Neutral Citation Number: [2017] EWHC 928 (Admin)

Case No: CO/10/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/04/2017

Before :

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Between :

The Queen (on the application of W2 and IA)	**Claimants**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

MS S HARRISON QC and **MR A VAUGHAN** (instructed by **Birnberg Peirce Ltd**) appeared on behalf of W2.
MS A WESTON (instructed by **Birnberg Peirce Ltd**) appeared on behalf of IA.
MR R DUNLOP (instructed by the **Government Legal Department**) appeared on behalf of the Respondent.
MR A UNDERWOOD QC (Instructed by **Special Advocates' Support Office**) appeared as Special Advocate

Hearing dates: 23rd and 24th of March 2017

Redacted Approved Judgment (OPEN)

This judgment has been redacted in order to comply with an order made by Flaux LJ on 3 February 2017.

Mrs Justice Elisabeth Laing DBE:

Introduction

1. W2 was a British Citizen and is a citizen of [redacted]. On [redacted] he went [redacted]. He had booked a return flight for [redacted]. On [redacted], the Defendant ('the Secretary of State') sent a notice of her decision to deprive him of his citizenship to W2's last known address. [redacted]. The notice letter was opened and read by IA. She told W2 about it by phone the next day. The reason for that decision was that it was conducive to the public good because of the threat which W2 posed to national security. The submission shows that it was known that W2 was, at that stage, [redacted]. The open evidence filed by the Secretary of State makes it clear that the Secretary of State did not know where in [redacted] he was.

2. [redacted], the Secretary of State made an order depriving W2 of his citizenship. W2 tried to fly back to the United Kingdom on [redacted]. The Secretary of State had sent out a notice to carriers instructing them not to carry W2, and he was not allowed to board the plane.

3. W2 has exercised his statutory right of appeal to the Special Immigration Appeals Commission ('SIAC'). The appeal is against the decision to make an order depriving him of his citizenship.

4. This is my decision on applications for permission to apply for judicial review and for interim relief by W2 and IA. The decision they challenge in the claim form is the order depriving W2 of his citizenship. The interim relief they seek is an order requiring the Secretary of State to facilitate W2's return to the United Kingdom. That would require the Secretary of State to give W2 some sort of leave to enter, and to pay for his flight (he was prevented from boarding a flight which he had paid for). On 3 February 2017, Flaux LJ ordered a 'rolled-up' hearing of the Claimants' application for judicial review, and of the application for interim relief. He also gave various other directions including for anonymity and for expedition. The parties later agreed that at this hearing the court would consider only the applications for permission to apply for judicial review, and for interim relief

5. W2 was represented by Ms Harrison QC and Mr Vaughan; IA by Ms Weston; and the Secretary of State by Mr Dunlop. The Special Advocate was Mr Underwood QC. I thank all the advocates for their helpful written and oral submissions, some of which were prepared and delivered against tight time constraints, and their legal teams for all the hard work which has evidently been done to prepare for the hearing.

6. I heard submissions in open and in closed. This is my open judgment. I have also prepared a closed judgment. I should make clear that nothing I heard in the closed part of the hearing changes the views I express in this open judgment. The closed material does not undermine, and indeed, reinforces, the views I have reached on the basis of the open material and arguments. I reached the views I express in this open judgment without taking into account any of the closed material.

The grounds

7. The grounds of challenge are that:

    a. the order is flawed because the relevant notice provisions were not complied with;

b. the order is flawed because it was not served on W2 until after he had tried to fly back [redacted];

c. the order is flawed because it was made while W2 was outside the United Kingdom and

   i. he thus cannot play a 'meaningful' part in his statutory appeal;

   ii. he was not consulted before it was made;

   iii. [redacted];

d. the order is flawed because the reasoning about article 8 and section 55 of the Borders Citizenship and Immigration Act 2009 in the submission to the Secretary of State on which the decision to make a deprivation order was based is inadequate; and in any event is disproportionate; and

e. the order is a breach of EU law.

