Appeal No: SN/01/2022
Hearing Date: 15th February 2024
Date of Judgment: 23rd February 2024

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE JAY
UPPER TRIBUNAL JUDGE O' CALLAGHAN
MR ROGER GOLLAND

FGF

Applicant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant:	Mr Nick Armstrong KC instructed by Deighton Pierce Glynn Solicitors
For the Respondent:	Ms Lisa Giovannetti KC and Mr Richard Evans instructed by Government Legal Department

MR JUSTICE JAY

INTRODUCTION

1. The sole remaining issue in this case is whether SIAC has power to order SSHD to pay FGF's costs in connection with the latter's application for review brought under s. 2D(2) of the Special Immigration Appeals Commission Act 1997 ("the SIAC Act 1997").

2. In outline, FGF made an application for naturalisation on 27 January 2020. This was refused in SSHD's decision given on 16 February 2022 on the grounds that FGF did not meet the requirement of good character imposed by s. 6(1) of and para 1 of Schedule 1 to the British Nationality Act 1981. SSHD stated that it would be contrary to the public interest to give reasons. SSHD then certified the decision under s. 2D of the SIAC Act 1997.

3. FGF's s. 2D(2) application for a review was brought on 22 February 2022. On 2 August 2022 SSHD notified FGF that the decision would be withdrawn and remade. On 11 August 2022 a notice was served by SIAC, signed by the Chairman, recording that the "appeal" (the notice should have said, "application") is to be treated as having been withdrawn pursuant to rule 11A(2) and (3) of the Special Immigration Appeals Commission (Procedure) Rules 2003, as amended ("the Procedure Rules"). It is clear from email correspondence between 2 and 11 August 2022 that FGF was contending that SSHD should pay his costs and that the Chairman was aware of his position. The Chairman did not decide to delay signing the rule 11A notice pending the determination of the costs issue, but on a fair reading of his email dated 11 August 2022 he was reserving to FGF the right to make a costs application notwithstanding the service of the notice. On 2 August 2023 the decision was remade and the application for naturalisation was refused. There are now extant fresh proceedings to review that decision.

4. Legal aid is available for review proceedings under s. 2D of the SIAC Act 1997. However, FGF did not qualify for legal assistance because his income and capital exceeded the relevant threshold. The parties made submissions about the availability of legal aid but we do not think that they advance the case either way.

5. The issues arising in connection with this costs application are as follows:

   (1) Does SIAC have any jurisdiction to award costs at all?
   (2) In the alternative, does SIAC have jurisdiction to award costs in circumstances where SSHD has withdrawn the decision before a determination by SIAC was made?
   (3) Have FGF's Convention rights under Articles 8 and 14 been breached?
   (4) In the event that jurisdiction exists, should this application for costs be stayed pending the determination of the second set of review proceedings?

6. In our judgment, the proper starting point, if not necessarily the answer, to Issues (1) and (2) is the decision of the Court of Appeal in *C7 v SSHD* [2023] EWCA Civ 265; [2023] KB 317 ("*C7*"). Issue (3), for reasons which we will briefly explain, cannot take the argument any further in FGF's favour. Issue (4) is entirely straightforward: if jurisdiction exists, the status of further litigation cannot logically impact on the exercise of SIAC's discretion.

RELEVANT STATUTORY PROVISIONS

7. Section 51 of the Senior Courts Act 1981 is headed "Costs in civil division of Court of Appeal, High Court and county courts". The High Court obviously includes the Administrative Court. Section 51(1) provides "[s]ubject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings" in the courts mentioned in the heading, and in the family court, "shall be in the discretion of the court". Section 51(2) makes further provision about rules of court. Section 51(3) provides that "The court shall have full power to determine by whom and to what extent the costs are to be paid".

8. The leading authority on s. 51 is *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] 1 AC 965. The House of Lords held that the language of the section was wide enough to permit the court to order that costs be paid by a non-party to the litigation, and that wide power was not limited by any rules of court. The wording of s. 51(1) – "subject … to rules of court" meant that a rule might control the exercise of the power, but the power itself was not contingent on there being a rule.

9. SIAC, although a superior court of record, is entirely a creature of statute. It is therefore necessary to ascertain whether there is anything in the SIAC Act 1997 which confers on SIAC the power to order costs in favour of a party in circumstances such as these.

