Neutral Citation Number: [2023] EWCA Civ 169

Case No: CA-2021-001616

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Special Immigration Appeals Commission (Cheema-Grubb J, Upper Tribunal Judge O'Connor and Mr Roger Golland)
SC/150/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 February 2023

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE STUART-SMITH
and
LADY JUSTICE ELISABETH LAING

- -

Between:

R3	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Hugh Southey KC and David Sellwood (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
Rory Dunlop KC and Natasha Barnes (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 18 January 2023

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Approved Judgment

This judgment was handed down remotely at 11.00am on 17 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. On 30 May 2013, the Appellant ('A') travelled to Turkey. He did not book a return journey. He then went to Syria. On 24 May 2017, the Secretary of State gave notice of her intention to make an order ('the Order') depriving A of his British citizenship on the grounds that it was conducive to the public good so to deprive him ('the Decision'). The Secretary of State's reason for the Decision was her assessment that A had aligned himself in Syria with a group which was aligned to Al Qaeda ('AQ'). A appealed to the Special Immigration Appeals Commission ('SIAC') against the Decision.

2. SIAC made three decisions in A's case, which I will refer to as decisions 1, 2 and 3. In decision 1, SIAC held that the effect of the Order was that it did not make A stateless. In decision 2, SIAC refused A's application to amend, or to 'vary' his grounds of appeal. In decision 3, SIAC dismissed A's appeal. A applied for permission to appeal against those three decisions, on seven grounds.

3. SIAC (Supperstone J, sitting alone) made decision 2 after an oral hearing, the application to amend having first been refused on the papers. A had applied to amend his grounds of appeal to SIAC so as to argue that the Decision was contrary to article 8 of the European Convention on Human Rights ('the ECHR') because there was a risk of arbitrariness, and at the time of the Decision, it was not foreseeable enough to be 'in accordance with the law' ('the *Gillan* ground').

4. I considered the application for permission to appeal to this Court on the papers. I was the judge who, in 2019 in SIAC, on the papers, had refused A permission to amend his SIAC grounds of appeal. I therefore asked the Court of Appeal Office to check whether the parties objected to my considering the application for permission to appeal to this Court. They did not object.

5. I then gave A permission to appeal on one ground only, that decision 2 was wrong. I recognised that a successful challenge to decision 2 might have implications for the lawfulness of decision 3. I therefore asked A, if he wished to, to apply to amend his grounds of appeal, to explain briefly in the proposed amendment what he said those implications were. I also asked the parties to deal, in their skeleton arguments, with the implications of the success of the challenge to decision 2. I also suggested that A should be ready to defend the merits of his application to amend at the hearing of the appeal, in case this Court decided that they were relevant to the exercise of the power to permit amendments, and decided to the deal with that issue itself.

6. As I explain in paragraph 45, below, A applied at the hearing of the appeal for permission to amend his grounds of appeal. As I also explain in paragraph 46, below, a further issue, whether SIAC was right to hold, in decision 3, that article 8 did not apply when the Secretary of State made the Decision, arose in the course of the hearing.

7. Paragraph references are to decisions 1, 2 or 3, as the case may be, unless I say otherwise, or, if I am considering an authority, to that authority.

8. On this appeal, Mr Southey KC and Mr Sellwood represented A. Mr Dunlop KC and Ms Barnes represented the Secretary of State. I thank counsel for their written and oral submissions.

9. For the reasons I give below, I have reached three conclusions.
    i. A was not within the jurisdiction of the United Kingdom when the Decision was made and article 8 did not, therefore, apply, as SIAC rightly held in decision 3.
    ii. Supperstone J did not, in decision 2, err in law in refusing A permission to vary his grounds of appeal.
    iii. If either of those conclusions was based on an error of law, any such error was immaterial.

The facts

10. I have taken this summary largely from decision 3 and from A's skeleton argument.

11. A was born in London in 1979. His parents were both British citizens by naturalisation. Before the Decision, A held Pakistani and British citizenship. He went to schools in Leytonstone. He graduated from the University of Westminster with a BSc in computing. He became more interested in Islam towards the end of his university career. He grew a beard and listened, for example, to Imam Anwar al-Awlaki's sermons. He worked as a gas engineer for the father of his cousin, B3. Some of his associates were members of Al-Muhajiroun. Three were made the subject of control orders. Two were reported to have been killed in drone strikes in Pakistan. It is clear that SIAC considered that A had, in his oral evidence, downplayed those associations (paragraphs 47 and 122).

12. A's father died in 2017. His mother, two brothers and sister all live in the United Kingdom. He married his first wife in April 2003. I shall refer to her, as SIAC did, as 'W1'. They had four children who were born between January 2006 and December 2012. W1 and those four children all live in the United Kingdom. A and W1 separated before A left the United Kingdom on 30 May 2013.

13. By August 2017 A spoke to his four children in England once a month or once every six weeks. By November 2020 he was speaking to his four children in England once a week when they visited his mother. W1 did not facilitate contact between them but consulted him about things like medical treatment and schooling (paragraph 102).

14. A now lives in Turkey with his second wife. I shall refer to her, as SIAC did, as 'W2'. W2 is a Syrian national. A married her in April 2015. They now have two children. Their daughter was born in 2016. Their second child was born after November 2020. All A's children are British citizens, apart from the youngest. Neither W2 nor their daughter speaks English (paragraph 101).

15. A's case is that he began loading aid convoys for Syria in 2011. He then decided to go to Syria; on his case, to provide humanitarian aid. He booked a one-way ticket to Turkey and left the United Kingdom on 30 May 2013. He crossed the border into Syria.

16. On 24 May 2017, the Secretary of State gave notice that she intended to deprive A of his British citizenship on the grounds that it was conducive to the public good. Her assessment was that A had aligned himself in Syria with a group which was aligned to AQ. She was satisfied that A was a Pakistani national, so that an order depriving him of his citizenship would not make him stateless. She made an order to that effect on 26 May 2017.

17. A stayed in Syria until 27 August 2017, when he went to Turkey. He was accused by the Turkish authorities of being a member of Daesh (ISIS) and of entering Turkey illegally. He was detained in prison on 27 August 2017 and then in immigration detention. When he asked for consular assistance, he was told that the Secretary of State had deprived him of his citizenship.

18. The prosecutor in Turkey eventually decided that an intelligence report was an inadequate basis for a prosecution (paragraph 85). A was released from immigration detention in February 2019.

19. In the meantime, A appealed to SIAC against the Decision, on 11 April 2018. His grounds of appeal included a denial of the Secretary of State's allegations against him. He denied that he was a threat to national security. His case was that he wanted to do humanitarian work in Syria. He argued that it was not proportionate to deprive him of his (British) EU citizenship when no other state would recognise him as a national, so that he would not have the benefit of citizenship of any state, that the Decision was not proportionate as there were less intrusive ways of achieving the same aim, and that it amounted to a disproportionate interference with his article 8 rights and with those of his family.

20. On 7 December 2018 SIAC held that the order did not make A stateless (decision 1). On 29 January 2019, SIAC directed A, among other things, to file and serve any amended grounds of appeal and any applications by 28 June 2019 ('the directions'). In a document dated 3 June 2019, A applied for permission to amend his grounds of appeal, and asked for information about decisions made by the Secretary of State since 2011 to deprive people of their citizenship on the grounds that it would be conducive to the public good.

21. The *Gillan* ground, in more detail, was that the Decision was an unlawful breach of A's article 8 rights because there were 'insufficient safeguards to avoid discrimination and there is a clear risk of arbitrariness (*Gillan v United Kingdom* (2010) 50 EHRR 45). In addition, at the time of [A's] alleged actions, deprivation of citizenship was not sufficiently foreseeable (*Gillan*). The decision is therefore not "in accordance with the law" (*R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368) and the appeal falls to be allowed (*Charles (human rights appeal: scope)* [2018] UKUT 89 (IAC))'. In his skeleton argument in support of the application to vary his grounds of appeal, A also relied on paragraph 104 of *R (MS (India)) v Secretary of State for the Home Department* [2017] EWCA Civ 1190; [2018] 1 WLR 1190.

22. On 1 July 2019 SIAC considered A's applications on the papers. SIAC refused the application to amend because it was too late and had no reasonable prospects of success. A renewed that application to an oral hearing. Supperstone J refused the application after an oral hearing on 31 October 2019.

Decision 2

23. Supperstone J quoted the *Gillan* ground in paragraph 7. He recorded that A's first submission was that he did not need permission to amend his grounds of appeal. A argued that the directions amounted by implication to permission to amend his grounds of appeal. It was anticipated that fairness would entitle A to amend his grounds of appeal. Before his release from detention, his solicitors had only been able to take basic instructions.

24. In paragraph 10, Supperstone J accepted the submission of the Secretary of State that the directions did not amount to an implied general permission to amend the grounds of appeal. He noted that rule 11 of Special Immigration Appeals Commission (Procedure) Rules 2003 ('the Rules') 2003 SI No 1034 ('the Rules') made SIAC's permission a condition of any amendment to the grounds of appeal. He also noted that A had, in fact, applied to amend his grounds of appeal.