Ms Harrison recognised, in oral argument, that I am bound by authority to reject ground c. ii. I record that she reserved her position on it, and I say no more about it.

The relevant legislative provisions

8. Section 40(1) of the British Nationality Act 1981 ('the 1981 Act') defines 'citizenship status'. Section 40(2) confers a power on the Secretary of State by order to deprive a person of his citizenship status if she is satisfied that deprivation is conducive to the public good. Before making such an order the Secretary of State must give the person written notice specifying that she has decided to make the order, the reasons for the order, and the person's right of appeal under section 40A(1) or section 2B of the Special Immigration Appeals Commission Act 1997 ('the 1997 Act') (section 40(5)). W2's right of appeal is to SIAC because the Secretary of State has issued a certificate under section 40A(2) of the 1981 Act (section 2B of the 1997 Act). Section 41(1) of the 1981 Act gives the Secretary of State power to make regulations generally for 'carrying into effect the purposes of this Act'. Section 41(1)(e) specifically authorises provision 'for the giving of any notice required or authorised to be given to any person...'.

9. The British Nationality (General) Regulations 2003 (2003 SI No 548) ('the notice regulations') are made under sections 41(1) and (3) of the 1981 Act. Regulation 10 is headed 'Notice of proposed deprivation of citizenship'. It provides

> '(1) Where it is proposed to make an order under section 40 of the Act 1 depriving a person of a citizenship status, the notice required by section 40(5) of the Act to be given to that person may be given—
>
> (a) in a case where that person's whereabouts are known, by causing the notice to be delivered to him personally or by sending it to him by post;
>
> (b) in a case where that person's whereabouts are not known, by sending it by post in a letter addressed to him at his last known address.
>
> ....

(3) A notice required to be given by section 40(5) of the Act shall, unless the contrary is proved, be deemed to have been given—

(a) where the notice is sent by post from and to a place within the United Kingdom, on the second day after it was sent;

(b) where the notice is sent by post from or to a place outside the United Kingdom, on the twenty-eighth day after it was sent, and

(c) in any other case on the day on which the notice was delivered.'

10. Section 40A in its original form provided for an appeal pursuant to section 40A to be suspensive, in the sense that an order depriving a person of his citizenship could not be made while an appeal was pending (section 40A(4)). Section 40A(4) was repealed by the Asylum and Immigration (Treatment of Claimants etc) Act 2004. There was thus a deliberate decision by Parliament that the pursuit of an appeal should no longer prevent the Secretary of State from making an order depriving a person of his citizenship.

11. Section 78 of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act'), which prevents the removal of an appellant while a statutory appeal is pending, does not apply, and, as far as I can see, has never applied, to a section 40A appeal (see section 40A(3) of the 1981 Act). Nonetheless, the Secretary of State appears to have conceded in *L1 v Secretary of State for the Home Department* SC/100/2010, judgment 4 August 2014, that section 78 in effect applied (see paragraph 60 of SIAC's judgment). This concession is reflected at several points in the reasoning Court of Appeal in that case, but I do not understand its legal basis.

12. During the hearing, I gave Mr Dunlop permission to make further written submissions on this issue (after the hearing) if he wished to. GLD sent an email to SIAC about this on 28 March 2017. They explained that their researches had not shown why the apparent concession was made. They said that deprivation on its own would not, then, have enabled the Secretary of State to remove a person from the United Kingdom; a decision to deport that person would also have been necessary. So there was a statutory bar to removal if the person was in-country, though not for the reasons given in the judgments in *L1*.

13. The effect of the amendments to the 2002 Act made by the Immigration Act 2014 is now that if W2 were returned to the United Kingdom and were to argue that return to [redacted], he would, absent certification, have a right of appeal against any decision to refuse such a claim, and the bringing of an appeal in the exercise of that right would attract the protection of section 78 of the 2002 Act. The in-country right of appeal would not apply if the Secretary of State certified the claim as clearly unfounded under section 94 of the 2002 Act, or made a certificate under section 94B that W2 would not suffer 'serious irreversible harm' pending his appeal.

