Appeal no: SC/65/2007
Hearing Dates: 21st – 22nd October 2008
Date of Judgment: 7th November 2008

**IN THE SPECIAL IMMIGRATION APPEALS COMMISSION**

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE GOLDSTEIN
MR M G TAYLOR CBE DL

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**('BY')**

**Appellant**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

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MR R de MELLO & MR A BERRY (instructed by Owen White & Catlin Solicitors) appeared on behalf of the Appellant.

MR A McCULLOUGH & MR S CRAGG (instructed by the Special Advocates' Support Office) appeared as Special Advocates.

MR R PALMER & MR T EICKE (instructed by the Treasury Solicitor) appeared for the Secretary of State

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**OPEN JUDGMENT**

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**MR JUSTICE MITTING :**

Background

1. BY was born in Punjab, India, on 7th June 1980. His father Wadhawa Singh is, and has for many years been, leader of an extremist Sikh organisation called Babbar Khalsa. For many years – the Security Service believes since the 1980's – Wadhawa Singh has lived under the reported protection of the Pakistani Inter-Services Intelligence Directorate (ISI) in Pakistan. The Security Service believes that he has lived there since that time with his wife and close family. BY maintains that he did not arrive in Pakistan until 1994, when he was fourteen. For the purposes of this appeal, the difference is not significant. In late 2004 BY settled in Germany. He claimed asylum, as the son of the leader of BK and as a member of BK in Germany. He was granted refugee status. During the course of the hearing, it became common ground that he had been granted that status in December 2004, but the documents suggest that it might have been somewhat later. An official document from the Federal Office for Immigration and Fugitives dated 18th January 2005 states, by a cross against a printed entry, that his application for asylum had been rejected. (A/202 and 258). He states that he was given a travel document in March 2005 (witness statement 10/04/08 paragraph 17). He has produced a travel document issued on 19th November 2007 which may have replaced an earlier version. There is no doubt that he does, currently, enjoy refugee status in Germany. On 11th November 2005 he married a Sikh woman, resident in Yorkshire and a British citizen called Balwant Kaur, in Pakistan. A civil ceremony was performed in Denmark on 17th February 2006. She gave birth to their daughter D on 14th June 2007 in Lorrach, Germany. There is no doubt that their marriage is genuine and fulfilled. Her parents and family live in Yorkshire. She has a degree in Psychology and an MSc in Health Psychology. Although she has not been able to work in her chosen profession in the United Kingdom, she has worked in a managerial capacity in her family's carpet and mat manufacturing business and later in its coach firm. Since the birth of her daughter she has lived with BY and their daughter in a single bedroom flat in Weil Am Rhein, in Southern Germany, very near to Basle. Their financial circumstances are poor. She cannot exploit her qualifications or full earning capacity in Germany and is constrained to work as a kitchen hand, part time, for which she is paid 350 euros per month after tax. Apart from her husband and daughter, she has no family in Germany and greatly misses their support and comfort. She and BY wish to live in the United Kingdom, preferably in South Yorkshire.

2. On 3rd July 2006 BY applied for leave to enter the United Kingdom with a view to settlement as the spouse of Balwant Kaur. On 10th August 2006, entry clearance was refused on the ground that the Secretary of State had personally directed that his exclusion from the United Kingdom was conducive to the public good under paragraph 320(6) of the Immigration Rules. It has never been suggested that the requirements of paragraph 281 were not, or could not in the future, be met. In particular, there is no reason to doubt that paid employment is available to both of them in one of Balwant Kaur's family firms which would be sufficient to maintain them without recourse to public funds. Balwant Kaur states (and there is no reason to doubt) that she took up permanent residence with BY in Germany in September 2004 and has since exercised her rights as an EEA national to undertake paid work in Germany and to reside there. Meanwhile, on 11th October 2007 the Secretary of State

gave reasons for refusing BY's application for entry clearance: for reasons of national security, because of his membership and involvement with BK. She certified the decision under section 97(3) and section 98(2)(b) of the Nationality Immigration and Asylum Act 2002, so that his appeal (limited to human rights and race discrimination grounds) was to this Commission.

