Appeal no: SC/63/2007
Hearing Dates: 7th July 2008 – 9th July 2008
Date of Judgment: 30th July 2008

IN THE SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE JORDAN
MR J LEDLIE

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ZZ

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MR H SOUTHEY (instructed by Messrs Fisher Meredith) appeared on behalf of the Appellant.

MR T EICKE and MR N MOSS (instructed by the Treasury Solicitor) appeared for the Secretary of State

MR M KHAMISA QC and MR M GOUDIE (instructed by the Special Advocates' Support Office) appeared for the Secretary of State.

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OPEN JUDGMENT

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Mr Justice Mitting :

Background

1. ZZ was born in Morocco on 6th October 1958 of Algerian parents. He has dual nationality: Algerian and French. He lived in Algeria from 1972 to 1979. He first arrived in the United Kingdom either in September 1978 or on 8th April 1979. Nothing turns on the difference. From then until 1983 or 1984 he studied at various English institutions, with appropriate leave to enter, frequently granted at Heathrow, after trips abroad. From 1984 until 1986 he lived in Dubai with his sister Houria who, it is accepted, is a wife of Sheikh Mohammed Bin Rashid Al Makhtoum. She has provided him with substantial financial support which, it is accepted, explains the very large balances in his bank accounts in the mid 1990s. From 1987 to 1989 he lived in France and set up a business with another sister. On 23rd February 1990 he married Theresa Anne Drew, a British citizen. On 3rd August 1990, he was granted one year's leave to remain as the spouse of a British citizen. Home Office records do not establish the basis upon which he then remained in the United Kingdom; but it is not suggested that his residence was unlawful. Thereafter, he resided in the United Kingdom, apart from intermittent trips abroad until he departed for Algeria on or shortly before 19th August 2005. The Secretary of State does not dispute that he was lawfully resident in the United Kingdom from 1990 until August 2005. We will decide the case on that assumption. On 6th March 1995 ZZ applied for naturalization as a British citizen. His application was refused on 20th January 1999 on the basis that he did not meet the good character test on grounds of national security. A United Kingdom EEA residence permit was, however, issued to him on 4th August 1999, valid for 5 years. On 25th March 2004 he was granted indefinite leave to remain. We had initially assumed that this represented a considered judgment by Home Office officials in the light of full information about the reason for refusal of naturalization given on 20th January 1999. A letter from the Treasury Solicitor of 8th July 2008 explains the true position: that indefinite leave to remain was granted routinely by an official who was not aware of the security concerns about ZZ. ZZ made two further applications for naturalization. The first was refused on the ground that he had not been granted indefinite leave to remain before making his application for naturalization. The second had not been determined before he left for Algeria in August 2005. The Home Office was notified that he had left the United Kingdom on 19th August 2005. On 25th August 2005 the Home Secretary personally decided to cancel ZZ's indefinite leave to remain and to exclude him on the grounds that his presence was not conducive to the public good for reasons of national security. He had no right of appeal against that decision. Naturalization was refused on 30th August 2005. On 18th September 2006 ZZ arrived at Heathrow from Algiers, presenting a French passport. On 19th September 2006, he was refused admission under Regulation 19(1) of the Immigration (European Economic Area) Regulations 2006 on the basis that his exclusion was justified on grounds of public security. He was removed to Algiers on the same day. This was an appealable decision and on 9th October 2006 ZZ lodged an appeal to the Asylum and Immigration Tribunal. On 15th March 2007 the Home Secretary certified the decision to refuse admission to the United Kingdom

under Regulation 28 of the 2006 Regulations. This Commission is, therefore, the appropriate body to determine his appeal: Regulation 28(1).

Law

2. The 2006 Regulations came into force on 30th April 2006. They transpose into English Law Directive 2004/38/EC of the European Parliament and of the Council of 29th April 2004. The Directive has direct effect. The Regulations closely follow the wording of the Directive, omitting only procedural requirements, which are already provided for in UK procedural law. The Directive is a consolidating and amending measure. Its foundation is the statement of principle in recitals (1) and (2) 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."