14. W2's solicitors, in their further written submissions, emphasise that if the Secretary of State were to certify such [redacted] claim under section 94B(2) of the 2002 Act, that would deprive W2 of an in-country right of appeal. They suggest that on her case, the Secretary of State would be entitled to certify such a claim. If she did so, W2's only remedy would be an application for judicial review of the certification. [redacted]. If the court were to find that, for whatever reason, W2 did face [redacted], it would not be surprising that he could not lawfully be returned there.

Some decisions on the interpretation of the legislative scheme

The right of appeal

15. The Court of Appeal has decided that there is nothing in the statutory scheme which requires an appeal against a decision to deprive a person of citizenship to be in-country: see *R (G1) v Secretary of State for the Home Department* [2012] EWCA Civ 867; [2013] QB 1008, paragraph 22, per Laws LJ. He also said that an in-country right of appeal could only be guaranteed by legislation. In *G1* the appellant applied for judicial review of a decision to exclude him from the United Kingdom which had been made at the same time as an order depriving him of his citizenship, and had appealed to SIAC against the decision to make a deprivation order. He argued that the exclusion order was unlawful because it prevented him from effectively pursuing his appeal in the United Kingdom. The Court of Appeal rejected that argument. SIAC had pointed out, at paragraph 11 of its judgment, that if the appellant was right, the Secretary of State would be required to take a step (returning him to the United Kingdom) which would frustrate an otherwise lawful decision to deprive him of his citizenship on the grounds of national security.

16. In *LI v Secretary of State for the Home Department* [2015] EWCA Civ 1410 a submission was made to the Secretary of State asking her to decide in principle that the next time the appellant left the United Kingdom, he should be deprived of his citizenship and excluded from the United Kingdom. He went to Sudan, and such decisions were then made. The preliminary issue on the appeal to SIAC was whether it was lawful for the Secretary of State to do that, or whether it was an abuse of power, because it deprived the appellant of an in-country right of appeal. When the decision was made in principle, the appellant's whereabouts in the United Kingdom were known (judgment, paragraph 18). Laws LJ agreed with SIAC that the notice provisions were a 'simple code'. The Secretary of State's acts were, on their face, lawful. They would be unlawful only if they 'had frustrated the policy or purpose' of the appeal provisions. 'Such a case would certainly be made out if it were shown that the Secretary of State had acted so as to deprive the appellant of an in-country appeal for reasons of tactical advantage in the appeal process. That would be an improper motive and the illegality of such a motive ...needs no authority'. That was not the position, however, because SIAC had accepted that 'the timing of the decision here was determined by reference to national security considerations' (judgment, paragraph 21). The Secretary of State was not, if she proposed to deprive someone of his citizenship, obliged to 'take no steps which stand in the way of [his] exercising his right of appeal in country even though in her view, on expert advice, his doing so would or might damage the security of the United Kingdom' (judgment, paragraph 22). The scheme provided for an appeal in country if the appellant was in the United Kingdom, but not otherwise (judgment, paragraph 24).

17. In *SI, T1, U1 and VI*, SIAC inferred that the Secretary of State had deliberately timed the notices and orders depriving the appellants of their citizenship while they were in Pakistan. She knew that any appeal could only be from abroad. The appellants in that case argued that this approach was unlawful, for various reasons. SIAC held that the appellants' real complaint was against the timing of the order and that SIAC did not have jurisdiction to consider that complaint. In any event, nothing about the timing of the order could retrospectively invalidate the notice of the decision to make the order. The appellants had made no application for leave to enter ('LTE'), and unless and until they had, SIAC had no jurisdiction to entertain any appeal against a refusal to allow the appellants to return to the United Kingdom to prosecute their appeals (SC/106-9/2011, judgment 26 July 2012, paragraphs 3, 13(ii) and 14).