10. Pursuant to s. 2B, a person may appeal to SIAC against a decision to make an order to deprive him of his British citizenship pursuant to s. 40 of the British Nationality Act 1981 where SSHD has issued the relevant certificate. That was the provision in play in *C7*.

11. Sections 2C-2F deal with applications for review. The wording of each of these provisions is similar. As regards ss. 2C and 2D, these provisions were introduced into the SIAC Act 1997 by s. 15 of the Justice and Security Act 2013 ("the JSA 2013"). The present case is concerned with s. 2D which provides:

> **"2D Jurisdiction: review of certain naturalisation and citizenship decisions**
>
> (1) Subsection (2) applies in relation to any decision of the Secretary of State which—
>
> (a) is either—

(i) a refusal to issue a certificate of naturalisation under section 6 of the British Nationality Act 1981 to an applicant under that section, or

(ii) a refusal to grant an application of the kind mentioned in section 41A of that Act (applications to register an adult or young person as a British citizen etc.), and

(b) is certified by the Secretary of State as a decision that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public—

(i) in the interests of national security,

(ii) in the interests of the relationship between the United Kingdom and another country, or

(iii) otherwise in the public interest.

(2) The applicant to whom the decision relates may apply to the Special Immigration Appeals Commission to set aside the decision.

(3) In determining whether the decision should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings.

(4) If the Commission decides that the decision should be set aside, it may make any such order, or give any such relief, as may be made or given in judicial review proceedings."

12. Section 5 of the SIAC Act provides:

"5 Procedure in relation to jurisdiction under sections 2 and 3.

(1) The Lord Chancellor may make rules—

(a) for regulating the exercise of the rights of appeal conferred by section 2 or 2B above,

(b) for prescribing the practice and procedure to be followed on or in connection with appeals under that section, section 2 or 2B above, including the mode and burden of proof and admissibility of evidence on such appeals, and

(c) for other matters preliminary or incidental to or arising out of such appeals, including proof of the decisions of the Special Immigration Appeals Commission.

(2) Rules under this section shall provide that an appellant has the right to be legally represented in any proceedings before the Commission on an appeal under section 2 or 2B above, subject to any power conferred on the Commission by such rules.

(2A) Rules under this section may, in particular, do anything which may be done by Tribunal Procedure Rules**.**

…

(8) The power to make rules under this section shall be exercisable by statutory instrument.

(9) No rules shall be made under this section unless a draft of them has been laid before and approved by resolution of each House of Parliament."

13. A number of points should be made about this section. First, s. 5(2A) was first introduced into the SIAC Act 1997 by two provisions of the Nationality, Immigration and Asylum Act 2002 with effect from 1 April 2003. It originally provided: "Rules under this section may, in particular, do anything which may be done by rules under s. 106 of the Nationality, Immigration and Asylum Act 2002". There was provision under s. 106(3)(a) for rules to be made enabling the adjudicator or the Tribunal (but not SIAC) to make an award of costs and expenses. That rule-making power has not been exercised. On the other hand, under s. 29 of the Tribunals, Courts and Enforcement Act 2007, the costs of and incidental to proceedings in the First-tier and Upper Tribunal may be awarded in the discretion of the relevant tribunal. Secondly, the Procedure Rules confer no power on SIAC to make an award of costs in appellate or review proceedings. Thirdly, although the wording of the heading has not been amended, s. 5 addresses SIAC's jurisdiction under *inter alia* ss. 2 and 2B of the SIAC 1997; it is silent about s. 2D. However, the effect of s. 6A of the SIAC Act 1997, introduced into that statute by s. 20 of the JSA 2013, is that s. 5 also covers all review proceedings. Fourthly, it is noteworthy that if s. 2D(4) does create a costs jurisdiction the only circumstances in which it could sensibly be exercised would be in an applicant's favour. It presupposes the setting aside of the decision in question, not the upholding of it. Section 2D(4) therefore confers no power in SIAC to award costs in favour of SSHD.