Recitals (22) to (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.
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> (23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host member state. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host member state, their age, their state of health, family and economic situation and the links with their country of origin.

> (24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host member state, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host member state, in particular when they were born and have resided there throughout their life….
>
> (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."

Article 28 provides for increasing degrees of protection, depending upon the length of residence in a member state of the individual:

> "1. Before taking an expulsion decision on grounds of public policy or public security, the host member state shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host member state and the effect of his/her links with the country of origin.
>
> 2. The host member state may not take an expulsion decision against Union citizens or their family members, irrespective of

> nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
>
> 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by member states, if they:
>
> (a) have resided in the host member state for the previous ten years…"

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 30.4 provides:

> "4. Member states may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory."

4. Article 24 makes provision for equal treatment:

> "1. Subject to such specific provisions as are expressly provided for in the treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host member state shall enjoy equal treatment with the nationals of that member state within the scope of the treaty….".

5. Part 4 of the 2006 Regulations deals with refusal of admission and removal. Regulation 19(1) provides for the restriction on freedom of movement and residence permitted by Article 27:

> "(1) A person is not entitled to be admitted to the United Kingdom by virtue of Regulation 11 (which requires the United Kingdom to admit an EEA national on production of a valid national identity card or passport) if his exclusion is justified on grounds of public policy, public security or public health in accordance with Regulation 21."

Regulation 21 gives effect to Articles 27 and 28, but in a way which significantly extends their scope. Regulation 21 applies to a "relevant decision" which "means an EEA decision taken on the grounds of public

policy, public security or public health". An "EEA decision" is defined in Regulation 2(1) as including a person's

> "(a) entitlement to be admitted to the United Kingdom"

as well as,

> "(c) removal from the United Kingdom".

The restrictions imposed by Article 28 are, accordingly, applied to both categories of decision and not just to expulsion decisions. The relevant operative parts of Regulation 21 provide:

> "(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under Regulation 15 (including an EEA national who has resided in the United Kingdom "in accordance with" the regulations for 5 years) except on serious grounds of public policy or public security
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> (4) A relevant decision may not be taken except on imperative
>
> grounds of public security in respect of an EEA national who –
>
> a) has resided in the United Kingdom for a continuous
>
> period of at least 10 years prior to the relevant decision...
>
> (5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles –
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> a) the decision must comply with the principle of proportionality;
>
> b) the decision must be based exclusively on the personal conduct of the person concerned;
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> c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;
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> d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;
>
> e) a person's previous criminal convictions do not in themselves justify the decision.
>
> (6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of

the person, the person's length of residence in the United Kingdom, the person's social and cultural integration into the United Kingdom and the extent of the person's links with his country of origin".

6. Part 6 of the Regulations deals with appeals and procedure, but does not contain provisions equivalent to Articles 30.2 or 31.4. In proceedings before this 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. Mr Southey accepts that this appeal concerns a denial of entry to the territory of the United Kingdom, so that the obligation to permit the Appellant to submit his defence in person under Article 31.4 does not arise.

7. Articles 27.2 and 28 create a hierarchy of protection, with "imperative grounds of public security" (or "motifs graves de securite publique", in the (possibly erroneous) French text), as does Regulation 21(3) to (6): *LG (Italy) v Secretary of State for the Home Department* [2008] EWCA Civ 190. The relevant periods of residence necessary to achieve the higher degrees of protection are periods of residence which are, objectively, enjoyed by Treaty and Directive right, not only under domestic law: *McCarthy v Secretary of State for the Home Department* [2008] EWCA Civ 641. It would be possible to engage in a complex debate about the precise category into which ZZ now falls. The transitional provisions in paragraphs 2(5) and (6) of Schedule 4 to the regulations may add an additional level of complexity. Mr Eicke submits that, by reason of his absence in Algeria between August 2005 and 18th September 2006, ZZ has ceased to be entitled to either of the two higher levels of protection based on long residence. Mr Southey submits that such an approach would not properly apply the principle of proportionality as expounded in recitals 23 and 24 of the preamble to the Directive. It is unnecessary for us to resolve these arguments. For the reasons explained below, the family circumstances of ZZ his wife and children are such that the principle of proportionality requires that they could only be outweighed by imperative grounds (or motifs graves) of public security, even if the only test being applied was that contained in Article 27.2 and Regulation 21(5) and (6).