25. Supperstone J then described the arguments in paragraph 27 of A's skeleton argument in support of the application to amend his grounds of appeal. The Secretary of State had stated in Parliament that she would only decide to deprive a person of his nationality in extreme circumstances. There was no guidance about what those would be. Statements by the United Kingdom Government had suggested that doing humanitarian work could be a good reason to travel to Syria. The Secretary of State had accepted that that might have been part of A's reason for going to Syria. When A had gone to Syria, the United Kingdom Government had provided £7.4m of non-lethal support to the opposition in Syria and had said that it would be providing £2m more. It was not until 30 January 2014 that people were discouraged from going to Syria.

26. Supperstone J recorded A's argument that one way of considering whether the law was sufficiently precise was to consider whether it provided for enough safeguards against arbitrary decisions. It was submitted that it did not appear to do so. Further, a comparison between A's case and the case of Jack Letts showed apparently arbitrary decision-making. Finally, a right of appeal was irrelevant. A person has a right to know the consequences of his actions in advance.

27. Supperstone J's view was that the only legal basis put forward in support of the amendment was the *Gillan* ground. It had two parts. First, section 40(2) of the British Nationality Act 1981 ('the BNA'), which gives the Secretary of State power to deprive a person of his nationality on the grounds that it is conducive to the public good, does not contain enough safeguards against arbitrariness. Second, at the time of the allegations against him, it was not sufficiently foreseeable that A could be deprived of his nationality.

28. Supperstone J was satisfied that there were enough safeguards. There were two material distinctions, Supperstone J held, between the present case and *Gillan*. First, there was a right of appeal, leading to a broad merits-based review by an independent court. In *Gillan*, the only available challenge was by judicial review which was considered not to be an adequate safeguard. Second, the power conferred by section 40(2) is limited by guidance and procedural safeguards. It can only be exercised by

the Home Secretary personally. A published policy limits the grounds of its exercise. There was no evidence that it had been exercised arbitrarily in practice.

29. A relied on paragraph 3.16 of a report by the Independent Reviewer of Terrorism Legislation, David Anderson QC (as he then was) dated April 2016. The Secretary of State submitted that a deprivation decision might involve a wide range of factors and that a highly specific definition of 'terrorism' or 'conducive to the public good' could not be expected. The case of Jack Letts did not help A. Each case depended on its own facts. There could be all sorts of reasons why A was deprived of his nationality and B was not.

30. Supperstone J was also satisfied, having regard to the Secretary of State's OPEN national security case, which relied on A's actions after 13 May 2013, that A could have foreseen during the period (if necessary with legal advice) that if he travelled to Syria and aligned himself with AQ, he might be deprived of his British nationality on the grounds that such deprivation was conducive to the public good. The Secretary of State has had such a power since 16 June 2006. The assessment of the Security Service is that 'anyone who had travelled voluntarily to align with AQ is aware of the ideology and aims of AQ and the attacks it has carried out' (paragraph 16). At the hearing of the appeal, A would be able to adduce evidence in support of his reasons for travelling to Syria, and of his case that he did not knowingly align himself with AQ, and that, as a result, it would not be conducive to the public good to deprive him of his citizenship. If SIAC were to find that he knew he was aligning himself with a group aligned to AQ, and, as a result, it was conducive to the public good to deprive him of his citizenship, his argument that that was not foreseeable would not succeed. If he failed on the factual issues, *Gillan* would not help him.

31. In paragraphs 18-21 Supperstone J considered A's application for disclosure. A asked the Secretary of State to disclose:
    i. the numbers of people who were deprived of their citizenship on the grounds that deprivation was conducive to the public good, in each year from 2011,
    ii. how many of those people were deprived of their citizenship as a result of their activities in Syria or Iraq,
    iii. a breakdown of the second group of figures in each year by sex, and 'ethnicity', and
    iv. the numbers of people who had returned to the United Kingdom from Syria and Iraq in each of those years, and for each year, a breakdown by sex, 'ethnicity', prosecutions and the imposition of temporary exclusion orders.

32. A suggested that the disclosure was relevant to his grounds of appeal and necessary for the determination of the appeal pursuant to rule 39(5)(c)(i) of the Rules, for four reasons, which Supperstone J listed in paragraph 19, and further explained in paragraph 20.
    i. If many people who had been to Syria were being managed in the United Kingdom, as the Secretary of State had apparently admitted in Parliament, there was a question whether deprivation was necessary in A's case.

ii. If, as media reports and government statistics suggested, people have only recently been deprived of their nationality after 'travel to Syria' that suggested an issue about the foreseeability of deprivation.
iii. Statistics showing disproportionate use of powers against particular ethnic groups or one sex were potentially relevant to article 8 (see paragraph 85 of *Gillan*). The case of Jack Letts suggested a difference in treatment which was relevant to article 8, one purpose of which is to safeguard against arbitrary decisions.
iv. They were also relevant to the question whether A had himself been discriminated against and whether that was justified.

33. Supperstone J did not accept that the further information was necessary for a decision on any of A's existing grounds of appeal. He referred to rule 39(5)(c)(i) of the Rules. There was already information in the public domain about the numbers of people who had been deprived of their citizenship over the years, and A had referred to it. The further information was only potentially relevant to the *Gillan g*round. In Supperstone J's view, the value of that information would be 'minimal', even if A had permission to pursue the *Gillan* ground. The information revealed nothing about the individual circumstances of each case. Figures about sex and race could not in themselves help in any decision about whether the power had been used arbitrarily. Finally, collating the information would 'take a disproportionate amount of time, cost and effort' (paragraph 21).

Decision 3

34. SIAC (Cheema-Grubb J, Upper Tribunal Judge O'Connor and Mr Roger Golland) recorded that no rule 38 hearing had been necessary because after discussions with the Special Advocates, the Secretary of State had agreed to further disclosure. SIAC had, nonetheless, considered carefully whether it could have required more material to be disclosed to A than had been disclosed by the Secretary of State. It decided that it could not. It was satisfied that A, who had been represented by experienced lawyers, had been given an accurate account of the reasons for the Decision. He must have inferred, accurately, that 'he should provide any evidence which might explain contact which he has had with AQ aligned groups and also provide as full an account as possible of his activities while in Syria'. He had done so (paragraphs 5 - 7). SIAC was satisfied that the procedure had been fair (paragraph 8).

35. SIAC described the facts in outline in paragraphs 10-23. It then summarised the parties' arguments in paragraphs 25-26. The Secretary of State's case was that A had spent years in 'war-torn Syria, closely associated with his cousin B3 who had been deprived of his nationality on conducive grounds'. The Secretary of State accepted that A had done humanitarian work and that a desire to do such work might have been part of his reason for going to Syria. The Secretary of State argued, nevertheless, that A had aligned himself with an AQ-aligned group, presented a danger to national security and should not be allowed to return. A's case was that all he had done was humanitarian work. He had risked his life to help 'distressed civilians'. He was 'compelled by compassion'. His close connection with his cousin was 'entirely innocent'. He was trapped in Turkey but would like to return to the United Kingdom to see his four older children and to make his home here.

36. SIAC quoted from the documents which the Secretary of State had produced for the hearing which described her case in more detail, and from the ministerial submission which preceded the Decision (paragraphs 27-35). In paragraph 37 it recorded that A had attended the OPEN hearings by video link from Turkey, and the other evidence and materials which it had considered. It summarised the relevant law in paragraphs 38-43. The appeal was a 'challenge to the merits of the [Decision]'. SIAC had to decide 'for itself whether [the Decision] was conducive to the public good, on the basis of all the evidence before it'. In doing so, it should 'give great weight to the assessment of the Secretary of State who is in the best position to decide what national security requires (see *Home Secretary v Rehman* [2013] 1 AC 153 at [26])'. SIAC had reached its own conclusion 'based on our own assessment of the Open and Closed evidence, whether we are satisfied to a high degree of conviction that [A] represents a future risk of threat to the national security of the UK. We have also made an assessment for ourselves of the impact of the [Decision] on the Convention rights of both [A] and his family, both that in the UK and his new family presently in Turkey' (paragraph 43).

37. In paragraphs 51-70, SIAC considered the evidence from A's side about his activities in Syria, and in paragraphs 72-86, his evidence about leaving Syria and staying in Turkey. He had crossed the border illegally, and was evasive about the identity of the smuggler who had helped him to cross and the phone numbers he had used (paragraphs 74, 77-80 and 123). He was also evasive about the accuracy or otherwise of the record of his interview with the Turkish authorities, each page of which had been translated to him and signed by him (paragraphs 76, 82-83 and 123). In paragraph 85, SIAC recorded that although A had been released in Turkey, he was still flagged as a 'terror suspect'.

38. Paragraphs 87-96 are headed 'Aid as a cover'. SIAC summarised the expert evidence on this topic. The evidence of one expert who claimed that it was 'improbable' that a person could pose as an aid worker as cover for more sinister activities was undermined by his failure to have read all the relevant material before writing his report (paragraphs 92 and 93).