14. Finally, rule 11A of the Procedure Rules provides:

"**Withdrawal of appeal or application for review**

11A.
(1) An appellant may withdraw an appeal or application for review—
(a) orally, at a hearing; or
(b) at any time, by filing written notice with the Commission.
(2) An appeal or an application for review shall be treated as withdrawn if the Secretary of State notifies the Commission that the decision to which the appeal or application for review relates has been withdrawn.
(3) If an appeal or application for review is withdrawn or treated as withdrawn, the Commission must serve on the parties and on any special advocate a notice that the

> appeal or application for review has been recorded as having been withdrawn."

15. The Chairman of SIAC has ruled on more than one occasion that SIAC has no option but to serve a rule 11A(3) notice when it is notified by SSHD that the relevant decision has been withdrawn. However, rule 11A(3) does not state that the notice must be served immediately. Once served, the proceedings come to an end and the application for review is recorded as having been withdrawn.

C7

16. C7 was a case about the power to award costs in appeals under s. 2B of the SIAC 1997, not review proceedings under s. 2D. Elisabeth Laing LJ gave the lead judgment for the Court of Appeal although both Underhill and Dingemans LJ gave short concurring judgments. Elisabeth Laing LJ made it clear that her judgment did not cover reviews under *inter alia* s. 2D [5]. In one deprivation appeal where an oral judgment was given, it was assumed [96] that SIAC did have jurisdiction to award costs even in a s. 2B case.

17. Elisabeth Laing LJ's reasons for holding that SIAC did not have jurisdiction to order costs in a s. 2B case were as follows:

    (1) In the absence of s. 51 of the Senior Courts Act 1981 (see §7 above) the High Court would not have power to award costs in judicial review proceedings. The introduction of the section was to make it clear that the award of costs was discretionary [72].
    (2) At the time of enactment, SIAC did not have power to award costs. This was because there was no express statutory power in the SIAC Act 1997, and an examination of s. 5 reveals that if SIAC was to have any power to award costs it could only be conferred by rules made by the Lord Chancellor (and none have been made) [73-74].
    (3) The amendment to the SIAC Act 1997 making SIAC a superior court of record did not change the position [75].
    (4) The position was made even clearer by the introduction of s. 5(2A) in 2003 (it was later amended in 2010 and that contains the current wording) [76].
    (5) There was no implied power to award costs [80-83].

18. Item (4) above merits elaboration. What Elisabeth Laing LJ said at [76] is important:

> "I consider that, whatever the position was before this amendment, the words of s. 5(2A) show Parliament's clear intention that, if SIAC was to have a power to award costs, the source of such a power, as in the case of the tribunal and adjudicators, was to be rules made by the Lord Chancellor. It would follow that, if so such rules were made, SIAC would have no such power."

19. At [83] of her judgment, Elisabeth Laing LJ observed:

> "I should make clear that, in reaching this conclusion, I have not been influenced by the amendments to the 1997 Act which gave SIAC power to set aside certain decisions on a statutory review (ss. 2C-2F). I do not consider that these changes, which arguably gave SIAC a power to award costs in these contexts, can cast light on the meaning of s. 5, which, for present purposes, was in its current form before the statutory review amendments were made."

20. To the extent that [83] is a commentary on the review provisions, including s. 2D, it is *obiter*.

21. Dingemans LJ's short concurring judgment agreed with the judgment of Elisabeth Laing LJ and also addressed C7's submissions under Article 14 of the Convention, read in conjunction with Articles 6 and 8. He rejected the contention that the absence of a jurisdiction to award costs violated C7's Convention rights.

22. Underhill LJ agreed with both judgments. He placed particular emphasis on Item (4). He considered it "at first sight rather odd" that the Lord Chancellor has chosen not to exercise a costs conferring power.

23. We note that in *C7* the Court of Appeal did not comment on the fact that Chamberlain J determined the costs issue alone. The Chairman in the present case decided to convene a panel of three because he could find nothing in the delegated powers provisions of the Procedure Rules (rule 5(1)) which covered costs decisions.