8. The next question to be determined is the approach which must be taken to establishing the existence of imperative grounds of public security. Mr Southey submits that it must be based upon facts relating to the personal conduct of ZZ which are proved to the criminal standard or, at least, those facts which are relied upon for that purpose must be so proved. For that proposition he relies on *Gough v Chief Constable of the Derbyshire Constabulary* [2002] QB 1213. Mr Eicke submits that the more flexible approach held by the Court of Appeal to apply in the case of non-derogating control orders in *Secretary of State for the Home Department v MB* [2007] QB 415 should be adopted. Neither case binds us, because each considered different statutory provisions from those which we must apply. Nevertheless, we draw some assistance from these authorities, as we do from the *Secretary of State for the Home Department v Rehman* [2003] 1AC 153 and *European Commission v Spain* [2006] ECR 1-1097.

9. *Gough* concerned the imposition of a banning order under Section 14B of the Football Spectators Act 1989. Two requirements had to be satisfied before a banning order could be made: proof that the Respondent had within the last 10 years caused or contributed to any violence or disorder; and satisfaction that there were reasonable grounds to believe that making the order would help to prevent violence or disorder at or in connection with football matches. The orders interfered with the freedom of movement – in particular the ability to leave the United Kingdom – of those subjected to them and so engaged member states' obligations to ensure freedom of movement of EEA nationals, including their own. Article 3 of Directive 64/221/EEC was in identical terms to Article 27.2 of the 2004 directive, save that it omitted reference to the principle of proportionality. The Court concluded that a banning order should only be imposed "where there are strong grounds for concluding that the individual subject to the order has a propensity for taking part in football hooliganism": paragraph 86A-B. The proceedings were not criminal, but required proof that the Respondent had caused or contributed to violence or disorder to a standard that "is practically indistinguishable from the criminal standard". That proposition was based upon a concession made by counsel for the Secretary of State, but was adopted unanimously by the Court. It was also preceded by the observation that "…the necessity in the individual case to impose a restriction upon a fundamental freedom must be strictly demonstrated": paragraph 91B.

10. There are real distinctions to be drawn between the material which can be relied upon to justify the making of a banning order and that which can be relied upon to support exclusion or expulsion on the ground of public security. The former requires proof of facts in ordinary adversarial proceedings – by first hand evidence, credible hearsay and video recordings. The latter does not necessarily require proof of facts at all, as is demonstrated by *European Commission v Spain*. Intelligence, believed for good reason to be reliable, that an EEA national was about to enter the United Kingdom for the purpose of carrying out a serious terrorist act here, could be relied upon to exclude him. It is in the nature of intelligence that frequently it cannot be established to be true to the criminal standard. In *European Commission v Spain*, the Court held that a provision of the Schengen Agreement which required member states to exclude aliens (i.e. persons who were not a national of a member state of the European Union) when another member state had posted an alert on the Schengen Information System was inconsistent with what is now Article 27.2 of the Directive. Nevertheless, its requirements for exclusion of an alien fell far short of proof to a criminal standard. The individuals who provided the occasion for the reference to the Court were spouses of nationals of a member state. In their case the Court required that an entry in the Schengen Information System "must be corroborated by information enabling a member state which consults the SIS to establish, before refusing entry into the Schengen area, that the presence of the person concerned in that area constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society": paragraph 53. The member state posting the alert was required to "make supplementary information available to the consulting state to enable it to gauge, in the specific case, the gravity of the threat the person for whom an alert has been issued is likely to represent":