18. The appellants appealed (*S1 etc v Secretary of State for the Home Department* [2016] EWCA Civ 560; [2016] 3 CMLR 1122). The Court of Appeal considered not only the appeal from SIAC's decision, but an application for judicial review which had been issued in parallel, for an order quashing the deprivation orders, and for other relief to enable the appellants to return to the United Kingdom. The Court of Appeal noted that the arguments it had to consider were similar to those already considered in *G1* and *L1*. Burnett LJ, with whom the other members of the court agreed, was not persuaded that SIAC had any power to help the appellants (judgment, paragraph 85). They should have asked the Secretary of State for LTE outside the Immigration Rules (HC 395 as amended) ('the Rules') to prosecute their appeals and have challenged any refusal by judicial review. They took the first step, in substance, in correspondence with the Secretary of State. The circumstances in which such a refusal could be successfully challenged would be rare and would require 'clear and compelling evidence...that absent physical presence in the United Kingdom, the person concerned could take no meaningful part in the ...appeal. Even then the decision would have to be reviewed in the light of public law principles' (judgment, paragraph 88). The Court of Appeal granted permission to apply for judicial review but dismissed the claim (judgment, paragraph 87). I attribute no significance to the fact that the Court granted permission to apply for judicial review; it seems to me that that must have been a pragmatic decision which ensured that the Court was able to dispose finally of both matters.

The notice requirements

19. In paragraph 56 of *G1* Laws LJ made clear that the only notice requirements which apply to a notice pursuant to section 40 of the 1981 Act are the requirements of the notice regulations.

20. In *H2 v Secretary of State for the Home Department* SC/120/2012, judgment 22 January 2015, SIAC considered, as a preliminary issue, whether the appellant had been properly served with notice of the Secretary of State's decision to deprive him of his citizenship. The appellant was abroad. The notice was sent by letters to the appellant's father's address, where the appellant had been living before he left the United Kingdom. It was 'his last known address' (judgment, paragraph 86).

21. The Secretary of State submitted that the notice regulations had two purposes: ensuring, first, that reasonable steps are taken to bring the notice to the attention of the person concerned while, second, that deprivation is not frustrated by practical difficulties in effecting postal or personal service. SIAC rejected any suggestion that the Secretary of State was bound to search for the appellant for the purposes of service under regulation 10(1)(a) rather than serving under regulation 10(1)(b). 'There may be circumstances in which the 'whereabouts' of an Appellant could be easily determined and if determined would permit personal service to be readily effected. This case is very far from such a situation' (judgment, paragraph 91). On his own case, the appellant had been detained by Al Shabaab when the deprivation order was made. SIAC rejected the argument that the notice had not been properly served.

Discussion

22. An important aspect of these applications is the relationship between the court's power to give relief by means of judicial review and the statutory appeal which W2 has initiated. The court must be careful to ensure that judicial review is not available where there is a suitable alternative remedy. In my judgment there is a significant overlap between the grounds on which judicial review is sought, and the issues which SIAC could consider in the appeal. My first task is to identify that overlap, and, having identified it, to refuse permission to apply for judicial review on any ground

which SIAC could consider in the appeal. To do this, I need to consider a second relationship; that between the notice and the order.

23. The authorities recognise, in accordance with the statutory scheme, that the decision and the order are legally distinct steps. Nonetheless, they are closely linked. The fact that there is no timetable for service of the order shows that Parliament has permitted the Secretary of State to make an order as soon as lawfully possible after service of the notice. The decision is a 'decision to make an order under section 40(5)' (section 40A(1)). The notice the Secretary of State is required to give is that she 'has decided to make an order [and] the reasons for the order' (section 40(5))). The provisions show that the decision of which the Secretary of State is required to give notice is given effect by the order, and that the order and the notice are not, in substance, distinct decisions. Whether or not the order is made as soon as possible after the decision is notified, the reasons for the decision and for the order are and must be the same. The making of the order does not require a distinct process of reasoning, nor does the legislative scheme permit that.