H5

24. H5 was a case concerning s. 2F of the SIAC Act 1997. At almost the 11th hour SSHD withdrew his decision and invited SIAC to serve a rule 11A notice. SIAC did so, but the Chairman decided to list the case for hearing in order for SIAC to address H5's compelling arguments about delay and unfairness. SIAC (Johnson J presiding) held that it did not have jurisdiction to address any of these arguments once the decision had been withdrawn:

> "17. The application for review relates to the decision of 17 February 2023. That decision has been withdrawn. There is therefore no extant decision. … Here, there is no question of SIAC determining whether the decision should be set aside, because the decision has already been withdrawn. We do not therefore accept that s. 2F(3) gives SIAC any broader judicial review jurisdiction that would enable us to breathe life into these proceedings.

> 18. Similarly, s. 2F(4) is predicated on SIAC first deciding that SSHD's decision should be set aside. There is no question of SIAC first deciding that the decision should be set aside, because the decision has been withdrawn. There is nothing to set aside …"

FGF'S SUBMISSIONS

25. Mr Nick Armstrong KC for FGF submitted that SIAC's jurisdiction to award costs is conferred by a purposive construction of s. 2D(4) of the SIAC Act 1997. Sub-sections (3) and (4) of s. 2D show that both in the process leading to the Commission's decision, and in the remedy granted once a decision has been reached, the same approach must be taken as is taken in judicial review. Mr Armstrong points out that the language of sub-section (4) is particularly broad and unconstrained, and that once jurisdiction is established it would be absurd to construe the statutory language so that withdrawal decisions fall outside it.

26. In oral argument Mr Armstrong submitted that SIAC still makes a judicial decision when responding to the withdrawal of the decision in question by SSHD. This is the case even on the apparently mandatory wording of rule 11A. In these circumstances, what SIAC is doing is deciding whether to set aside the decision.

27. Mr Armstrong drew attention to the circumstances in which s. 2D was inserted into the SIAC 1997 in 2013. The policy of Parliament was to ensure that a closed material procedure would be available in relation to decisions of this nature – such a procedure would not have been available if naturalisation decisions continued to be subject to ordinary judicial review. Mr Armstrong's essential argument was that Parliament clearly intended that s. 2D proceedings would proceed as if they were judicial review proceedings, with SIAC possessing the same powers as would the High Court. It would be an absurd result if SIAC did not have power to award costs in situations where SSHD had acted unreasonably.

28. Mr Armstrong also relied on the general principle of access to justice and the rule of law: see, for example, the decision of the Supreme Court in *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869.

29. Mr Armstrong addressed SSHD's argument based on rule 11A. His submission was that it is wrong in principle to deploy secondary legislation as the means of construing a statute, not least because the rule predates the introduction of s. 2D by six years.

30. Finally, Mr Armstrong advanced a series of submissions founded on Article 14 of the Convention. These were the same arguments that Dingemans LJ rejected in *C7*.

SSHD'S SUBMISSIONS

31. The primary submission of Ms Lisa Giovannetti KC on behalf of SSHD was that SIAC has no jurisdiction to award costs in any circumstances. First, the language, purpose and scheme of the legislation do not indicate that Parliament intended to provide SIAC with jurisdiction to award costs in s. 2D cases (or in review cases across the board). The purpose of the 2013 amendments was to confer jurisdiction on SIAC in naturalisation cases so that CLOSED material could be considered. The provisions relied on by FGF, namely s. 2D(3) and (4), do not mention costs at all. The absence of express wording is a clear indication that this was not Parliament's intention. The comparison with s. 29 of the Tribunals, Courts and Enforcement Act 2007, where there is an express jurisdiction, is illuminating.

32. In oral argument Ms Giovannetti developed a submission that had not been prefigured in writing. In reliance on the principle that Parliament is deemed to have legislated with knowledge of the state of the pre-existing law, her submission was that Parliament well knew that before the changes effectuated by the JSA 2013 there was no power in SIAC to award costs. Moreover, Parliament must also be deemed to be aware of rule 11A. It follows that clear and express wording was required to change the status quo, and none exists.

33. An examination of the express language of the two potentially relevant provisions discloses that: (1) the issue only arises if the Commission decided that the decision should be set aside (that is not the situation here), and (2) the wording of sub-section (4) is limited to the principles that the Commission should apply when exercising its jurisdiction either to uphold or set aside the decision at issue.