paragraph 56. Mr Southey submits that *European Commission v Spain* is not in point, because it concerns a family member of a member state national, not the national himself. This distinction finds no real echo in the directive: Article 27.1 permits member states to restrict the freedom of movement and residence "of Union citizens and their family members, irrespective of nationality". The protection afforded by Articles 27.1 and 28.1 and .2 apply both to Union nationals and to family members. Only Article 28.3 is, in terms, confined to "Union citizens". It is this, apparently anomalous, exception to the general rule which requires to be justified, not the general rule. It follows that if Articles 27 and 28 permit exclusion or expulsion decisions to be based upon "information" which enables the member state to establish the existence of the necessary threat, they would not require proof of past facts to the criminal standard before exclusion or expulsion could be justified.

11. *MB* concerns non-derogating control orders (i.e. restrictions on liberty and freedom of movement which fall short of deprivation of liberty so as to engage Article 5 ECHR). The Secretary of State and, subsequently, the Court have to be satisfied that there are "reasonable grounds for suspecting the individual is or has been involved in terrorism – related activity": Section 2(1)(a) of the Prevention of Terrorism Act 2005. This is a lower threshold than proof that someone has caused or contributed to violence or disorder. Reasonable grounds for suspicion may be established by a matrix of alleged facts "some of which are clear beyond reasonable doubt, some of which can be established on balance of probability and some of which are based on no more than circumstances giving rise to suspicion": paragraph 67. The test required by Article 27.2 and Regulation 21(5)(c) is higher than reasonable suspicion: it is that "the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat…". In most cases, a conclusion about the existence of the threat will be based wholly or to a significant extent on past events, even though that may not always be required. *MB* was, in fact, a case in which the rights to freedom of movement of an EEA national were restricted by the control order imposed upon him (he was a British citizen – see [2007] 3 WLR 701d and the control order prohibited him from leaving the United Kingdom or from having in his possession any passport or identity card: [2007] QB 430g-h). Article 3 of 64/221/EEC (the predecessor to Article 27.2) applied to him. No point was taken about it. In our view, *MB* provides an uncertain foundation for the proposition that, in assessing personal conduct under Regulation 21(5)(c) and Article 27.2, conclusions as to past fact can be founded on information which would only support reasonable suspicion. It certainly does not determine the issue.

12. Authority, accordingly, does not compel a conclusion as to the standard of proof to be applied to past facts when assessing the personal conduct of a person. In relation to past facts, the use of the word "conduct" imports something that is found to have happened. Proof that something has happened outside the field of asylum, in which for pragmatic reasons, Courts and Tribunals are required to adopt a low standard of proof, is ordinarily achieved either by proof on balance of probabilities or to a criminal standard or to something approaching it. The criminal standard is not appropriate, for two reasons:

i) In the field of national security, evidence and information may not be capable, for good reason, of being traced back to an ultimate source; and it will often be undesirable or impossible for that source to be examined directly.

ii) The Court concluded in *European Commission v Spain* that something far short of proof to the criminal standard can support a conclusion that the personal conduct of a person represents "a genuine present and sufficiently serious threat".

That leaves the balance of probabilities. This test is familiar and not difficult to apply, as the decisions of the Commission in deportation cases demonstrate. Further, we find persuasive the observation of Lord Slynn, accepted by Lord Steyn, in *Rehman* that "when specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof": paragraph 22. We have ultimately applied that standard to the factual questions which we have determined.

13. We have in fact been able to, and have, determined some of the essential questions of fact in the closed judgment to the criminal standard. If, ultimately, it is determined that that standard, not the balance of probabilities, is to be applied, an appellate Court which reads both the open and closed judgments will, we trust, have sufficient findings of fact to permit the issue to be determined without a further hearing.