3. On 29th July 2008, BY applied for an EEA family permit under Regulations 9 and 12 of the Immigration (European Economic Area) Regulations 2006 as the spouse of an EEA national. The application was refused on15th October 2008 under Regulation 19 and on 21st October 2008, the first day of the hearing before the Commission, certified by the Secretary of State under Regulation 28. BY gave notice of appeal against that decision on the same date.

4. Commendably, the parties have co-operated to ensure that the obstacles to a prompt hearing which might have been created by this complex and, in part, abbreviated procedure have not prevented the Commission from determining these appeals on their substantive merits.

Issues and Law

5. The appeals raise manifold issues of law; but the parties have accepted the Commission's suggestion that determination of the issues which arise under Article 27.2 of Directive 2004/38/EC of the European Parliament and of the Council of 29th April 2004 will determine their substantive outcome. If the Secretary of State can justify exclusion under Article 27.2, she must also succeed in doing so under the Immigration Rules and under Article 8 ECHR. If BY cannot succeed in defeating the Secretary of State's decision to obstruct his right of free movement, he cannot succeed under any other substantive ground of appeal. Both sides accept that the Article 8 rights of BY and his wife (and daughter) can be fully taken into account under the principle of proportionality included in Article 27.2. Accordingly, we shall address in detail only those issues which arise under or by reference to Article 27.2 and will treat the answers as determinative of the substantive appeals.

6. Directive 2004/38/EC has direct effect. It is a consolidating and amending measure. Its foundation is the statement of principle in Recitals (1), (2) and (5) of the preamble:

> "(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the member states subject to the limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.
>
> (2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.
>
> (5) The right of all Union citizens to move and reside freely within the territory of the member states should, if it is to be exercised under objective conditions of freedom and dignity, be also be granted to their family members, irrespective of nationality…."

Recitals (22), (25) and (26) identify the purposes for which the restrictions on the ability of a member state to exclude or expel a citizen or family member contained in the operative articles of the Directive are laid down:

> "(22) The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC of 25th February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals, which are justified on grounds of public policy, public security or public health.
>
> (25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another member state, as well as to uphold the principle that any action taken by the authorities must be properly justified.
>
> (26) In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another member state".

3. Chapter VI deals with restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health. Article 27.1 permits member states to restrict freedom of movement and residence on those grounds. Article 27.2 provides:

> "2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
>
> The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on consideration of general prevention shall not be accepted."

Procedural requirements are set out in Articles 30 and 31. Article 30.2 requires that

> "2. The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of state security."

Article 31.1 provides that member states must afford a right of appeal against an exclusion or expulsion decision.

Article 23 provides:

> "Irrespective of nationality, the family members of a union citizen who have the right of residence or the right of permanent residence in a member state shall be entitled to take up employment or self employment there".

7. It is common ground that BY's wife is a UK national working in another EEA state and living with BY as his spouse so that entry, and in consequence, the right to take up employment or self employment in the United Kingdom, can only be refused to BY if the Secretary of State establishes the grounds for exclusion set out Article 27.2. (See regulation 9 of the Immigration (European Economic Area) Regulations 2006.)

8. Parts 2 and 4 of the Regulations give effect to the substantive requirements of the Directive in virtually identical language. Because the Directive has direct effect and is determinative of the issues, it is unnecessary to set out the regulations here. Part 6 of the Regulations deals with appeals and procedure, but does not repeat Article 30.2. In proceedings before the Commission when national security is in issue, the United Kingdom's procedural obligations under Article 30 are contained in the Special Immigration Appeals Commission (Procedure) Rules 2003. It is not suggested that they are inconsistent with Article 30.2. It is, however, submitted for BY that Article 6 ECHR applies to both and that both may, in consequence, require to be read so as to give effect to the procedural protections afforded by Article 6.

9. The principal issues in the appeals can be divided into procedural and substantive:

Procedural

i) The nature of the proceedings: criminal, civil or neither?

ii) The standard of proof to be applied to findings of past fact: criminal, balance of probabilities, or something less?

Substantive

iii) Has the Secretary of State established grounds of public security (or policy) upon which to restrict BY's freedom of movement and residence?

iv) Has the Secretary of State established that the personal conduct of BY represents a genuine and sufficiently serious threat affecting one of the fundamental interests of society?

v) Does the decision to exclude comply with the principle of proportionality?

vi) (An issue which bears principally upon (v)) what, if any, effect on our decision should the fact that BK membership is not prohibited in Germany have?