34. Furthermore, the jurisdiction does not exist under either sub-section where a decision is withdrawn. That interpretation is reinforced by rule 11A of the Procedure Rules. The correct approach to that provision is that it does not "drive" the true construction of the primary legislation; rather, it identifies the limits within which s. 2D(4) in particular operates.

35. Ms Giovannetti's second argument in support of the language, purpose and scheme of the legislation, and in aid of her alternative submission that if jurisdiction exists it is confined to situations where SIAC has made a determination on the merits of the review application, was that the wording of s. 2D(3) is quite clear: it governs the approach SIAC should adopt in determining where the decision should be set aside. That wording cannot apply to the present context of a decision that has been withdrawn. The wording of s. 2D(4) is equally clear, and only applies where SIAC decides to set aside the decision. Ms Giovannetti added in oral argument that these consequences are far from absurd. She contended that it would be disproportionate for SIAC to have to make costs decisions in complex litigation involving CLOSED material without having made a substantive determination on the merits. She said, without irony, that the work of the Chairman of such is already sufficiently onerous.

36. Ms Giovannetti made a number of submissions in writing about access to justice and the Convention which we need not summarise.

DISCUSSION AND CONCLUSIONS

37. This case is more complex than it first appeared. Ms Giovannetti, as usual, did an excellent job in presenting her client's best case. We have been shown no previous decision in which SIAC has awarded costs in a review applicant's favour. By email dated 11 August 2022 GLD informed SIAC that in *Gill v SSHD* [SN/14/2015] the then Chairman (Irwin J as he then was) accepted SSHD's submission that a costs jurisdiction does not exist unless the Commission itself sets aside the decision in question. A copy of any transcript of Irwin J's ruling is not available.

38. SIAC does not have jurisdiction to award costs unless an express statutory power to do so is identified. Section 5 of the SIAC Act 1997 is not the locus of any relevant power because the Procedure Rules are silent about costs. It follows that FGF must look elsewhere. His eye alights on s. 2D(3) and (4) of the SIAC Act 1997, provisions which were introduced for the first time in 2013.

39. Section 2D(3) does not contain any power to award costs. Its function is to specify that in reaching its conclusions on the merits of the review application, judicial review principles must be applied. We do not think that this provision is wide enough to cover the creation of a costs-conferring power because its remit is confined to the approach SIAC should be adopting in relation to review applications. However, one does need to focus on the correct provision and the language of s. 2D(4) is extremely wide. SIAC has power to make **any** order that the High Court may make in judicial review proceedings. It follows that SIAC has power to grant declaratory relief and make a quashing order: the provisions of s. 31 of the Senior Courts Act 1981 are incorporated by reference. These provisions are not expressly mentioned, but no one could sensibly dispute that the relevant powers are not conferred. On this approach there is absolutely no reason why a power to award costs is not incorporated by reference to s. 51 of the same Act. An award of costs is made by order. Again, the fact that costs are not expressly mentioned is nothing to the point. At para 3 of his judgment in *C7*, admittedly *obiter*, Chamberlain J thought that the wording of s. 2D(4) was clearly wide enough to cover an order for costs and we respectfully agree.

40. It is interesting to compare SIAC's powers with those of its sister Commission, the Proscribed Organisations Appeals Commission ("POAC") set up under the Terrorism Act 2000. Under s. 5 POAC is required on an appeal to apply judicial review principles. The only order it can make under s. 5(4) clearly does not include costs. Although there is no obvious reason why SIAC's and POAC's powers should differ, the contrast in the statutory wording is stark.

41. The natural and ordinary meaning of the clause "make any such order" being clear, in the sense that it covers an order for costs, Ms Giovannetti's purposive and other submissions have to persuade us that a restrictive construction of this wording is required: in other words, an interpretation which curtails the ambit of the natural and ordinary meaning.

42. We cannot accept Ms Giovannetti's submission based on the proposition that Parliament is deemed to legislate against the backdrop of the existing law: see *Bennion* at para 11.3. That is of course true, but applied to this case the submission contains a degree of circularity. In our view, the whole point of the new provisions was to bring into scope an entirely new and different jurisdiction in ss. 2C-2F which falls to be understood and interpreted in the light of what the sections say and their underlying statutory purpose. That jurisdiction was intended to be based on the application of judicial review principles to these review proceedings from cradle to grave. Parliament cannot have overlooked that costs are payable in judicial review proceedings. The pre-existing law in SIAC – governing the period 1997-2013 – does not apply to this review jurisdiction, although it continues to apply to appeals.