14. Mr Southey submits that the requirements of procedural fairness identified in *MB* apply to these proceedings. We do not agree. We set our reasons for rejecting that submission in deportation proceedings in *OO v Secretary of State for the Home Department* SC/51/2006 27th June 2008. We repeat and adopt that analysis. There is no difference in principle between deportation and exclusion proceedings which would require a higher standard of procedural fairness in the latter. It should be supplemented by reference to a case of which the Commission was then unaware, *G v Bulgaria* 1365/07 24th April 2008. The Court set out the requirements of Article 13 in cases in which the executive has invoked national security in paragraph 57 of its judgment:

> "Even where an allegation of a threat to national security has been made, the guarantee of an effective remedy requires as a minimum that the competent appeals authority be informed of the reasons grounding the expulsion decision, even if such reasons are not publicly available. The authority must be competent to reject the executive's assertion that there is a threat to national security where it finds arbitrary or unreasonable. There must be some form of adversarial proceedings, if need be through a special representative following security clearance."

We can find nothing in the judgment of the Court to indicate that, if Article 8 impliedly imports procedural requirements (as in the case of Articles 2 and 3) they are any different from those required by Article 13 or require material properly kept closed for national security reasons to be disclosed or gisted to

the Appellant or his open advocates. Nor can such a requirement be implied by virtue of European Union law. Article 30.2 expressly exempts from disclosure to a person concerned the precise grounds upon which the decision in his case is taken if to do so would be contrary to the interests of state security. We have not been referred to any case in which that express provision has been held to be qualified.

15. Mr Southey further submits that not to apply *MB* standards of procedural fairness to this decision would infringe ZZ's right to equal treatment under Article 24: a British national is entitled to *MB* procedural fairness, including disclosure when restrictions are placed upon his liberty and freedom of movement; an EEA national, such as ZZ, is not. Despite its ingenuity, this argument is fallacious. *MB* requirements apply in non-derogating control order cases because Article 6 ECHR is engaged. For the reasons explained in OO, it is not engaged in exclusion or deportation cases. Freedom of movement is not a "civil right" as that concept is understood in the jurisprudence of the Strasbourg Court. Both the British national and the EEA national are, in relation to freedom of movement considered under the Directive and Regulations, treated the same.

Facts

16. Little of the case against ZZ is contained in the first and second open statements. They assert that he was involved in the GIA and "terrorist activities". The only specific incident of any weight relied upon is the discovery in May 1995 of a set of British registration plates for a white Toyota which ZZ admits he owned for a short time, together with a grey Peugot 309 which he admits owning, in a garage in Brussels rented by El-Majda, a known extremist, in which was also found a quantity of arms, ammunition and medical supplies. ZZ denies that he was ever a member of or associated with the GIA or knew anybody who was a member. In paragraphs 42 -58 of his second witness statement, he has given a long and detailed explanation of his movements in Italy and Belgium and of his ownership of the two cars. As indicated at the start of the case to Mr Southey, we draw no inference adverse to ZZ from the fact that he has been unable to give evidence in person or by television link. We accept that he would wish to do so, if that were possible; and that the reasons why it has not been are not his responsibility. We also stated that we did not place less weight on ZZ's written statements than we would have done if he had been able to give evidence personally, simply by reason of the fact that he has not been able to do so. We have also decided not to hold against him any lack of frankness about his activities in 1995 and 1996 because of his current situation: he is in Algeria, without the benefit of assurances given to the British government about his treatment by the Algerian authorities, and may fear that frankness might cause him to be prosecuted under Article 87(a)(vi) of the Algerian Criminal Code. We also do not exclude the possibility that he might genuinely fear ill treatment at the hands of the Algerian authorities, despite the ending of the civil conflict. Even so, we do not accept ZZ's denial of involvement in the GIA in 1995 and 1996, for the reasons which are substantially set out in the closed judgment. We also dismiss as implausible his contention that the discovery of the number plates

and car formerly connected with him in the Brussels garage is an inexplicable and unfortunate coincidence.