39. SIAC considered A's prospects in paragraphs 97-101. A admitted socialising with men who had terror codes but denied that this was because he shared their world view (paragraph 97). He lied about those associates to his Turkish lawyer (paragraph 124). He would not return to Syria. Pakistan was not an option because A feared that the Turkish authorities would share intelligence with the Pakistani authorities (paragraph 99). A had no status in Turkey. He could not work legally, or get free health treatment. A's lawyer said that Pakistan had refused to accept A as a citizen.

40. SIAC summarised the OPEN evidence from a witness from the Security Service in paragraphs 103-112. In paragraphs 114-121, SIAC resolved some legal issues. SIAC accepted that a 'high hurdle of justification exists for the Secretary of State before deprivation can be made or upheld'. It did not matter whether the test was a common law test, or proportionality (whether EU proportionality, or proportionality for the purposes of article 8).

41. SIAC rejected A's submission that 'the threshold for deprivation in section 40 of the 1981 Act is too low to permit interference with [A's] article 8 rights'. SIAC was not, in any event, persuaded that article 8 'applies to those outside the UK (and EU) at the time of the deprivation decision.' A was living in Syria with a Syrian wife and their child. His other children were in the United Kingdom. He had not seen them for about three years 'a significant period in the lives of children'. He did not want to return to the United Kingdom, but to stay in Syria. He intended his trip to Turkey to be short. A's daughter was in a similar position to the daughter of S1 (paragraph 121). That is a reference to the decision of this Court in *S1 v Secretary of State for the Home Department* [2016] EWCA Civ 560; [2016] 3 CMLR 37 (see paragraph 72, below). S1 was one of the appellants in that case, and his daughter was a British citizen.

42. In paragraphs 122-134 SIAC stated its conclusions on the national security case. It found, in short, for the reasons it gave in paragraphs 122-126, that A was not a credible witness. SIAC nevertheless accepted that he had spent part of his time in Syria doing humanitarian work (paragraph 125). Overall, however, he was 'hiding the full picture of his role and activities in Syria' (paragraph 126).

43. SIAC said that the CLOSED evidence was 'conclusive' that A's account that he had only done humanitarian work in Syria was 'untrue'. There was 'compelling evidence that [A] engaged in terrorism-related activity with an AQ aligned group alongside some humanitarian work'. This alignment 'went well beyond day to day accommodation in order to facilitate aid work' (paragraph 128). The evidence and SIAC's specific conclusions were in the CLOSED judgment, but 'we find this central allegation of AQ alignment in Syria firmly proved' (paragraph 129). SIAC listed the factors which had not influenced that conclusion in paragraph 130.

44. The next question SIAC considered was whether deprivation was 'proportionate'. SIAC considered various aspects of A's family and private life in paragraphs 132-134. Its conclusion was that none of those 'considerations' was 'substantial enough to come close to upsetting the significance of the risk that [A] has been found to pose to the national security of the UK' (paragraph 134).

45. In paragraph 135, SIAC noted that A had not argued that if SIAC found that he had aligned himself with an AQ-aligned group, deprivation of his citizenship would not be conducive to the public good. The Decision was 'lawful and fully justified'. It would have been lawful even if 'it had meant a significant encroachment on his and his family's Article 8 rights at the time but we have found that it does not' (paragraph 135). In the light of the danger which A posed, deprivation was conducive to the public good and 'the choice of measure was proportionate and reasonable'. SIAC would defer to the Secretary of State's expertise, but had come to the same conclusion itself. 'Any measure short of deprivation would not have met the risk effectively' (paragraph 136). Deprivation was proportionate both at the time of the Decision and at the time of the SIAC hearing (paragraph 139).

The amended ground of appeal to this Court

46. I have described the original ground of appeal, for which leave was given, in paragraph 5, above. A applied to amend that ground of appeal so as to add that the Decision was directly material to the outcome of his appeal (that is, to decision 3). It is said that a finding that 'decision 3' [sic] was arbitrary and/or not foreseeable and/or

not in accordance with the law would have led SIAC to allow A's appeal under section 6 of the Human Rights Act 1998 ('the HRA'); or decision 2 was indirectly relevant as it 'would have potentially led to further relevant disclosure'. When prompted, A applied, at the hearing of this appeal, for leave to amend his grounds of appeal to include this ground. The Secretary of State did not oppose that application. This Court granted it.

A further necessary amendment to the grounds of appeal

47. A premise of the *Gillan* ground is that article 8 of the ECHR applied when the Secretary of State made the Decision. If SIAC's finding in paragraph 121 of decision 3 (that article 8 did not apply) stands, it is fatal to the *Gillan* ground. A did not, in his initial application for permission to appeal to this Court, nor in his amended ground of appeal, ask for permission to challenge SIAC's finding in paragraph 121. When this was pointed out to Mr Southey in the course of oral argument he accepted responsibility for the failure to challenge that finding, and applied, out of time, for permission to challenge it. Mr Dunlop fairly accepted that he was not taken by surprise and that he was prepared to deal with the merits of that argument. His position was that we should hear argument and then refuse permission to appeal against that finding on the grounds that it was not arguably wrong.

The law

Deprivation of nationality

48. Sections 1-4C of the BNA provide for various methods by which British citizenship can be acquired. Section 40(2) gives the Secretary of State power, by order, to deprive a person of his British citizenship if she is satisfied that deprivation is conducive to the public good. Section 40(3) gives the Secretary of State a similar power if the citizenship results from registration or naturalisation and she is satisfied that the registration or naturalisation was obtained by fraud, false representation or concealment of a material fact. She cannot make an order under section 40(2) if she is satisfied that the order would make the person stateless (section 40(4), subject to the exception stated in section 40(4A)). Before making such an order, the Secretary of State 'must give the person written notice specifying' three things, including his right of appeal against the Secretary of State's decision to make an order.

49. There are two routes of appeal: section 40A of the BNA and section 2B of the Special Immigration Appeals Commission Act 1997 ('the 1997 Act'). The normal route of appeal is to the First-tier Tribunal ('F-tT'), under section 40A, unless the Secretary of State issues a certificate under section 40A(2) of the BNA, that, in short, the decision was taken wholly or partly on the basis of material which it would be contrary to the public interest to make public. In such a case, the appeal is to SIAC, under section 2B of the 1997 Act.

The procedure rules which are relevant to the appeal

50. Section 5(1) of the 1997 Act gives the Lord Chancellor power to make rules which, among other things, govern the procedure for appeals to SIAC. The Rules are the result of the exercise of that power.

51. Rule 10 is headed 'Further material in relation to an appeal'. It applies to appeals, and not to applications for a review (rule 10(1)). It governs the filing of evidence for an appeal, and exculpatory reviews by the Secretary of State. Rule 10A(5) enables the appellant and the Special Advocate to apply to SIAC for a direction requiring the Secretary of State to 'file further information about [the appellant's] case, or other information'. The applicant 'must indicate why the information …is necessary for the determination of the appeal' (rule 10A(6)). This echoes the language of rule 39(5)(c)(i), which was referred to by Supperstone J in decision 2 (see paragraph 33, above). SIAC may make such a direction if it considers that the information is 'necessary for the determination of the appeal' and 'may be provided without disproportionate cost, time or effort' (rule 10A(7)).

52. Rule 11 is headed 'Variation of grounds of appeal…'. Subject to section 85(2) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') (which concerns a statement of additional grounds made under section 120 of the 2002 Act), the appellant 'may vary the grounds of appeal …only with the leave of [SIAC]' (rule 11(1)). Rule 11(2) requires the appellant to file any 'proposed variation of the grounds of appeal with [SIAC] and serve a copy on the Secretary of State'.

53. 'Striking out' is the heading of rule 11B. Rule 11B(1) gives SIAC power to strike out 'a notice of appeal' or a reply by the Secretary of State 'if it appears to [SIAC] that it discloses no reasonable grounds for bringing or defending the appeal…', or to strike out a notice of appeal if it appears to SIAC to be an abuse of SIAC's process.

Shamima Begum v Secretary of State for the Home Department

54. A relies on the decision of SIAC in *Shamima Begum v Secretary of State for the Home Department* SC/174/2020, SIAC (Jay J, sitting alone). Jay J listed a case management and directions hearing at his instigation and at short notice (paragraph 1) in four deprivation appeals. Each appellant was being held in Al-Roj camp in north-east Syria. The appellants wanted a stay of those parts of their appeals which depended on their instructions to their lawyers, but wanted to pursue public law grounds of appeal which did not depend on those instructions.

55. The appellant applied to file nine replacement grounds of appeal after the decision of the Supreme Court on the Secretary of State's appeals in her case. In paragraph 10 of his judgment, Jay J said,

> *'Although it was suggested on behalf of the Respondent that some of these grounds are not arguable, it is not right that I consider their merits at this stage. An application to "vary" grounds of appeal requires permission (rule 11), and [SIAC] also has power to strike out inter alia a notice of appeal if it does not disclose reasonable grounds for bringing the appeal (rule 11B). The rule-maker has not set out the basis for exercising the power to grant or refuse permission under rule 11, and I must therefore proceed on the basis that my discretion is broad. In my opinion, an application under rule 11B requires proper notice, and none has been given'.*

The Strasbourg cases about territorial jurisdiction

56. Article 1 of the ECHR provides that contracting states must secure the listed rights and freedoms to persons 'within its own jurisdiction'. Article 1 is not one of the Convention rights listed in Schedule 1 to the HRA.