43. In this context Ms Giovannetti reminded us of the decision of the Supreme Court in *Lachaux v Independent Print Ltd* [2019] UKSC 27; [2020] AC 612, at para 13. That does not assist her case. In enacting the Defamation Act 2013 Parliament was aware of the existing principles governing harm to reputation but was legislating to change them.

44. We also cannot accept Ms Giovannetti's point that Parliament in 2013 must be deemed to have recalled the wording of rule 11A. That is something of a longshot in the context of a recondite provision which has nothing to do with an award of costs.

45. It is quite true that in *C7* the Court of Appeal focused on s. 5 of the SIAC Act 1997 and the evincing of a clear legislative intention that any power to award costs could only be conferred by rules made by the Lord Chancellor. No such rules have been made. However, the salience of s.5 within the schema of Elisabeth Laing LJ's judgment must be properly understood. She had identified no express power elsewhere in the SIAC Act 1997 which covered an award of costs in a s. 2B appeal. It followed that unless s. 5 was the locus of the power, C7's case could not succeed. The Court of Appeal's reasoning was that, in this particular context, the absence of any costs-awarding rule made by the Lord Chancellor was dispositive of the issue. Had Elisabeth Laing LJ considered that the absence of an express rule was equally dispositive of the position in a statutory review case, she would not have said that she did in [83]. Further, and as *Aiden Shipping* makes clear, in a situation where jurisdiction exists but is stated to be subject to rules of court, the absence of a rule does not matter. The purpose of any rule that the Lord Chancellor or the relevant entity sees fit to make is to control or regulate the exercise of the power rather than to bestow it.

46. Section 5 of the SIAC Act 1997, which applies to these review proceedings by virtue of s. 6A, is relevant to this extent. We have already pointed out that s. 2D(4) does not confer power on SIAC to award costs against an applicant if SSHD's decision is upheld. This creates a potential anomaly which is capable of lending some support to Ms Giovannetti's case. We consider that the probable reason for this state of affairs is that Parliament thought that in a procedure which is so heavily dependent on CLOSED material it would be unfair to subject an applicant to a further possible penalty. However, there is nothing to prevent the Lord Chancellor deciding as a matter of policy that applicants should be at risk of costs if they were to act unreasonably, for example. That result could be achieved by the making of an appropriately worded rule.

47. We agree with Mr Armstrong that an analysis of the statutory purpose avails FGF. These amendments were introduced in 2013 to expand SIAC's jurisdiction to cover decisions which were previously considered in applications for judicial review. However, the High Court's consideration of such decisions was somewhat circumscribed by the fact that the underlying material could never be scrutinised; instead the grant of a PII certificate foreclosed that issue. An applicant could only succeed by showing a public law flaw in the OPEN material. Parliament in 2013 might have decided to keep naturalisation decisions within the High Court but allow the underlying material to be addressed within a Closed Material Procedure: see ss. 6-8 of the 2013 Act. Had that been Parliament's will, there would have been power to award costs both in favour of and against the applicant. Instead, and very sensibly, Parliament decided to reduce the burden on the High Court and locate this jurisdiction within this expert Commission. Against that background, there is no reason of purpose and/or policy why SIAC should not possess all the powers of the High Court in these circumstances.

48. It follows that Ms Giovannetti's principal argument must be rejected, but what of her alternative contention that the power exists only if SIAC makes a decision; it does not exist if the decision is withdrawn? At first blush, this argument appears far more promising than the principal argument because the wording of s. 2D(4) refers to the setting aside of the decision by SIAC.

49. Our point of departure is to observe that this alternative argument cannot be deployed to fortify SSHD's case on the primary argument. The correct way of looking at this issue is to ask this forensic question: given that SIAC has power to order costs when it sets aside a decision of SSHD, does that power subsist in a context where the decision is not set aside but withdrawn?