24. The premise of Ms Harrison's argument was, to a great extent, an artificial distinction between the decision to make the order and the order, founded on the decision of the Court of Appeal in *S1 etc* that SIAC does not have jurisdiction to consider arguments about the timing of the order. It does not follow by any means from that lack of jurisdiction that the court should therefore entertain such arguments, if, in substance, their purpose is (as here) to make a collateral attack on the decision to make an order.

25. If that analysis is right, any challenge to the substance or to the effect of the order is also a challenge to the substance or effect of 'the decision to make the order' (which generates the statutory right of appeal). In my judgment, grounds c. iii and d. are challenges both to the substance and effect of the order, and to the decision to make the order, and SIAC would be able to consider them in the appeal. I do not consider that this analysis is arguably changed by the fact that, as Ms Harrison argues, those challenges are directed to the period pending the appeal only. The remedy which Parliament has provided against the substance and effect of the decision to make the order, at whatever point in time those effects are felt, is the statutory appeal. If the appeal succeeds, the order will no longer have effect. That is the sole remedy Parliament has provided for all the effects of the decision.

26. It is not necessary for me therefore to say anything about the merits of those arguments. Indeed, given that they will be canvassed in the SIAC appeal, it would be inappropriate. But I will make three general points.

27. First, Ms Harrison argued that the order was flawed because the submission to the Minister did not properly consider the article 8 rights of the family. This argument is inconsistent, in my judgment, with the approach of the House of Lords in, for example, *R (SB) v Governors of Denbigh High School* [2006] UKHL 16; [2007] 1 AC 100 and *Belfast City Council v Miss Behavin' Limited* [2007] UKHL 19; [2007] 1 WLR 1420.

28. Second, Ms Harrison argued that IA and her children had no means of vindicating their article 8 rights, and their argument about section 55 of the 2009 Act, other than by an application for judicial review of the order. I reject that argument. I accept Mr Dunlop's submission that SIAC will be required to consider, on the statutory appeal, the article 8 rights of the whole family, not just W2's article 8 rights; see *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39; [2009] 1 AC 115. It seems to me that the arguments about section 55 are bound to be a facet of that consideration on the facts of this case.

29. Third, Ms Harrison argued that deprivation while W2 was outside the United Kingdom was disproportionate, because there were less intrusive ways of managing, in the United Kingdom, the risks he poses. No doubt there are other ways in which the risk which W2 poses could be managed, were he in the United Kingdom. The point, however, is that the decision to deprive W2 of his nationality while he was abroad was made precisely because of the assessment that his risk could be better managed if he were outside the United Kingdom. The Court of Appeal has held that that is a proper purpose for making an order while a person is outside the United Kingdom. Moreover, in *S1 etc*, at paragraph 44, Burnett LJ said, of a similar argument that 'It is difficult to conceive that SIAC could have concluded that the deprivation decisions were disproportionate in any sense given the nature of the case advanced by the Home Secretary against these appellants'. Burnett LJ then listed the alternatives to deprivation outside the United Kingdom on which the appellants in that case relied. He said 'To my mind this is an unrealistic submission. Any measures available to the Home Secretary or intelligence agencies would be expensive, divert resources from other activities and would be decidedly second best when the underlying premise of the deprivation decisions is that it is the presence of the appellants in the United Kingdom which poses the threat to our national security.'

30. I would not rule out the possibility that this argument could succeed on the appeal to SIAC, as that appeal will give an opportunity for the evidence about the national security case to be tested. But if that case survives such testing, this argument clearly faces significant hurdles. The fact that the national security case cannot be tested on an application for judicial review in the same way as it would be on a SIAC appeal is an additional reason why judicial review should not be made available on this aspect of the case.