17. We accept his evidence about his sister Houria and the fact that she was the source of the substantial funds in his accounts in the mid 1990s. We accept that is nothing sinister in his relationship with her husband's family. We accept, without reservation, the expert evidence of Dr Christopher Davidson in his report of 30th June 2008. The Security Service places no reliance upon his involvement in the Al-Ansar newspaper. Nor do we.

18. As will be apparent from the brief analysis of the open case against ZZ and of his response to it, neither really engages with the critical issues, which we have determined principally by reference to the closed material. If *MB* requirements apply to these proceedings and they require that the gist of the case against ZZ is disclosed to him, they have not been fulfilled.

Proportionality

19. Subject to the distress caused by their enforced separation, ZZ and his wife are happily married. They have eight children aged from six to seventeen. All have spent the whole of their lives in the United Kingdom, apart from the oldest boy Abdurrahman, who spent an unhappy year at school in Algeria in 2005/6, when aged eleven. English is the first language of ZZ's wife and children. Apart from the fact that ZZ is Algerian, none of them have any contact with or affinity for Algeria. All view the prospect of living in Algeria with dismay. We have read, and accept as truthful and not overstated, the witness statement of ZZ's wife and the statements and letters of his six oldest children. The statement of his eldest daughter Heiba is particularly clear and moving. We accept that, despite the matters which we have found to be proved in the closed judgment, ZZ has been a kindly husband and father and has kept his family free from extremist views. We have found the report of Renee Cohen dated 8th April 2008 to be especially illuminating. She found that ZZ's wife was under very great stress and that the situation was taking its toll upon her mental health. We saw for ourselves her unexaggerated distress in the open sessions. The children created a very favourable impression upon Mrs Cohen. We saw some of them during the open sessions and her impression is confirmed by what we saw. We accept, without reservation, her conclusion that the enforced separation of ZZ from his family is having a profound and damaging impact upon it and, given the nature of these proceedings, that the situation is necessarily incomprehensible to them. We share her concern that this situation may have a serious long term impact upon intelligent children who might be made bitter and antagonistic to the British society in which they have been raised. On any view, the enforced separation is a tragedy for ZZ's wife and his children. Further, public security considerations apart, we would regard it as unreasonable for ZZ's wife and children to resettle in Algeria. The weight to be given to the family life of this family in the balancing exercise required by the principle of proportionality is very heavy.

20. Nevertheless, for reasons which are explained only in the closed Judgment, we are satisfied that the personal conduct of ZZ represents a genuine present and

sufficiently serious threat which affects a fundamental interest of society namely its public security and that it outweighs his and their right to enjoy family life in the UK. We have considered, pursuant to the principle of proportionality, whether those interests could be adequately protected by the imposition of a control order upon ZZ. There are two problems with that course: first, the Secretary of State would, in imposing a control order and seeking to uphold it in the High Court, have to rely upon the closed material which we have considered. The requirements of procedural fairness identified in *MB* would demand that which the Secretary of State is unwilling to do for good reasons: to disclose the gist of the essential elements of the case to ZZ. Her inability to do so, would almost certainly prevent the imposition of a control order. Secondly, and more important, as we demonstrate in the closed Judgment, the imposition of a control order is not an appropriate method of controlling the risk to public security created by the personal conduct of ZZ.

21. For reasons which are given in the open and closed Judgments, read together, we are satisfied that the imperative grounds of public security which we have identified in the closed Judgment outweigh the compelling family circumstances of ZZ's family so as to justify the Secretary of State's decision to exclude him from the United Kingdom. For those reasons, this appeal is dismissed.

22. We are grateful to Mr Eicke for his post-hearing note on the extent to which we can take into account matters occurring since the date of decision in this out of country appeal. We accept his submission that we can and should take into account matters which have occurred since the date of the decision which bear upon it. The only relevant matter is the impact of separation on his family, which is dealt with entirely in the open material.