Appeal No: SC/101/2010
Hearing Date: 28th January 2011

SPECIAL IMMIGRATION APPEAL COMMISSION

BEFORE:

THE HONOURABLE MR JUSTICE MITTING
SENIOR IMMIGRATION JUDGE ALLEN
MR TAYLOR, CBE, DL

BETWEEN:

M1

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

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MS S HARRISON and MR E GRIEVES (instructed by Birnberg Peirce & Partners) appeared on behalf of the Applicant

MR T EICKE (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State

MR ZUBAIR AHMAD (instructed by the Special Advocates Support Office) appeared as Special Advocate.

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JUDGMENT ON PRELIMINARY ISSUE

The Hon Mr Justice Mitting :

1. On 15 October 2010 the Secretary of State gave notice to the Appellant, an Italian national, of her intention to deport him to Italy under Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations 2006. She certified the decision under Regulation 28(4)(a). Accordingly, the Appellant's appeal against her decision lay to SIAC. His appeal is listed for hearing in the week commencing 11 April 2011. The Secretary of State has served her first open national security case, in which she sets out the open material upon which she relies to justify her decision. She has also served a closed statement on SIAC and the special advocates. That closed statement, and any subsequent closed material, has been and will be reviewed by the special advocates to see whether or not further disclosure should be made to the Appellant under Rule 38 of the Procedure Rules. The Secretary of State will respond, either by accepting that further disclosure should be made or by declining to do so. Unresolved differences will be determined by SIAC. The preliminary issue which we must determine is whether or not the Appellant is entitled to yet further disclosure under the law of the European Union. The issue arises because of the decision of the 7th Chamber of the General Court of the European Court of Justice. In *Kadi (No 2) v European Commission* 30 September 2010 and of the language used by the Court to explain its decision in paragraphs 173, 177 and 181 of its judgment. Miss Harrison, for the Appellant, contends that the law of the European Union requires the Secretary of State to disclose to him sufficient details of the allegations which she makes against him to permit him to amount an effective challenge to them and, to that end, to disclose to him details of the evidence upon which she relies to justify those allegations. Mr Eicke, for the Secretary of State, submits that European Union law imposes no such requirement.

2. Two basic propositions are not in dispute:

(i) Responsibility for the public and national security of Member States is not within the competence of the Union.

(ii) Upholding the qualified right of every Union citizen to move and reside freely within the territory of Member States is within the competence of the Union.

(i) is unmistakably established by Articles 4.1 and 4.2 and Article 5.2 of the Treaty on European Union (TEU), in particular by the last sentence of Article 4.2: "In particular, national security remains the sole responsibility of each Member State". Nothing in the Treaty on the Functioning of the European Union (TFEU) contradicts or qualifies that unambiguous statement. Article 6 TEU provides that the rights, freedoms and principles set out in the Charter of Fundamental Rights shall have the same legal value as the Treaties, but also expressly states that its provisions " shall not extend in any way" the competencies of the Union. (ii) is contained in Article 21 TFEU. The relevant limitations and conditions on the right of free movement and residence are set out in Directive 2004/38 EC of 29 April 2004. The Directive has direct effect in Member States.

3. What happens when, as here, a Union right is effected by a decision made within the exclusive competence of a Member State? The starting point must be to look at the relevant conditions which govern the Union right. They are set out in Articles 28, 30, 31 and 32 of the Directive. Article 28 requires the host Member State to take into account a number of considerations, which, in the case of this Appellant, prohibit the taking of an expulsion decision, unless "based on imperative grounds of public security, as defined by Member States". Article 30.2 provides:

> "The persons concerned shall be informed, precisely and in full, of the…public security…grounds on which the decision taken in their case it based, unless this is contrary to the interests of state security".

Article 30.3 requires that the person concerned is informed of his appeal rights and given not less than one month to leave, save in duly substantiated cases of urgency. Article 31 sets out the procedural safeguards to which the person concerned is entitled:

> "(1) The persons concerned shall have access to judicial and, where appropriate administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of…public security."

