 8th May 2009 I gave directions for the hearing of BM's appeal against the decision to make the control order under section 3(10) of the Prevention of Terrorism Act 2005. The appeal is due to be heard in the week commencing 25th January 2010. The control order as served required BM to reside at his mother's home in Ilford. The statement of Miss Hadland, dated 29th April 2009 which accompanied the application for permission to make the order, indicated that it was intended, for national security reasons, to relocate BM to an address, yet to be identified and secured, approximately 2 – 3 hours outside of London. Due to an administrative error, that intention was not made known to BM until 8th May 2009. By letter dated 14th May 2009, the Secretary of State notified BM that he would be relocated to a new address in Leicester on 21st May 2009. The address was, in fact, a one bedroom flat. It was intended, after about a month, to locate a family house suitable for occupation by BM, his wife and children, should they choose to join him. On 15th May 2009 BM gave notice of appeal under section 10(1)(b) against the modification. On 20th May 2009 BM applied for an injunction restraining removal to the Leicester address. The application was refused by Blake J on the same day. He did, however, give directions for the hearing of BM's appeal against the modification, which I began to hear on 12th June 2009. On 21st May 2009 BM was served with a modified control order which required him to reside at the Leicester flat. He was moved to that address on the same day. He has remained there since. The addresses of the three properties are identified in a confidential schedule.

The first issue: does Article 6(1) ECHR apply to this appeal?

3. Miss Rose QC for BM submits that his appeal against the modification determines his civil rights and obligations in three respects: his right to respect for family life under Article 8 and to access to his children; the state-imposed obligation on where he is to live; and his right to occupy either or both of the homes in Ilford at which he resided before 21st May 2009. The first two grounds are open to debate. The right to respect for family life is a Convention, not a civil right, although it may include a package of civil rights. One of them may be the right of access to children by a parent: *W v United Kingdom* [1987] 10 EHRR 29 paragraph 78. But the modification challenged does not deprive BM of access to his children. For an uncertain period likely to be counted in weeks, it may make access more difficult; but if the Secretary of State

locates a suitable family home away from Ilford and BM's wife and children choose to live in it with him, his right of access to his children will be unimpaired. Even if that were not to happen, his appeal against the modification does not determine his right of access to his children. At most, it may have a partial indirect effect upon it. That would be insufficient to engage Article 6(1). The obligation to reside at a particular address, imposed for reasons of national security, is not obviously a civil obligation, except in the sense that it is not imposed by, or in consequence of, an order of a court exercising criminal jurisdiction. My provisional view – I have not heard full argument upon the question – is that it falls within the "hard core of public authority prerogatives" identified in *Ferrazzini v Italy* (2002) 34 EHRR 1068 as falling outside the scope of civil rights and obligations.

4. It is unnecessary for me to resolve these controversial questions, because, subject to an argument advanced by Mr Hall for the Secretary of State, Miss Rose's third ground is securely founded. The right to occupy land, including a home, is a classic civil right. Proceedings which determine that right are subject to Article 6(1): *Gillow v United Kingdom* (1986) 11 EHRR 335 paragraph 68. I take that to be so even in the case of proceedings which determine that right for a limited period. A fairly close analogy is a decision to make a closure order under section 2 of the Anti Social Behaviour Act 2003. Proceedings before the Magistrates' Court are civil proceedings: *Metropolitan Police Complaints Commissioner v Hooper* [2005] EWHC 340 (Admin). The challenged modification is clearly intended to remove BM's right to occupy either of his homes in Ilford for a significant period – at least until the hearing of his section 3(10) appeal. Subject to Mr Hall's point, which I discuss below, I am satisfied that BM's appeal against that modification does involve the determination of his civil right to occupy either or both of his homes.

5. Mr Hall's point is that the closed material establishes that BM did and does not intend to occupy either of his homes, so that his appeal against the modification does not determine a civil right of any real value to him. All that it decides in relation to that right, is an interim measure which has the effect of maintaining the status quo. It is settled law that Article 6 does not apply to proceedings relating to interim orders or other provisional measures adopted prior to the proceedings on the merits, because such measures do not in general involve the determination of civil rights and obligations: *R(Wright) v Secretary of State for Health* [2009] UKHL 3 per Baroness Hale at paragraph 20. Only those interim measures which have such a clear and decisive impact upon the exercise of a civil right attract the application of Article 6(1): paragraph 21. Accordingly, Mr Hall submits that, if BM did not intend to occupy either of his homes, the impact on his civil right is theoretical. Accordingly, Article 6(1) does not apply to the determination of his appeal against the modification which affects that right.