57. In *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, the ECtHR said, in paragraph 131, that a state's jurisdictional competence under article 1 is primarily territorial. There is a presumption that it is exercised normally throughout the state's territory. Acts of contracting states 'performed in, or producing effects, outside their territory, can constitute an exercise of jurisdiction within the meaning of art. 1 only in exceptional cases'. Whether a case is exceptional is a question of fact (paragraph 132). When a state, through its agents, exercises control and authority over a person, 'the state is under an obligation under art. 1 to secure to that [person] the rights and freedoms under s.1 of the Convention that are relevant to the situation of that individual'.

58. The applicants in *IR v United Kingdom (Admissibility)* (application no. 14876/12) (2014) 58 EHRR SE14 were nationals of Sri Lanka and Libya. The Secretary of State decided to exclude them from the United Kingdom on the grounds that their presence was not conducive to the public good. He cancelled the leave to remain of one applicant, and refused entry clearance to the other. They appealed to SIAC. They then complained to the ECtHR of breaches of article 8 and of article 6. The ECtHR declared their applications inadmissible. In paragraph 52, the ECtHR observed that the applicants were outside the jurisdiction of the United Kingdom when the Secretary of State made the relevant decisions. There might therefore be a question whether there was a sufficient jurisdictional link for the purposes of article 1 'notably by reason of UK law giving the applicants an "out-of-country" right of appeal…'. The ECtHR did not consider it necessary to 'pursue this preliminary issue' because of its conclusion that the applications were, in any event, inadmissible. I note that in the next case I consider, the ECtHR rejected the idea that an out-of-country appeal could be a basis for establishing jurisdiction (see paragraph 28 of *Abdul Wahab Khan v United Kingdom* (application no 11987/11), which I summarise in the following paragraphs).

59. The applicant *Abdul Wahab Khan* was a Pakistani national. He came to the United Kingdom in 2006 on a student visa. His leave to remain was extended until 31 December 2009. He was arrested on 8 April 2009 with four other Pakistani nationals on suspicion of conspiracy to carry out a mass-casualty attack. They were not charged but the Secretary of State decided to deport them all, and detained them under immigration powers. The applicant then left the United Kingdom voluntarily and the Secretary of State withdrew the decision to deport him. The Secretary of State later cancelled his leave to remain on the grounds that his presence in the United Kingdom was not conducive to the public good for reasons of national security. At a point which is not clear from the judgment of the ECtHR, the Secretary of State also made an exclusion order against the applicant, on national security grounds. The applicant argued that the existence of that order increased the risk to him in Pakistan.

60. The five men appealed to SIAC. SIAC found that one of the appellants was an AQ operative and that the applicant and the other appellants, except one, were committed Islamist extremists and knowing participants in a plan to carry out an attack. SIAC held that there was a real risk of ill treatment breaching article 3 if the two appellants

who were still in the United Kingdom were returned to Pakistan. The applicant and another appellant asked SIAC to make a direction to facilitate the issue of entry clearance for their return to the United Kingdom, and, by implication, to allow their appeals against the cancellation of their leave to remain. SIAC rejected that argument, holding that the United Kingdom had no jurisdiction over Pakistani citizens in Pakistan. This Court dismissed the applicant's applications for permission to appeal.

61. On his application to the ECtHR, the applicant argued that there is a difference in principle between a person who has never been in the jurisdiction and one who has left and has been refused re-entry. He relied on articles 2,3, 5 and 6. He also argued that he had built up a strong private life in the United Kingdom, so that his exclusion and the cancellation of his leave to remain were a breach of article 8. Finally, he made a claim under article 14.

62. The ECtHR said that whether articles 2, 3, 5 or 6 were 'engaged' depended on whether the applicant, who had returned voluntarily to Pakistan, was 'within the jurisdiction' of the United Kingdom for the purposes of article 1. There was nothing in the case law of the ECtHR which cast doubt on the conclusions of SIAC and of this Court that he was not (paragraph 24). The applicant had returned voluntarily to Pakistan. Neither of the two principal exceptions to territorial jurisdiction (state agent authority and control, or effective control over an area) applied. He did not complain about the conduct of diplomatic or consular agents in Pakistan. He was free to live there without any control by agents of the United Kingdom (paragraph 25). There was no reason in principle to distinguish between a person who leaves territory voluntarily, and a person who was never in the jurisdiction at all. There was no support in the case law for the proposition that a state's obligations under article 3 required it to take article 3 into account when making adverse decisions against people who are not within its jurisdiction (paragraph 26).

63. There was support in the case law for the proposition that a state's obligations under article 8 might, in some circumstances, require family members to be re-united with relations living in that state. That positive obligation rests 'in large part' on the fact that a member of the family is already in the contracting state and is being prevented from enjoying that family life because his relation has been denied entry. The transposition of that limited article 8 obligation to article 3 would 'in effect, create an unlimited obligation…to allow entry to an individual who might be at real risk of ill-treatment contrary to Article 3, regardless of where in the world that individual might find himself' (paragraph 27). Nor could jurisdiction be established on the basis of the appeal to SIAC. The fact that the applicant had exercised his right of appeal 'had no direct bearing' on the question whether his substantive complaints fell within the jurisdiction of the United Kingdom (paragraph 28). The complaints based on articles 2, 3, 5 and 6 were inadmissible (paragraph 29).

64. The ECtHR then considered the applicant's complaints under articles 8 and 14. It held that they, too, were manifestly ill-founded and inadmissible. SIAC had found the allegations against him proved, so that, given his rather limited private life, the decision to exclude him was 'clearly proportionate'. Any complaint that SIAC had failed to comply with the procedural component of article 8 was answered by the decision of the ECtHR in *IR v United Kingdom* (see paragraph 58, above). The complaint based on article 14 was without foundation, as the decision was taken

solely on the basis of an assessment that the applicant was involved in Islamist extremist activity.

65. The applicant in *K2 v United Kingdom (Admissibility)* (42387/13) (2017) 64 EHRR SE18 was a Sudanese national. In 2000, he became a British citizen by naturalisation. In 2009 he left the United Kingdom when he was on bail. The Secretary of State's case was that he then went to Somalia and engaged in terrorism-related activity, before going to Sudan. The Secretary of State notified him of her intention to deprive him of his British nationality on the grounds that it would be conducive to the public good. She also made an order excluding him from the United Kingdom. He applied for judicial review of the second decision, and appealed to SIAC against the first. His application for judicial review failed, as did his appeal.

66. He complained to the ECtHR that the decisions were substantive and procedural breaches of article 8. The ECtHR summarised the effect of its earlier decisions on deprivation of citizenship: the arbitrary denial of citizenship might 'in certain circumstances, raise an issue under art. 8 of the Convention because of its impact on the private life of the individual…'. The ECtHR would investigate two issues: whether the deprivation was arbitrary and its consequences for the applicant (paragraph 49). In deciding whether it was 'arbitrary', the ECtHR had taken into account whether the revocation was in accordance with the law, whether it was accompanied by the necessary procedural safeguards, including whether the applicant was given an opportunity to challenge the decision before courts affording the relevant guarantees, and whether the authorities acted diligently and swiftly (paragraph 50). The standard of 'arbitrariness' is 'a stricter standard than proportionality' (paragraph 61). It held that the challenges to both decisions were 'manifestly ill-founded' (paragraphs 64 and 67). It was prepared to accept 'for the purposes of the present decision' that the applicant's exclusion from the United Kingdom interfered with his private and family life in the United Kingdom. The interference was limited and in the light of the findings about his terrorism-related activities, was not disproportionate to the legitimate aim pursued (paragraph 66). The ECtHR did not consider, or make any decision about, jurisdiction for the purposes of article 1.

67. Mr Southey referred to *Usmanov v Russia* (application no 439361/18) (2021) 72 EHRR 33. The ECtHR adopted an approach to deprivation of citizenship similar to that described in *K2* (see the previous paragraph) (paragraphs 53-54). The applicant was in Russia at the relevant time. The ECtHR held that the annulment of the applicant's citizenship and a decision to expel him from Russia both breached article 8.

68. Mr Southey relied in his written submissions on *Johansen v Denmark* (application no. 27801/19, 3 March 2022), in which the Second Section of the ECtHR declared the applicant's application inadmissible. He was a dual Danish and Tunisian national, who was born and lived for most of his life in Denmark. He was in Denmark at the time of the hearing before the ECtHR. He was convicted of terrorist offences in Syria, sentenced to four years' imprisonment, and deprived of his Danish nationality. The authorities made a decision to expel him from Denmark. He had a wife and child in Denmark. In paragraph 44, the ECtHR said that the right to citizenship is not guaranteed by the ECHR, although an 'arbitrary denial of citizenship might in certain

circumstances raise an issue under article 8'. The ECtHR described its usual approach in such cases in paragraph 45 (see paragraph 66, above). The applicant's case, including on the impact of article 8, was carefully considered by the Danish Supreme Court. In those circumstances, the ECtHR held that it raised no issue under article 8.