Procedure

(i) The nature the proceedings

10. Mr de Mello submits that the proceedings are, in the autonomous Strasbourg concept, criminal. We can deal with this issue shortly, because it has already been considered in proceedings which are closely analogous, control order proceedings, by the House of Lords in *Secretary of State for the Home Department v MB* [2008] 1AC. The reasons why the latter are not criminal were explained by Lord Bingham, with whose speech all members of the Appellate Committee agreed, in paragraphs 19 – 23 of his speech and summarised in paragraph 24. With one significant exception, they all apply to these appeals. The decision under Article 27.2 is preventative in purpose, not punitive or retributive: it is to protect one of the fundamental interests of society, public or national security. The decision does not result in the imposition of a penalty, let alone one approaching the degree of severity sufficient to require it to be classified as criminal. The decision can only stand if it is no more restrictive than is judged necessary to meet the threat: this is inherent in the principle of proportionality. The significant difference between control orders and the appealed decisions is that in the latter, the Secretary of State must establish that the personal conduct of the Appellant must represent the threat. As the Commission decided in *ZZ* SC/63/2007 30th July 2008, the use of the word "conduct" in relation to past facts imports something that is found to have happened: paragraph 12. In these appeals, none of the acts alleged to have been committed by BY amount to the commission of an offence contrary to the criminal laws of the United Kingdom. Mr de Mello submits that the Secretary of State's "basic concern" is that BY will commit offences in the United Kingdom contrary to Sections 11 and/or 12 of the Terrorism Act 2000. As Lord Hoffman observed in paragraphs 48 – 49 of *MB*, both domestic law and Strasbourg jurisprudence recognise the distinction "between determination and punishment of past guilt and prevention of future suspected wrong doing". Accordingly, the fact that our task includes reaching a judgment about BY's personal conduct which is, to a significant extent, based on past events does not make these proceedings, otherwise clearly not criminal, criminal in the autonomous meaning.

11. Mr de Mello and Mr Berry submit that, in the alternative, the proceedings determine three rights which they maintain are categorized as "civil" for the purposes of Article 6.1 ECHR: rights of entry and residence and the right to take up employment and self employment. The first two are closely linked: exercise of the right to reside in a member state (conventionally referred to in the United Kingdom as the right of abode) is necessarily dependent upon the right to enter. Both are conventionally categorized as public law rights: hence, the concession noted in paragraph 5 of *Al Jedda v Secretary of State for the Home Department* SC/66/2008 22nd October 2008. The right to freedom of movement within the EEA (and so of entry to a member state) is a public law right: *Adams and Benn v The United Kingdom* application numbers 28979/95 and 30343/96 paragraph 2 and *McCullough v The United Kingdom* application number 24889/94 paragraph 2. Control of the boundaries of a member state is just as much "part of the hard core of public authority prerogatives," identified by the Strasbourg Court in *Ferrazzini v Italy*, when applied to EEA nationals as to aliens. In the case of the latter, it is firmly established that decisions regarding the entry, stay and deportation of aliens do not concern the determination of civil rights, any more than of a criminal charge: *Maaouia v France* [2001] 33EHRR 42 at paragraph 40. There is a clear distinction between deprivation of a right of residence or abode in the territory of a member state resulting from the refusal of entry and the interference with the right of an individual to live at a particular place within a member state of the kind which may be imposed by a control order: a decision on the

latter may well involve determination of a civil right, in particular if the result of state action is to prevent an individual from living in a property which he owns or which he has the right to occupy. Not so where the prohibition on residence is general throughout the territory of the member state.

12. Mr Berry categorizes the right to take up employment or self employment as a hybrid right – part public and part civil. We accept that the right to take up employment may, and often will, include a right which can be categorized as civil. If the state were to prevent an individual from undertaking employment with an identified employer or employment in an identified field, the decision would be closely analogous to decisions held by the Strasbourg Court to involve the determination of a civil right: for example, the granting of administrative authorisation relating to the conditions of professional practice or of a licence to sell alcoholic beverages, identified as within that category in *Ferrazzini* in pargraph 27. But it is only to proceedings which are "decisive for private rights and obligations" (*Ringeisen v Austria* [1971] 1EHRR 45 paragraph 94) that Article 6(1) ECHR applies. Where the impact of a determination is indirect, it does not, even if it has major repercussions on the enjoyment of the civil right. This is the necessary consequence of the ruling of the Strasbourg Court in *Maaouia v France* at paragraph 38:

> "The fact that the exclusion order incidentally had major repercussions on the Applicant's private and family life or on his prospects of employment cannot suffice it to bring those proceedings within the scope of civil rights protected by Article 6(1) of the Convention."