6. Mr Hall does not shrink from the startling result of his argument. BM will not be able to give effective instructions about the decision of the Secretary of State to deprive him of the civil right to occupy his homes because, for reasons which are not disclosed to him, this appeal does not determine that right. Indeed, the opportunity to avoid disclosure is the reason for advancing the argument. Mr Hall submits that the decision, whether or not Article 6(1) is engaged is to be made by applying common law principles which do not incorporate the requirements of Article 6(1). The argument is ingenious and has a tenuous logic to it. It cannot, however, succeed.

7. The starting point is that the modification does, on its face, deprive BM of a civil right for a significant period. The value of that right to him and the justification, if any, for interfering with it, can only be determined on the material put before the Court. That is the same material which must be addressed when deciding whether or not Article 6(1) applies to the proceedings. If BM is entitled to be told sufficient about the Secretary of State's case on the need for the modification to be able to give effective instructions about it, he will necessarily also require to be told sufficient to enable him to give instructions about the application of Article 6(1) to the proceedings.

8. Further, on this particular issue, there can be no distinction between an appeal against a modification of a control order under section 10(1)(b) and the review of the need for the same obligation under section 3(10). Both involve the same apparent interference with the same civil right. Both will be for an uncertain, but finite, period (the time until the review hearing or the expiry of the control order, as originally made or renewed). It cannot sensibly be argued that the former is an interim measure, whereas the latter is not. If Mr Hall's argument is right, the Secretary of State would be entitled to withhold from BM the totality of the grounds upon which he relies to deprive him, during the duration of the control order, of the right to occupy his homes. That is flatly inconsistent with the Secretary of State's concession (originally made in *Secretary of State for the Home Department v MB & AF* [2007] UKHL 46 and reiterated in *Secretary of State for the Home Department v AF* [2009] UKHL 28), in relation to the review of control orders under section 3(10), that Article 6(1) applies.

9. For the reasons given, I am satisfied that Article 6(1) applies to the appeal against this modification.

The second issue: what, by way of disclosure, does Article 6 require?

10. The Secretary of State has provided an open statement in response to the notice of appeal. It does not set out the full open national security case, which is not due to be served until 3rd July 2009. Mr Hall submits, and Miss Rose accepts, for present purposes, that the concession made by counsel for the appellants in *AV & AU* [2008] EWHC 1895 (Admin) – that sub-section 10(3) does not require or permit the Court to question the grounds for suspecting that an individual has been involved in terrorism-related activity or that it is necessary, for the purposes connected with protecting the public from a risk of terrorism, to make the control order – was correct and applies to this appeal. I agree with both propositions. The open statement is directed only to the issue which arises in this appeal: the necessity or otherwise of the relocation of BM to Leicester. The statement refers to association with other Islamist extremists, but focuses on the risk of absconding. It notes the Security Service's assessment that prior to the move to Leicester, BM presented "an imminent abscond risk" and would present a lesser risk of absconding if relocated to there than if he remained in Ilford; and that he would be willing to abscond without his family. The only specific incident relied on is the possible tampering with the antenna of his monitoring device on 12th May 2009 which the monitoring company Serco accepted had been accidentally knocked by a pack of cotton buds. The Security Service's tentative assessment was that BM may have been testing the sensitivity of the equipment and the response time of the police or Security Service. Mr Hall did not contend that that specific incident, by itself, could justify relocation to Leicester.

11. The necessity for relocation is, on the open case, justified only by reference to the Security Service's assessment of the risk of absconding. That assessment is not supported in the open case by the grounds upon which it was made. On the assumption that Article 6 required BM to be given sufficient information about those grounds to enable him to give effective instructions about them, I indicated in closed session what the Secretary of State must disclose to BM to fulfil that requirement. On 16th June 2009, he indicated that he was not prepared to make any further disclosure. I do not criticise his decision – indeed, I would have been surprised if it had been otherwise. The upshot is that if Article 6 does require further disclosure of the grounds upon which the assessment was made for there to be a fair hearing of BM's appeal, its requirements have not been satisfied. It is common ground that in that event and by analogy with the procedure laid down by CPR 76.29(7), the Secretary of State could not rely on the closed grounds which support the open assessment.