69. In *HF v France* (application numbers 24384/19 and 44234/20; 14 September 2022, GC), the applicants were four parents who lived in France and were trying to secure the return of their daughters and grandchildren to France. Their daughters were French citizens. The daughters were detained by a non-state entity in camps in North East Syria. The daughters were not the applicants.

70. Article 3.2 of Protocol 4 to the ECHR ('A3P4') forbids deprivation of the right to enter the territory of which a person is a national. The applicants relied on article 3 of the ECHR and on A3P4. Article 8 was relied on in one application. It is not entirely clear from paragraph 3 whether the rights relied were those of the daughters or of the parents, but the reasoning in paragraph 150 suggests that the second interpretation is the right one. The ECtHR considered the standing of the applicants in paragraph 150. The French Government argued that the applicants did not have standing to bring claims relying on article 3 and article A3P4. The ECtHR held, in that context, that two of the four applicants had standing because they were victims of 'the alleged violation of article 8'. None of the applicants were victims of the alleged violations of article 3 or of A3P4. In all the circumstances the ECtHR held that, exceptionally, all the applicants had standing to bring claims on behalf of their daughters (paragraph 152). There was no suggestion that the applications were based on an alleged violations of the article 8 rights of the daughters. The ECtHR was asked to give A3P4 a 'dynamic interpretation' so as to impose on France a positive obligation to secure the repatriation of the applicants' daughters and grandchildren from Syria (paragraph 253). It rejected that argument (paragraph 259). It held that A3P4 can only impose positive obligations (such as an obligation to issue travel documents) in exceptional circumstances (paragraph 261). The ECtHR then asked whether the circumstances of the case were exceptional and whether the decision-making process of the domestic authorities had sufficient safeguards against arbitrariness (paragraph 263). It decided that the circumstances were exceptional (paragraphs 265-271), and that the absence of procedural safeguards (which could be limited: see paragraph 276) led to a breach of the procedural component of A3P4 (paragraphs 277-283). A finding of a violation was sufficient just satisfaction (paragraph 288).

Domestic cases about territorial jurisdiction

71. In *R (Al Skeini) v Secretary of State for the Home Department* [2007] UKHL 26; [2008] 1 AC 153 the claimants, whose relations were killed or mistreated by members of the British armed forces in Iraq, applied for judicial review of a decision of the Secretary of State to refuse to order an independent inquiry into those matters. In one of the cases, the Secretary of State did not accept that the armed forces had killed the person in question. One person, Baha Mousa, was killed by British troops in a military detention unit. The claimants had to show that their claims fell within the scope of the ECHR. As I have already indicated, the ECtHR has decided that the jurisdiction referred to in article 1 is primarily territorial, but it has recognised exceptions to that rule. The claimants then had to show that the claims fell within the scope of the HRA. The Secretary of State contended that the HRA did not apply

outside the territory of the United Kingdom. The majority of the Appellate Committee held that while legislation does not generally apply outside the territory of the United Kingdom, given its international context, the territorial scope of the HRA was to be interpreted as being co-extensive with the scope of article 1. Section 6 of the HRA therefore applied to a public authority acting not only in the United Kingdom but also within its article 1 jurisdiction outside its territory.

72. In *S1 v Secretary of State for the Home Department* this Court considered an appeal from SIAC, which had dismissed the appellants' appeals against decisions of the Secretary of State dated 31 March 2011 to deprive them of their British citizenship. The appellants were a father and three of his sons. They were all outside the United Kingdom when the decisions were made, having moved to Pakistan in September 2009, as the Secretary of State knew. They were Pakistani nationals. SIAC had decided two preliminary issues against them; that the order depriving them of their nationality did not make them stateless, and that it was not obliged to decide the appeals in the appellants' favour because they could not have a fair appeal from Pakistan.

73. Burnett LJ (as he then was), giving a judgment with which the other members of this Court agreed, listed the issues in paragraph 5. They included whether SIAC had erred in law in deciding that the appellants were outside the jurisdiction of the ECHR for the purposes of article 1, so that their arguments about potential breaches of articles 2 and 3 failed for want of jurisdiction, and whether the removal of their citizenship was compatible with article 8. The appellants argued on appeal that if the deprivation decisions gave rise to article 2 and article 3 risks, they were unlawful pursuant to section 6 of the HRA. They accepted that none of the exceptions described in *Al-Skeini* applied. They contended, nonetheless, that in international law a state has jurisdiction over its nationals for various purposes. The deprivation of nationality was a clear exercise of jurisdiction. That was sufficient for the purposes of article 1. The decision was made entirely in the United Kingdom and produced effects outside the United Kingdom. They relied on two cases, *East African Asians* (1981) 3 EHRR 76 and *Genovese v Malta* (2014) 58 EHRR 25 (paragraph 91).

74. Burnett LJ did not find the reasoning in either of those two cases illuminating (paragraphs 92, 93, 98 and 99). He said that the decision of the ECtHR in *Khan* (see paragraphs 59-64, above) provided 'powerful support' for SIAC's conclusion that the appellants were not within the jurisdiction of the United Kingdom for the purposes of article 1 when the Secretary of State made the deprivation decisions. Khan's claim was similar to the appellants' claim. 'The difference is of degree, not principle' (paragraph 95). He quoted paragraph 27 of *Khan* (see paragraph 63, above) in paragraph 97.

75. In paragraph 110, Burnett LJ quoted paragraph 23 of *R (Sandiford) Secretary of State for the Foreign and Commonwealth Affairs* [2014] UKSC 44; [2014]1 WLR 2697; 'However, there is no general Convention principle that the United Kingdom should take steps within the jurisdiction to avoid exposing persons, even United Kingdom citizens, to injury to rights which they would have if the Convention applied abroad.'

76. The authority which states have over their nationals for the purposes of international law is different from authority or control for the purposes of article 1. The appellants'

argument confused those two concepts (paragraph 101). A decision to deprive a person of his nationality was 'the antithesis of the exercise of control necessary to found jurisdiction under art. 1'. He considered that the decisions of the ECtHR and of domestic courts supported SIAC's conclusion about jurisdiction.

77. In paragraph 108, he noted that there was no separate argument about whether two members of the appellants' family, who were still British citizens, and were also then in Pakistan, were within the jurisdiction for the purposes of article 8. They could return to the United Kingdom. SIAC had concluded that their article 8 rights 'if engaged' could not help in the appeals. There could be little doubt that if they had stayed in the United Kingdom, or returned, article 8 would not support a finding that S1 should be admitted to the United Kingdom 'in the face of the finding that his presence here constituted a danger to national security'.

78. The appellant in *Abbas v Secretary of State for the Home Department* [2017] EWCA Civ 1393; [2018] 1 WLR 533 was a Pakistani national who lived in Pakistan. He applied for a visa to enable him, his wife and children to visit his elderly relations. The Entry Clearance Officer refused the application on the ground, among others, that he was not satisfied that the appellant would leave the United Kingdom at the end of his proposed visit. He appealed to the F-tT on the grounds that the decision was a disproportionate interference with his right to develop his private life. The F-tT allowed his appeal and the Upper Tribunal dismissed the appeal of the Secretary of State. This Court allowed the Secretary of State's further appeal. The Secretary of State was represented but the respondent took no part in the appeal. This Court held that article 8 did not impose a positive obligation on the United Kingdom to admit a person who was outside the United Kingdom for the purpose of developing his private life. Burnett LJ explained in paragraphs 14-22 why the appellant could not rely on the private life aspect of article 8 in order to impose a positive obligation on the United Kingdom to admit him and his family. He referred to *Khan* (see paragraphs 59-64, above). No Strasbourg case supported the position taken by the UT. He explained, in paragraphs 19-20 why, unlike private life, family life is unitary, by reference to *Beoku-Betts v Secretary of State for the Home Department* [2009] AC 115.

79. In paragraphs 23-25, Burnett LJ briefly considered jurisdiction. He accepted the Secretary of State's submission that the appellant and his immediate family were not within the jurisdiction for the purposes of article 1. Jurisdiction is primarily territorial and none of the exceptions described by the ECtHR applied. In article 8 cases involving family life, even though the member of the family who is seeking to enter the United Kingdom is outside the United Kingdom, 'members of the family whose rights are affected are undoubtedly within it. That provides the jurisdictional peg' (paragraph 25).

Aziz v Secretary of State for the Home Department

80. In *Aziz v Secretary of State for the Home Department* [2018] EWCA Civ 1884; [2019] 1 WLR 266, the appellants were British citizens by naturalisation and Pakistani nationals. They were convicted of grooming and sexually exploiting girls who were in their early teens. The Secretary of State gave them notice of decisions to deprive them of their nationality on the grounds that deprivation was conducive to the public good. The appellants all had children. In each notice the Secretary of State referred to the

appellant's children and said that the public interest in deprivation outweighed any effect on the children's article 8 rights.