31. The argument that the notice was improperly served is framed as a challenge to the validity of the order. If it had been a discrete challenge to the order, and had had merit, it is conceivable in theory that the court might have granted permission to apply for judicial review of the order. But this challenge is conceptually indistinguishable from an identical challenge which could be made to the validity of the notice of the decision. It is, in that way, an argument which SIAC can consider on the appeal, as *H2* shows. The court should, as a matter of discretion, refuse to deal with ground 1, as the SIAC appeal is a suitable alternative remedy.

32. Moreover, this ground faces significant hurdles on the facts, at least as they appear at this stage. The open evidence is that the Secretary of State did not know W2's whereabouts. All that the Secretary of State knew was that he was in [redacted]. It is not obvious, on the language of regulation 10, that, even if, as W2 argues, the Secretary of State had a phone number or email address for W2 that she was obliged to ring the number or use that address in order to try and find out where W2 was. Nor is it obvious that she was obliged to try and effect personal service at a Consulate or Embassy because an official described this as her 'preferred method' in a different case. On the face of it, the Secretary of State is entitled to use the method of service prescribed by the notice regulations. I have some difficulty with the suggestion that she is obliged, whatever the facts, to use a more favourable method because an official has described it as her 'preferred method' in a different case. Finally, I note that W2 was told about the notice by his wife, the day after she received it. He has not, it seems, suffered any injustice on the facts. It would be inappropriate for me to rule this out as an argument which would be available on the SIAC appeal, and I do not do so. I simply note that it does not, at this stage, appear to be a strong argument, for the reasons I have given.

33. Ms Harrison relied on an obiter passage in *Collier v Williams* [2006] EWCA Civ 20; [2006] 1 WLR 1945, a decision about a version of the CPR which is no longer in

force. The structure and language of the relevant provision differed from the structure and language of the notice regulations. SIAC would not be bound by the approach of the Court of Appeal in that case, and, to the extent that it differs from that of SIAC in *H2*, I consider that SIAC might follow *H2*.

34. Ground b. is, in my judgment, unarguable. Parliament has provided a 'simple code' for making deprivation orders. The Secretary of State is expressly required to give notice of the decision to make the order. She is not required to give notice of, or to serve, the order. Ms Harrison relied on *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 AC 604. That is a very different case. The majority of the House of Lords held, despite the clear language of the regulations at issue (see paragraph 20 of the dissenting opinion of Lord Bingham) that the Secretary of State had an implied duty to serve the decision refusing the appellant's asylum claim before it could affect her entitlement to income support. There is no need for such an implication in this scheme, as this scheme clearly requires the decision to make an order to be notified, together with the reasons for the order, and notice of the right of appeal. The principle of legality described by the majority of the House of Lords is satisfied by that procedure. There is no arguable need for the further service of the order.

35. I turn to ground c.i. In *S1 etc* the Court of Appeal made it clear that a claimant who complains about the fact that he cannot be present for his appeal must apply for LTE outside the Rules, and, if that is refused, apply for judicial review of that decision. It is clear, therefore, that the potential inability of an appellant to take part in his appeal is not a ground for challenging the deprivation order, but a potential ground for challenging a different decision (a refusal to grant LTE outside the Rules). The decision not to grant LTE is not the decision which is challenged in this case, no doubt for good reason (see box 3 of the claim form). I pointed out to Ms Harrison in the course of her argument that there was no challenge to the decision to refuse LTE. She did not apply to amend her grounds, arguing instead that the relief sought was what mattered. I do not agree that the starting point is the relief sought. The first problem, then, with this ground, is that it floats free of any challenge to the decision which gives rise to the complaint. That is enough to mean that I should refuse permission to apply for judicial review on this ground. It is a ground of challenge not to the only decision which is challenged in the claim form, but to a different decision, which is not challenged.

36. In case I am wrong about that, there is a second problem, which has two facets. The burden of showing that W2 could not participate effectively in his appeal from abroad is on W2 and he must do so with clear and compelling evidence (*G1*, paragraph 25; see also *K2 v the United Kingdom* Application no 48287/2013, 7 February 2017). I accept Mr Dunlop's submission that inability to take part meaningfully in the appeal is not enough: the decision not to give LTE must be reviewed on public law principles (see paragraph 86 of *S1*).