As in the case of residence, it is the refusal of entry which prevents BY from undertaking employment, including the employment with his wife's family's firm which was open to him when he made his application for a family residence permit.

13. Given that the proceedings are neither criminal nor civil, they do not attract the procedural protections of Article 6 ECHR. They are the determination of a public law right, to which the procedural protection afforded by the jurisprudence of the Strasbourg Court in and following *Chahal* and the 2003 rules apply. They are those identified by the Commission in its Judgment in *OO v Secretary of State for the Home Department* 27th June 2008 SC/ 51/2006 in paragraphs 13 – 16. The European Court of Justice has recently confirmed that such protections are appropriate in cases involving national security in *Kadi & Yusuf v Council of the European Union* C - 402/5P and C – 415/05P, 3rd September 2008, paragraph 344:

> "In such a case it is nonetheless the task of the Community judicature to apply in the course of the Judicial Reivew it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the Act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice (see, to that effect the Judgment of the European Court of Human Rights in *Chahal v United Kingdom*..."

ii) The standard of proof.

The Commission has already set out its conclusion and reasoning on this issue in *ZZ* in paragraphs 8 -12. Mr De Mello's submissions do not cover new ground and we see no reason to differ from the conclusions there expressed. We have applied the balance of probabilities standard to our findings of past fact.

14. It should, however, be noted that the foundation of the Secretary of State's open case – that BY is a member of BK – is admitted by him. That fact is established, whatever standard of proof should apply.

Substantive

15. The four substantive issues overlap and we propose to consider them together.

16. BK is an active terrorist organisation. Its objective is the establishment of an independent state of Khalistan, by all means, including terrorism. Major incidents in recent years are uncontroversially summarised, in reverse date order on pages 2 -5 of the profile at 1/5/10 – 13. To this must be added the bombing in October 2007 of a cinema in Ludhiana. It is identified as one of the groups and entities in respect of which the Council has concluded that they "have been involved in terrorist acts within the meaning of Article 1(2) and (3) of Council Common Position 2001/931/CFSP of 27th December 2001": Council decision 2008/583/EC of 15th July 2008 Recital 7. Thus, it has been identified as a group or entity controlled by persons who commit or attempt to commit terrorist acts or who participate in or facilitate the commission of terrorist acts: Council Common Position of 27th December 2001 2001/931/CFSP Article 1.2. By virtue of Article 2.1(a) of Council Regulation (EC) number 2580/2001 of 27th December 2001 member states are required to freeze its assets. Since February 2001, it has been an organisation proscribed in the United Kingdom under section 3 of the Terrorism Act 2000. It is not proscribed in Germany, but the attitude of the German authorities to its activities in Germany is summarised in the 2005 Annual Report on the Protection of the Constitution published by the Federal Ministry of the Interior at page 262: fundraising, to finance the armed struggle for independence. It is not suggested, and there is no evidence that, each BK group in an individual state is separate from every other BK group. It has a single leader, Wadhawa Singh, and a unifying aim, the establishment of Khalistan. It is identified in the EU instruments referred to above as a single entity.

17. Determination of a threat to the public security of a member state is a matter for the member state, not the Union. One member state is, accordingly, entitled to take the view that membership of an organisation poses a threat to its public security, even if the member state in whose territory the individual is resident does not. Even in relation to public policy, member states are entitled to have different views; *Van Duyn v Home Office* case 41-74 paragraphs 18 & 19. Indeed, EU law imposes on member states who seek to exclude an individual on the ground that he is a threat to public security the obligation to gauge the gravity of the threat, even where it is based upon information supplied by another state: *European Commission v Spain* case C – 503/03 10th March 2005 paragraph 56. The United Kingdom is, accordingly, entitled to take the view that membership of BK poses a threat to its public security, even though Germany does not.