81. The appellants appealed to the F-tT. The F-tT dismissed their appeals, as did the UT. On their appeal to this Court, the Secretary of State was represented, but the appellants were not. Sales LJ (as he then was), giving a judgment with which the other members of this Court agreed, held that on an appeal under section 40A of the BNA, a court was only required to assess the foreseeable consequences of deprivation to the extent necessary to see whether a deprivation order would be lawful and compatible with Convention rights. That would depend on the reasons for the Secretary of State's decision (paragraph 26). If the Secretary of State had decided that deprivation was conducive to the public good because the appellants should not be allowed to enjoy the benefits of citizenship, a court was not required to speculate about whether the appellant was likely to be deported later, as his rights would be fully protected at that stage by the procedures which the Secretary of State would then be obliged to follow. It would not be possible, at that later stage, for a deportation order to be made which breached the appellant's Convention rights. On the facts, the Secretary of State and the tribunals had been entitled to find that deprivation orders would not, of themselves, breach anyone's article 8 rights (paragraphs 27 and 28).

The cases which are relevant to the 'Gillan' ground

Gillan v United Kingdom

82. The applicants were stopped and searched by the police under the Terrorism Act 2000 ('the 2000 Act'). Section 44 of the 2000 Act gave a senior police officer power, if he considered it 'expedient for the prevention of acts of terrorism' to authorise any uniformed officer to stop anyone in a defined area and search them for articles 'of a kind which could be used in connection with terrorism'. People were searched in public. A failure to submit to a search was a criminal offence. An authorisation had to be confirmed by the Secretary of State within 48 hours. After the 2000 Act came into force in 2001, a series of continuous authorisations was made up to the date of the hearing in Strasbourg in 2010 (paragraph 34). Those authorisations covered the whole of the Metropolitan Police district and each lasted for the maximum time permissible. The applicants' applications for judicial review, and appeals to this Court and to the House of Lords were dismissed, among other reasons, because the two statutory discretions were very wide. Claims for damages against the police in the county court were also dismissed.

83. The applicants claimed that their rights under articles 5, 8, 10 and 11 had been breached. The ECtHR did not find it necessary to decide the article 5, 10, or 11 claims. The power to require a person to submit to a search was an interference with his right to respect for his private life. The ECtHR held that several features of the legal regime meant that those interferences were not 'in accordance with the law' for the purposes of article 8.

84. The ECtHR described the statutory scheme in paragraphs 28-34. There was a three-stage procedure: authorisation, confirmation and the exercise, by a police constable, of the power to stop and search. The exercise of that power was not subject to a requirement of reasonable suspicion. A constable could only require a person to remove his headgear, footwear, outer coat, jacket and gloves. In paragraphs 35-36, it

described the code of practice which applied to the exercise of all statutory powers of stop and search. Part of the code dealt with searches under the 2000 Act. Among other things, it required a constable to take reasonable steps to tell the person concerned about the legal basis of the search and his right to ask for a copy of the record of the search.

85. In paragraph 76, the ECtHR said that in order to be 'in accordance with the law' a measure has to have 'some basis in domestic law, and to be compatible with the rule of law'. The law must be 'adequately accessible, and foreseeable, that is, formulated with sufficient precision to enable the individual - if need be with appropriate advice - to regulate his conduct'.

86. Domestic law must therefore 'afford a measure of protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights, it would be contrary to the rule of law, one of the basic principles of a democratic society, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion …and the manner of its exercise. The level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed' (paragraph 77).

87. The applicants complained that the provisions conferred an unduly wide discretion on the police at the first and third stages. The ECtHR disagreed with the view of the House of Lords that there were enough safeguards (paragraph 79). The discretion conferred by the word 'expedient' was too wide, and not governed by a criterion of necessity or of proportionality. If the Secretary of State confirmed the authorisation, he could not change the area of the authorisation, only its period. In practice he had never done so. The availability of judicial review was not an adequate protection because the powers were so wide (paragraph 80). The temporal and geographical limits provided by Parliament had not, in practice, acted as any real check, at least in London (paragraph 81). The independent reviewer could only report on the statistics about the use of the power (paragraph 82). The wide power conferred on constables was also a concern. The code gave guidance about how to stop and search but did not constrain the exercise of that wide power. It 'radically …depart[ed] from our traditional understanding of the limits of police power' (per Lord Brown in the House of Lords) (paragraph 83).

88. In paragraph 84 the ECtHR said that it was 'struck' by the statistical and other evidence about the use of the powers in practice. The power had been used frequently when there was no terrorism-related offence, and in cases where there was 'not the slightest possibility' that such an offence had been committed. The ECtHR considered that there was 'a clear risk of arbitrariness in the grant of such a broad discretion to the police officer'. The judgments in the House of Lords showed the risks that the power could be used in a racially discriminatory way, including by stopping and searching white people to produce greater racial balance in the statistics. The power could also be misused against demonstrators (paragraph 85).

89. The current applications showed the limitations of judicial review as a safeguard. The power given to constables was so wide that it would be 'difficult if not impossible' to show that the power had been exercised improperly (paragraph 87). The powers were not 'sufficiently circumscribed nor subject to adequate legal safeguards against abuse'. They were not, therefore, in accordance with the law.

R (MS (India)) v Secretary of State for the Home Department

90. In *MS (India)* this Court considered three appeals about the Secretary of State's policy for granting restricted leave to applicants whose asylum claims had been refused, but whose removal from the United Kingdom was prevented by article 3. The claimants argued that the policy infringed the article 8 rights of those who were subject to it and that the policy was not 'in accordance with the law' for the purposes of article 8 because it did not define the scope of the conditions which it permitted the Secretary of State to impose, that it was too broad, and that its application was not limited in detail. They gave examples of arbitrary and unreasonable ways in which the policy could be applied. They also argued that there were no proper procedural safeguards.

91. In paragraph 104, this Court quoted paragraphs 76 and 77 of *Gillan*. Underhill LJ, giving a judgment with which Simon and Gloster LJJ agreed, said the last sentence of paragraph 77 was important. The more intrusive the power, the more the law would require the discretion to be specifically defined. 'The present case is not like that'. The conditions at issue in *MS* might interfere with the exercise of private and family life, but they were not as intrusive as telephone tapping, stop and search, or deportation. If the power was in fact exercised arbitrarily, judicial review was available. A policy is not 'not in accordance with the law' merely because it can be applied unreasonably. There was nothing in the policy which was 'inherently contrary to the rule of law'.

Submissions

SIAC's finding in decision 3 that article 8 did not apply to the Decision

92. Mr Southey tacitly acknowledged in his submissions that there was no case in which the ECtHR had held that article 8 applied when the Secretary of State made a decision to deprive of his nationality a person who was outside the United Kingdom having left the United Kingdom voluntarily, and who was not applying for entry clearance for the purposes of family reunion. I describe his position in that way because he was driven to rely on *HF v France* to support his argument on jurisdiction. Mr Southey referred to a few sentences of the ECtHR's reasoning in that case which, he said, showed that article 8 applied in principle, even though, as I think he accepted, the ECtHR was not invited to find that there had been any interference with the daughters' article 8 rights (see further, paragraph 70, above).

93. To be fair to Mr Southey, he also summarised his article 8 case in a supplementary skeleton argument dated 16 November 2022. *HF*, he submitted, shows that the 'territorial reach of the Convention has been found to be highly fact-sensitive'. His 'primary case' is that 'Article 8 is clearly engaged … via the 'jurisdictional peg' of having family members in the UK'. His secondary case, based on *HF*, is that article 8 is also 'engaged' because of A's ties to the United Kingdom; his former citizenship, the fact that he was deprived of his citizenship to stop him returning to the United Kingdom, that 'an absence of jurisdiction would prevent such individual being

protected from arbitrary interference with article 8 rights', and the fact that British citizens, A's children, and in particular, his daughter who is in Turkey, are adversely affected by the Decision. She cannot enter the United Kingdom with either of her parents.

94. In a further supplementary skeleton argument dated 22 December 2022, Mr Southey relied on *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591 and *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 63. *Pham* is said to show that the right to enter the United Kingdom is an attribute of citizenship, with the result that a deprivation of citizenship results in border control. That is said to be relevant to *HF*. *RJM* is said to show that 'Court of Appeal case law can be departed from in light of case law of' the ECtHR.

95. Mr Dunlop relied on the reasoning about article 1 in *HF* (paragraphs 184-211). He also relied on the conclusions of the ECtHR that the applicants' daughters and grandchildren were not within the jurisdiction for the purposes of article 3, and were only in the jurisdiction for the purposes of A3P4. He pointed out that A3P4 is not a provision which is in Schedule 1 to the HRA.

96. He made four further points.
    i. Article 8 does not apply when the Secretary of State makes a decision to deprive a person of his nationality who is outside the United Kingdom (and that person, 'the appellant') later appeals against that decision. He relied on *S1 v Secretary of State for the Home Department*.
    ii. Article 8 only applies in an appeal when the appellant is outside the United Kingdom if he appeals against a refusal of entry clearance for the purposes of family reunion.
    iii. The presence of members of an appellant's family in the United Kingdom is only a 'jurisdictional peg' in such a case; that is, if the appellant has applied for family reunion (see *Abbas*).
    iv. SIAC should focus on the decision which is challenged, and not anticipate what the Secretary of State might do in the future (*Aziz*: see paragraphs 80-81, above).