37. First, a large part of the argument at the permission hearing focussed on article 8 and section 55. There is nothing to prevent IA and the experts who have provided reports from giving evidence to SIAC about these questions.

38. Second, the evidence about this from W2 is very thin. He infers that because of the instruction to carriers given by the Secretary of State in [redacted] his name will be on a watch list kept by the [redacted] authorities. There is no evidence from W2 to support that inference. He has told his solicitors he 'is not willing' to travel outside [redacted]

[redacted]

39. I do not rule out the possibility that W2 might provide more evidence. If he were to do so, I cannot rule out the possibility that his inability to take part in the appeal (if shown to the necessary standard) might affect SIAC's approach to the appeal. If that point were reached, SIAC would be in a much better position to consider, in the light of the tested evidence about the national security case, to decide whether, and if so how, to reflect that evidence in its overall assessment of the case. I note that GLD indicated that issues about risk in [redacted] in this context could take several days of court time.

40. Ground e. concerns the applicability of EU law. The Court of Appeal in *S1 etc* considered that it was bound by the decision of the Court of Appeal in *G1* to hold that EU law did not apply to this type of decision. I consider that I should follow two different constitutions of that Court. That being so, this ground is not arguable. Should that position change for any reason, it will, of course, be open to W2 to rely on this argument in the SIAC appeal.

Conclusion on the application for permission to apply for judicial review

41. I conclude that I should refuse permission to apply for judicial review; the grounds are either unarguable, or raise issues which can, and therefore should, properly be dealt with by SIAC in the statutory appeal.

Interim relief

42. It follows from the conclusion I have just expressed that the question of interim relief does not arise. In case I am wrong about permission to apply for judicial review, however, I will say a little about interim relief.

43. The legislative scheme does not provide for any interim remedies. Ms Harrison emphasised that SIAC has no power to grant interim relief, as if it followed that the court must therefore have such a power. I disagree. Parliament has not provided for SIAC to grant interim relief in support of an appeal. Parliament has decided that SIAC, and not the court, should consider, on a statutory appeal, the merits of the decision to make the order (and of its effects on W2 and his family). It would be inconsistent with that scheme for the court to intervene by quashing the order or by granting interim relief which achieved that in substance, or frustrated the purpose for which the order was made.

44. That conclusion is, at least intuitively, supported by the fact that all the cases I was referred to in which the Secretary of State has been ordered by the court to return a person from overseas were cases where (a) that was the final relief after a substantive hearing, (b) the Secretary of State had unlawfully removed the person and (c) there was no national security element. Those three features are absent here.

45. Even if I am wrong about all those points, I would still consider that this is not an appropriate case for interim relief. I am not in a position to say anything about the risks to W2 in [redacted], as I have not heard full argument about this issue. His argument is that, were he to return to the United Kingdom for his appeal, and were the appeal to fail, he would then be returned to [redacted] as a person whose appeal to SIAC had failed, and he would then be bound to face [redacted]. This would mean that, [redacted], and the Secretary of State were required to return him to the United Kingdom to take part in his appeal, she would not be able to return him to [redacted], even if his appeal failed, and even though

she considers that the risk he poses to national security is best managed abroad. I do not consider that the court should, on an application for interim relief, either second guess (without proper investigation) the Secretary of State's assessment of the risk to national security which W2 poses, or make an order which might well have the effect of pre-judging the appeal by making W2 irremovable, despite the assessed risk to national security, and despite the fact that the merits of his appeal have not yet been investigated (cf paragraph 11 of the decision of SIAC in *G1*, cited with approval by the Court of Appeal in paragraph 25 of its judgment). In other words, the balance of convenience does not favour the grant of the mandatory relief W2 seeks.

Conclusion on interim relief

46. For those reasons, I would have dismissed the application for interim relief, had I needed to consider it.