((2) provides for interim suspension of enforcement of the decision)

> "(3) The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and the circumstances on which the proposed measure is based. They shall ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28."

((4) requires that the person concerned is ordinarily permitted to submit his defence in person).

Article 32 permits a person excluded on grounds of public security to submit an application for lifting the exclusion order after a reasonable period, but in any event after three years from enforcement of the order.

3. For present purposes, there are three core procedural requirements: (i) notification of the grounds on which the decision is taken, "unless this is contrary to the interests of state security"; (ii) access to judicial or administrative redress procedures; (iii) the redress procedures must permit examination of the legality of the decision and the facts and circumstances on which it was based. Accordingly, except in a case in which notification of the reasons for the decision is not required because contrary to the interests of state security, a Union citizen will necessarily have the opportunity to make representations to the judicial or administrative authority which will examine his case in response to a precise and full statement of the grounds upon which the decision to exclude him was made. Full compliance with Article 47 of the

Charter will readily be achieved ("Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a Tribunal in compliance with the conditions laid down in those Articles.
Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.")

4. What is to happen when the person concerned is not informed precisely and in full of the grounds on which the decision has been taken because to do so would be "contrary to the interests of state security"? He is still entitled to access to judicial or administrative redress procedures which must allow for the examination of the legality of the decision and the facts and circumstances on which it was based: Articles 31.1 and 31.3 of the Directive. The judicial or administrative authority which examines the decision must be independent and impartial and must act fairly. The person concerned must have the possibility of being advised defended and represented: Article 47 of the Charter. All of these requirements are fulfilled in an appeal to SIAC, applying its procedural rules. Even in the case of material which is neither disclosed nor gisted to the appellant and his open representatives, his interests are represented – in the experience of all serving members of SIAC, with conspicuous skill and thoroughness – by special advocates. Does Article 31 of the Directive, taken together with Article 47 of the Charter require that even in a case in which a precise and full statement of the grounds on which an exclusion decision has been taken has not been given because to do so would be "contrary to the interests of state security", that information must be disclosed in detail or at least in sufficient detail to permit him to amount an effective challenge to it? If such an obligation exists, it could only arise after notice of the decision was given under Article 30.2. If it exists, the obligation must arise during the course of the redress proceedings. If it did, it would strip the saving for the interests of state security in Article 30.2 of practical effect. All that it would achieve would be a short postponement of the obligation to make full and precise disclosure of the grounds on which the decision was taken. Such an obligation would, however, flatly contradict Article 346.1(a) TFEU, which provides:

> "The provisions of the Treaties shall not preclude the application of the following rules:
>
> (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security".

Articles 30 and 31 of the Directive have clearly been drafted with that unequivocal rule in mind. It cannot have been the intention of the Union legislature to circumvent that rule by subtle implication. The two Articles read together, can, in our view, only be understood as giving full effect to Article 346.

5. Miss Harrison submits that the Appellant's appeal could be determined without infringing that rule: Rule 38 of the Procedure Rules permits the

Secretary of State to refuse to disclose material if, in her view, it would be contrary to the interests of national security. The price is that she may not rely on that material to support her decision. All that is required is that Rule 38 should be read so as to require SIAC to put the Secretary of State to that election in respect of all of the material on which she relies, the disclosure of which is necessary to fulfil the requirements of procedural fairness set out in the observations in Kadi II (whatever the precise extent of that requirement is). Such an outcome would fulfil the letter of Article 346.1(a); but it would undermine its spirit. Further, it would flatly contradict the express provision set out in the second sentence of Article 4.2 TEU:

> "It [the Union] shall respect their [the Member states'] essential state functions, including…safeguarding national security".

To require a Member State, seeking to uphold a decision to exclude a Union citizen on the grounds of public security, to withdraw that decision or to cease to rely upon potentially decisive grounds to support it because, for proper reasons of national security, it was unwilling to disclose to him details of the evidence or grounds upon which the decision was made would not respect that Member State's essential state functions. It would itself be a breach of one of the fundamental principles of Union law.

6. For those reasons, we are satisfied that the rules of disclosure which must be applied are, and are only, those set out in Rule 30 of the Procedure Rules.