Decision 2

97. Mr Southey made four broad points about decision 2.
    i. The directions of themselves gave A permission to amend his grounds of appeal to SIAC.
    ii. Mr Southey criticised SIAC for holding a 'mini-trial' of the issues raised by the proposed amendment and by the linked application for disclosure. He argued that SIAC was not entitled to consider whether the proposed amendment had any prospects of success before exercising its discretion to permit the variation. He relied on paragraph 10 of *Shamima Begum*. He submitted that the only issues which rule 11 permits SIAC to consider on an application to amend are case management issues, such as whether an application is so late that it will prejudice the Secretary of State and/or will put a listed hearing date at risk.
    iii. SIAC was, in any event, wrong about the merits of the '*Gillan*' ground.

iv. SIAC's errors were material. If it had allowed the amendment, it would have ordered further disclosure, and, more fundamentally, if it had allowed the amendment, it would have been bound to allow the appeal, as the Decision would not have been 'in accordance with the law' for the purposes of article 8.

98. Mr Dunlop submitted that the directions had to be read against the power conferred by rule 11. It was inconceivable, in the light of the terms of rule 11, that SIAC intended, by the directions, to give A 'carte blanche' to vary his grounds of appeal without having seen, or approved, a draft of those grounds of appeal.

99. He argued that the power conferred by rule 11 is expressed in broad terms. By analogy with the CPR, which make the merits of a proposed amendment relevant to the exercise of the power to amend, SIAC must be entitled, in an appropriate case, to take the merits of a new ground into account. Mr Southey's concession that SIAC could refuse permission to amend on case management grounds undermined his attack on SIAC's approach in this case, as a consideration of the merits of a proposed amendment is part of case management. It is not efficient case management to allow an amendment which will waste the court's time, and will cost the parties time effort and money to pursue. Both parties were publicly funded.

100. He submitted that Jay J's compressed reasoning in paragraph 10 of *Shamima Begum* should not be understood as a statement that the merits of a proposed amendment were never relevant to the exercise of the power conferred by rule 11. If, however, that was what Jay J had meant, he was wrong. It was difficult to understand, how, in principle, the existence of a power to strike out a 'notice of appeal' on the grounds that it disclosed no reasonable grounds could control the exercise of a broad power to vary 'grounds of appeal'.

101. Finally, he submitted that Supperstone J was right, for the reasons he gave, both to hold that the *Gillan* ground had no reasonable prospects of success, and to refuse the application for further information. He pointed out that it was clear from Supperstone J's reasons that he would have refused this disclosure whether or not he had granted the application to amend.

Discussion

102. There are four broad issues.

i. Was A within the jurisdiction of the United Kingdom for the purposes of article 1 of the ECHR when the Decision was made?
ii. If he was, did the Decision breach article 8?
iii. If A was within the jurisdiction, did SIAC err in law in refusing A permission to vary his grounds of appeal?
iv. If SIAC did err in law, were any errors of law material?

Was A within the jurisdiction of the United Kingdom for the purposes of article 1 when the Decision was made?

103. *Al-Skeini* decides that, even though article 1 of the ECHR is not in Schedule 1 to the HRA, domestic courts must apply decisions of the ECtHR when considering whether or not a person is within the jurisdiction for the purposes of the HRA. We were

referred to no decision of the ECtHR which concerns a person deprived of his British nationality who was outside the United Kingdom, having left voluntarily, who was a dual national, and who was living in a family unit outside the United Kingdom when the deprivation decision was made. The closest decision factually is the admissibility decision in *K2*, but there is no reasoning about jurisdiction in that case. There is, therefore, no decision of the ECtHR which binds this Court to decide that A was within the jurisdiction for the purposes of article 1 when the Decision was made, so that he could rely on article 8 in his appeal against it.

104. I agree with Burnett LJ's view in *S1* that, although *Khan* was a different case (not least because the applicant was not a former British citizen, and was not challenging a decision to deprive him of his nationality), the reasoning of the ECtHR in that case, which relies on the principles which the ECtHR has developed in considering article 1, supports a conclusion that both S1 and A were outside the jurisdiction at the relevant time.

105. The closest domestic decision, factually, is *S1*. S1's claim was based on article 3, not on article 8, but there is no basis in principle for supposing that this Court's reasoning in paragraphs 88-102 would have been any different if S1's complaint had been based on article 8, rather than on article 3. I consider that this Court is bound to hold, or, if not bound, that there is strongly persuasive authority, that A was not within the jurisdiction for the purposes of article 1 when the Decision was made, so that he could not rely on article 8 in his appeal against it.

106. I accept Mr Dunlop's submission, based on *Aziz* (see paragraphs 80-81 above) that A's relationship with W1 and his four children in the United Kingdom is not relevant to this analysis. It might become relevant in the future, but would only become relevant if A were to apply for entry clearance to visit, or to be reunited, with them. It did not, when the Decision was made, provide 'the jurisdictional peg' described in *Abbas* by Burnett LJ in remarks which were not necessary to his decision in that case (see paragraphs 78-79, above), but which were nevertheless relied on by Mr Southey. I consider, in paragraph 108 below, the links with the United Kingdom on which A relied. If they are material to this issue, they do not support the argument that article 8 was breached.

Did the Decision breach article 8?

107. The starting point is that, even in cases like *Johansen* and *Usmanov*, in which the applicant was unarguably within the jurisdiction of the contracting state for the purposes of article 1, the ECtHR has been clear that there is no Convention right to citizenship. Its review of the compatibility of a deprivation of citizenship with the ECHR (and, specifically, with article 8) has been limited to the impact of deprivation on the applicant's private life, and to two inquiries only. It has asked only, first, whether the decision was arbitrary, which it has said is a stricter standard than that of proportionality, and second, what consequences the deprivation has had for the applicant. It is therefore clear that even if an applicant is within the jurisdiction, the scope of article 8 in a deprivation case is limited, and does not include the questions which an article 8 review usually entails. For the reasons I give below, in relation to the *Gillan* ground (see paragraph 123, below), the relevant provisions have the necessary quality of law, and safeguards against arbitrariness. The effects on A of the

Decision were limited, as he had voluntarily left, both the United Kingdom, and his family here. He did not wish then to return to the United Kingdom. He was not stateless. If, contrary to SIAC's clear finding, article 8 did apply when the Decision was made, the Secretary of State did not, by making the decision, breach article 8.

108. With the exception of A's former citizenship of the United Kingdom, the 'links' with the United Kingdom on which he relies, are, on analysis, not links at all, are tenuous, or are based on arguments which are circular. They are to be set against his links with Turkey when the Decision was made, and with his citizenship of Pakistan. In any event, such links, if established, are only relevant to the analysis in *HF v France*, on which A relies. In that case, the applicants did not rely on article 8 (except to the limited extent explained in paragraph 70, above), the ECtHR dismissed the claim based on article 3, and based its positive decision solely on A3P4. As Mr Dunlop pointed out, A3P4 is not in Schedule 1 to the HRA. The ECtHR did not refer to article 8, except to the limited extent referred to in paragraph 70, above. *HF* does not support an argument based on article 8. The Decision does produce effects on A's private life (which is a different inquiry), but they are slight when compared with the effects of deprivation in *Usmanov*.

109. For completeness, I should consider A's second supplementary skeleton argument. Neither *Pham* nor *RJM* helps A. *Pham* was an appeal against a decision of SIAC on a preliminary issue (whether the order in that case made the appellant stateless). The broad statements of the Supreme Court about citizenship, EU law and proportionality are all obiter. In any event, Mr Southey does not need the authority of the Supreme Court to make good the proposition that if a person is deprived of his citizenship, he will no longer be able freely to enter the territory of his former nationality. But the HRA does not in terms provide any protection for such a right. Mr Southey is right that in *RJM* the Appellate Committee indicated that it is was open to this Court not to follow one of its binding decisions if it inconsistent with a later decision of the ECtHR. He did not, however, as I understood them, explain in his submissions how any relevant decision of this Court was inconsistent with a later decision of the ECtHR. If his implied target was *S1*, it is not, to my mind, inconsistent with any later decision of the ECtHR to which A referred.

110. A's new ground of appeal, challenging SIAC's finding (in paragraph 121 of decision 3) that article 8 did not apply to A when the Decision was made is arguable. It is also an intrinsically important point, so there is, in any event, a compelling reason for giving permission to appeal. I would therefore give permission to appeal for this ground. I would, however, dismiss this new ground of appeal on the merits, for the reasons I have just given. In short, A was not within the jurisdiction for the purposes of article 1 when the Decision was made, but, if contrary to that view, he was, the Decision did not breach article 8 on the facts.

Did SIAC err in law in refusing A permission to amend his grounds of appeal?

111. Despite my conclusion on the first issue, I go on to consider the second issue which I described in paragraph 102, above. There are four sub-issues.
    i. Were the directions an implied general permission to vary the grounds of appeal?

ii. Did Supperstone J err in law in taking into account the merits of the proposed variation?
iii. Did Supperstone J err in law in his assessment of its merits?
iv. If Supperstone J had permitted a variation of the grounds of appeal, would he have ordered the further disclosure A asked for?