12. Mr Hall submits that a close examination of the reasoning of the Appellate Committee in *Secretary of State for the Home Department v AF* [2009] UKHL 28 demonstrates that Article 6 does not require that any further disclosure be made to BM of the grounds for relocation. The Appellate Committee only determined the extent of disclosure required on a section 3(10) review because, he submits, the total package of restrictions and obligations imposed by a typical control order are so onerous that the controlled person cannot be denied knowledge of the essence of the case against him. Where, as here, only one aspect of that package is in issue, a lesser standard of disclosure is all that is required – and has been fulfilled on the facts. He relies principally on the observation of Lord Phillips (with whose reasoning all other members of the committee except Lord Carswell, expressly agreed) in paragraph 65:

> "The Grand Chamber has now made clear that non-disclosure cannot go so far as to deny a party knowledge of the essence of the case against him, at least where he is at risk of consequences as severe as those normally imposed under a control order."

Taken in isolation, this observation, just, leaves room for the argument advanced by Mr Hall. But it must be read in the light of what Lord Phillips said in paragraph 57:

> "The requirements of a fair trial depend, to some extent, on what is at stake in the trial. The Grand Chamber was dealing with applicants complaining of detention contrary to Article 5(1). The relevant standard of fairness required of their trials was that appropriate to Article 5(4) proceedings. The Grand Chamber considered, having regard to the length of the detention involved, that Article 5(4) imported the same fair trial rights as Article 6(1) in its criminal aspect – see paragraph 217. Mr Eadie submitted that a less stringent standard of fairness was applicable in respect control orders, where the relevant proceedings were subject to Article 6 in its civil aspect. As a general submission there may some force in this, at least where the restrictions imposed by a control order fall far short of detention. But I do not consider that the Strasbourg Court would draw any such distinction when dealing with the minimum of disclosure necessary for a fair trial."

The less stringent standard to which Lord Phillips referred was illustrated by him in paragraph 66: it may be acceptable not to disclose the source of evidence founding the grounds of suspicion of involvement in terrorism-related activities. Not so in a criminal trial, when the evidence is determinative. But, in paragraph 57, Lord Phillips expressly rejected the proposition that the Strasbourg Court would draw any distinction between Article 6 in its criminal aspect and in its civil aspect "when dealing with the minimum of disclosure necessary for a fair trial". Each required that the controlled person must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations: paragraph 59.

13. Given the nature of the right at issue in this appeal – BM's right to occupy his homes – I am satisfied that that minimum standard applies to it. I have reached that decision without reference to the expert reports and other evidence about the impact of relocation on BM and his family. The issue is one of principle and must be determined as such. If the Secretary of State is to be permitted to rely on the material which supports the assessment of the Security Service about the risk of absconding, he would have to make the disclosure identified by me in the closed session which, for proper reasons, he has declined to make.

Decision

14. All that is left of the Secretary of State's case is the bare assessment of the Security Service that BM posed an imminent risk of absconding before relocation and that relocation is necessary to minimize that risk. On the open material, that assessment is groundless. It follows that the Secretary of State's decision to make the modification must be treated as flawed.

15. On the basis of the closed material, I would have decided that the decision was not flawed and would have upheld the modification, notwithstanding its significant and highly adverse impact upon BM's family, in particular upon his children.

16. As will be apparent from my reasoning, the task which I have performed is not the statutory task set out in sub-section 10(5)(a):

> "…to determine whether the following decision of the Secretary of State was flawed –
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> (a) in the case of an appeal against a modification, his decision that the modification is necessary…".

What I have decided is that the open material is not capable of supporting the decision. That is not the test which Parliament intended. Nor is it a satisfactory basis upon which to determine the rationality and proportionality of a decision properly made in the public interest by the Secretary of State. It is, however, the inevitable result of applying the principles clearly identified by the Appellate Committee in AF.

17. When the Secretary of State made the decision to relocate BM, her decision properly took into account closed material. There was no requirement that she should found her decision only on material the essence of which could be disclosed in any subsequent proceedings to be BM. The requirement for disclosure only arises when

the decision is challenged by appeal or review. Accordingly, it would not, in my view, be right to quash the obligation introduced by the modification. I, therefore, exercise the power to give directions to the Secretary of State to revoke the modification under sub-section 10(7)(c).