18. Mr de Mello submits that the grant of refugee status to BY by Germany should be decisive or, at the very least, carry great weight, in determining whether or not he

should be permitted to enter and reside in the United Kingdom. He submits that there are common elements in the test for exclusion of refugee status in Article 1F of the Refugee Convention and refusal of entry under Article 27.2. We accept that there may well be, but the two are not the same, not least in the consequence of refusal: under Article 1F, the individual may be returned whence he came. Under Article 27.2 all that occurs is that he is refused entry to a member state. The latter puts him at no risk of persecutory treatment, unlike the former. Further, we do not know on what principles Germany determines that an individual has been guilty of acts contrary to the purposes and principles of the United Nations (contrast the position in the United Kingdom, which is in part established by section 54 of the Immigration Asylum and Nationality Act 2006). The grant of refugee status by one member state is not inconsistent with the refusal of entry to the same individual by another.

19. In paragraphs 14, 16 and 17 of his witness statement of 10th April 2008, BY claims that he joined BK on the advice of others that it would help his asylum application in Germany, that he has no status in BK, that he is merely an honorary member of the German committee and that his reason for belonging to it is primarily social. We do not accept these claims, for reasons set out in the closed Judgment, but even if they were true, the United Kingdom would still be entitled to refuse entry to BY by virtue of his membership of BK: see *Van Duyn* paragraph 17:

> "Although a person's past association cannot in general, justify a decision refusing him the right to move freely within the Community, it is nevertheless the case that present association, which reflects participation in the activities of the body or of the organisation as well as identification with its aims and designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct within the meaning of the provision cited".

20. For the reasons set out in the Closed Judgment, we are satisfied on balance of probabilities that BY has been and remains an active participant in the affairs of BK. As such, he poses a genuine and sufficiently serious threat affecting a fundamental interest of the United Kingdom namely its public security. It is immaterial that BK has not committed a terrorist act within the United Kingdom and may never do so. It does, however, promote and commit acts of terrorism in India. For the reasons explained in paragraphs 33 – 41 of the Judgment of Lord Woolf in *Home Secretary v Rehman* [2003] 1AC 153, the national (and public) security of the United Kingdom is also put at risk by support for and the commission of terrorist acts abroad.

21. Whether or not the decision to exclude BY interferes with his, and more particularly, his wife's rights under Article 8 ECHR, their family circumstances and their wish to enjoy married life and to take up work in the United Kingdom are factors which must be given appropriate weight in determining the proportionality of exclusion. Three tests must be satisfied: the legislative objective must be sufficiently important to justify limiting the right; the measure (exclusion) must be rationally connected to the legislative objective; and the means used to impair the right are no more than is necessary to accomplish the objective: *R(Daly) v Secretary of State for the Home Department* [2001] 2AC 532. We are satisfied that the exclusion of BY fulfils all three tests: the legislative objective of protecting national and public security is of the highest importance; the measure (exclusion of an individual who poses a threat to them) is rationally connected to the objective; and exclusion is a means which is no

more than is necessary to accomplish the objective. Mr de Mello submits that the risk posed by BY could be managed, within the United Kingdom, by surveillance. This suggestion is quite unrealistic: human and financial resources are not unlimited – it is a matter of public information that the Security Service and the special branches of police forces have to monitor the activities of and investigate many individuals suspected of terrorist activities; and surveillance cannot guarantee to prevent, or even reliably inhibit, activities such as fundraising to support terrorism abroad. The only means of ensuring that BY does not further the aims of BK in the United Kingdom, from within the United Kingdom, is to exclude him. This will undoubtedly be to the detriment of his wife and daughter, in the manner summarised in paragraph 1 of this Judgment; but that is the unavoidable consequence of the need to deal with the threat posed, by the personal conduct of BY, to the public and national security of the United Kingdom. The measure of exclusion is proportionate.

22. Mr de Mello submitted that if the decision to exclude were taken solely or mainly to curry diplomatic favour with India, it would not be justified. The premise upon which that submission is made is unfounded. Accordingly we do not address it.

23. The answer to the four questions posed under the heading "Substantive" in paragraph 9 of this Judgment is, therefore, as follows:

iii) : Yes

iv) : Yes

(v) : Yes

(vi) : No material effect.

For the reasons given in the Open and Closed Judgments, these appeals are dismissed.