Were the directions an implied permission to amend the ground of appeal?

112. I accept Mr Dunlop's submission that rule 11 is an aid to the construction of the directions. There are three points about rule 11.
    i. It requires the appellant to serve copies of the 'proposed variation' on SIAC. SIAC therefore has an opportunity to consider the text of the proposed variation before it decides whether or not to give permission for it to be made.
    ii. It also requires service on the Secretary of State. The Secretary of State, therefore, has an opportunity to object to the proposed variation before SIAC gives permission for it to be made.
    iii. It requires SIAC to make a judicial decision, which is not expressly circumscribed, whether or not to permit the variation.

113. I consider, against that background, that it is implausible that SIAC thought that the directions, without more, gave A a general permission to amend his grounds of appeal. That is not, in any event, the question. The question is what an objective reader of the directions, with knowledge of the procedural background, would think that the directions meant. Such a reader would conclude that the directions were a timetable, not a general permission to vary the grounds of appeal. An objective reader would take into account that a general permission of the kind advocated by A would (a) prevent SIAC from making the judicial decision which rule 11(1) requires it to make, having considered the terms of the proposed amendment, and (b) deprive the Secretary of State of the procedural protection conferred by rule 11(2). Mr Southey's arguments do not touch these points. Finally, and this is a small point, A does not seem to have interpreted the directions in that way, because he later applied, with a proposed draft, for permission to amend his grounds of appeal.

Did Supperstone J err in law in taking into account the merits of the proposed amendment?

114. Mr Southey's argument that SIAC can only refuse permission to amend on case management grounds does not help him, for the reasons given by Mr Dunlop. It is not efficient case management to allow an amendment if that will waste time, effort and money on a hopeless argument. The power conferred by rule 10(1) is, on its face, a wide power. The power is not completely unfettered, as it must be exercised judicially, and on the basis of relevant considerations. There is nothing in the language of rule 10(1), however, which prevents SIAC, in an appropriate case, taking into account the merits of a proposed amendment when exercising that power.

115. I do not know whether *Shamima Begum* was a case in which, on its facts, it was, for some reason, inappropriate for SIAC to take into account the merits of the proposed amendments when deciding whether or not to permit them. It is not clear to me that that was SIAC's reason for allowing the proposed amendments. Paragraph 10 of the judgment is difficult to follow. Mr Southey submits that SIAC held that it was never appropriate to consider the merits of a variation on an application to vary, whereas Mr

Dunlop's primary submission was that SIAC only decided that it was not appropriate to do so on the facts.

116. The power to strike out a notice of appeal on the grounds that it discloses no reasonable grounds for bringing the appeal conferred by rule 11B is not an obvious aid to the construction of rule 11. The subject matter of the two rules is different. Rule 11 governs a proposed variation of existing grounds of appeal, and rule 11B, the striking out of a notice of appeal, that is, of the whole appeal.

117. Jay J might have been saying that the only way in which SIAC could consider the merits of a proposed variation was if the Secretary of State applied to strike out the notice of appeal under rule 11B. I doubt that that was what he was saying but, if it was, it was wrong for three reasons.

118. First, it would be an inefficient way of managing the case. The parties were all at a hearing. The appellant had applied for permission to vary her grounds of appeal, and the Secretary of State, as she was entitled to, was at the hearing, ready to oppose that application. The Secretary of State was not applying to strike out the notice of appeal; what was at issue was a proposed variation to the grounds of appeal. If this was Jay J's reasoning, its effect is that SIAC would give permission to vary the grounds of appeal without considering the merits of the variation, and then require the Secretary of State to make a further application to have the variation struck out on its merits, which SIAC would have to consider separately. A construction of the Rules which produces such a cumbersome result, especially when it is not required by the express words of the Rules, is an unlikely construction.

119. Second, an implication of this reasoning is that the Secretary of State had to give notice to A of her grounds for opposing the application to vary. I can see no basis for that implication in rule 11.

120. Third, as I have said, rules 11 and 11B have different subjects. There is a significant difference in language between them. Rule 11B does not give SIAC power to strike out a 'ground of appeal', but to strike out 'the notice of appeal', that, is the whole appeal. That difference in language in adjacent rules is not likely to be accidental, and should be given effect. If the Secretary of State followed the logic of paragraph 10, the merits of the variation could not be considered on the application to vary, with the result that the variation would be allowed. The merits could only be considered at a strike-out application, but SIAC would not have power to strike out the varied ground of appeal, as rule 11B only enables it to strike out the whole appeal. The Secretary of State had never suggested that the whole appeal should be struck out.

121. If SIAC was deciding in paragraph 10 of *Shamima Begum* that it could not, in principle, take into account the merits of a proposed amendment in exercising the power conferred by rule 11(1), it erred in law. By contrast, Supperstone J did not err in law in decision 2 in taking into account, in this case, the merits of the proposed variation of the grounds of appeal.

Did Supperstone J err in law in his assessment of the merits of the proposed variation?

122. The starting point is that the 'right to citizenship' is not a right protected by the ECHR. I do not consider that 'the right to citizenship' is a 'fundamental right' of the kind which the ECtHR had in mind in paragraph 77 of *Gillan*, because it is not, in language of that paragraph 'a right safeguarded by the Convention'. The ECtHR has held that its supervision of the exercise of a power to deprive a person of his citizenship is limited (see, in particular, paragraph 66, above).

123. *Gillan* was a totally different case from this case. The real vice of the statutory provisions was that they conferred two apparently unconstrained powers; the power of authorisation, given to a senior police officer if he considered it 'expedient for the prevention of acts of terrorism' and the power enabling constables to stop and search people when they did not have any reasonable suspicion of the commission of an offence. The code of practice did not relevantly define or constrain either power. It was the breadth of those powers which meant that judicial review could not be an adequate safeguard. By contrast, in this case, the Secretary of State has power to deprive a person of his citizenship if she considers deprivation would be conducive to the public good. There are many authorities at the highest level about the meaning of that phrase, and I accept Mr Dunlop's submission that the relevant guidance adequately explains how the power may be exercised. It is fanciful to suggest that A could, when, as SIAC held he did, he engaged in terrorism-related activity in Syria, have been in any doubt that the Secretary of State might decide to deprive him of his British citizenship if she found out about that activity. A had a right of appeal to SIAC, which he exercised. The ECtHR has, in several cases, held that a right of appeal to SIAC is a sufficient safeguard against the relevant risk of arbitrariness. The statutory framework and guidance have the quality of law, there are sufficient safeguards against arbitrariness, and the exercise of the power was, in the circumstances, foreseeable. The power was not exercised, as A's submissions at times suggested, on the grounds that he merely travelled to Syria.

124. It follows that Supperstone J did not err in law in deciding that the *Gillan* ground had no reasonable prospects of success, and in refusing A permission to vary his grounds of appeal for that reason.

If Supperstone J had given permission for the variation, would he have ordered the disclosure for which A asked?

125. I accept Mr Dunlop's submission that it is clear from Supperstone J's express reasons that he would not have ordered the disclosure A asked for even if he had permitted the variation (see paragraph 33, above). Supperstone J's assessments were that the value of the information would be 'minimal' to the *Gillan* ground, that the information could not help SIAC to decide whether or not the power to deprive had been exercised arbitrarily, and that it would take disproportionate time, cost and effort to provide the information. Those assessments related to the efficient management of the appeal. They were rational, were open to him on the terms of the relevant provisions of the Rules, and are assessments with which a court on an appeal on a point of law should not readily interfere. There is no basis for this Court to interfere with them on this appeal.

If, contrary to my view, SIAC erred in law, were any errors of law material?

126. If SIAC erred in law in decision 3 in holding that article 8 did not apply, any such error was immaterial, because, for the reasons I have given, a claim based on article 8

would have failed. It is significant that, despite having found that article 8 did not apply, SIAC, having fully reviewed the OPEN and CLOSED evidence, went further than it was required to, and found, in any event, that in the light of A's terrorism-related activity, the Decision was proportionate, having considered its effect on him and on his family.

127. If SIAC erred in law in decision 2 in refusing permission to A to vary his grounds of appeal, that error was not material, for two reasons. First, SIAC would not, in any event, have ordered the disclosure sought, for reasons which, I have held, are not wrong in law. Second, the *Gillan* argument would have failed.

Conclusion

128. For those reasons, I have reached three conclusions.
    i. I would give A permission to appeal against SIAC's finding that article 8 did not apply, but I would dismiss his appeal against SIAC's conclusion in decision 3 that article 8 did not apply.
    ii. If contrary to my primary conclusion, article 8 did apply, I would nevertheless dismiss A's appeal against decision 2. Supperstone J was entitled, for the reasons which he gave, to refuse A's application to vary his grounds of appeal.
    iii. If contrary to my view, SIAC erred in law in deciding that article 8 did not apply, or in refusing A permission to vary his grounds of appeal, any such errors were immaterial, for the reasons I give in paragraphs 126 and 127, above.

Stuart-Smith LJ

129. I agree.

Moylan LJ

130. I also agree.