50. We have to say that this argument lacks appeal. It would carry the day if, having seen which way the proverbial wind was blowing, SSHD decided to withdraw his decision between Day 1 and 2 of a review hearing. It clings by its fingertips to the submission that the literal wording of a statutory provision is a key importance. If the argument were correct, the result would be – entirely anomalously we think – that SIAC has power to award

costs where it decides in an applicant's favour on the merits, but has no such power if SSHD decides to withdraw his decision because he knows what SIAC's determination would likely be.

51. In our judgment, a revised or adjusted version of Mr Armstrong's core submission is required. *H5* was surely right to hold that in a situation where SSHD has withdrawn the decision at issue, it cannot logically be set aside. Moreover, the facts of *H5* were somewhat different from our facts in that what H5 was seeking to do was to breathe fresh life into proceedings for the purpose of compelling further action by SSHD. FGF is not so ambitious.

52. One needs to be clear what SIAC is doing when notified by SSHD that the relevant decision has been withdrawn. SIAC still has to do something which brings the proceedings to an end, as does the Administrative Court when notified that the decision-maker has withdrawn the decision at issue. There may be further consequential matters to consider such as the continuation of an anonymity order. The case remains on SIAC's books until it has formally been brought to an end by the service of the prescribed notice. In serving that notice it is therefore important to recognise that SIAC makes a judicial decision.

53. In the Administrative Court the parties may serve a consent order relating to the underlying decision but the successful party may invite the issue of costs to be determined. That often happens, and no one could doubt that jurisdiction exists. Mr Armstrong is right to seek to draw as complete a parallel as possible with judicial review proceedings.

54. Rule 11A is silent about costs and any other consequential matters. At the time rule 11A entered the rule-book in 2007 SIAC had no power to award costs[1], and it is reasonable to proceed on the premise that the draftsperson must have considered that costs issues do not arise in SIAC cases, but the tail cannot be permitted to wag the dog. As we have said, the better view is that no one at the time the JSA 2013 was enacted applied their mind to all the issues which might arise in relation to costs. If the Chairman had decided not to serve the rule 11A notice pending the resolution of the costs issue, it is difficult to understand why a costs jurisdiction should not be preserved. In such circumstances, although strictly speaking SIAC has not decided to set aside the decision at issue it would remain seized of the review application. The need for such a decision has been obviated by SSHD's unilateral action, but on a sensible, purposive construction of s. 2D(4) the costs power remains. In our judgment, for these purposes there is no difference between (1) SIAC deciding to set aside SSHD's decision and ordering costs, and (2) SIAC making a decision recording that SSHD's decision has been withdrawn (or, if necessary, delaying that decision until the costs issue has been determined), and ordering costs.

[1] Rule 11A was inserted into the Procedure Rules in 2007: see The Special Immigration Appeals Commission (Procedure) Rules 2007 (2007 SI No 1285). At that stage there were no reviews, only appeals, and costs issues did not arise. A further amendment was made in 2013 to expand Rule 11A to cover reviews (2013 SI No 2995).

55. This approach does no damage to the conclusion of SIAC in *H5* which we would strongly endorse. It is one thing to ask the Commission to examine what has already happened in determining whether a liability falls; it is quite another to ask the Commission to dictate to SSHD what he should do in the future. What H5 was seeking went well beyond what ordinarily happens in judicial review proceedings.

56. Is the position any different where the Chairman decides to serve a rule 11A notice in the face of being told by FGF that he seeks his costs of the proceedings? We think not. The correct analysis is that all facts and matters relevant to the exercise of SIAC's costs-awarding power have already taken place. The liability, if it exists, has already crystallised. The fact that SIAC finds itself deciding a consequential issue after the proceedings have come to an end does not mean that there is no power to determine it, particularly in circumstances where as here the Chairman reserved or adjourned the determination of the costs issue.

57. Ms Giovannetti did not submit in the further alternative that SIAC had inadvertently deprived itself of jurisdiction because the service of the rule 11A notice raised the drawbridge. The answer to that submission would have been that on 11 August the issue was adjourned. It may be seen that the issue would have been more complex if the rule 11A notice had been served before the costs issue had been raised. The only way forward would have been, we think, for SIAC to consider setting aside the rule 11A notice for the limited purpose of determining costs.

58. We are not attracted by Ms Giovannetti's concerns about the workload of the Chairman of SIAC. Every year about half a dozen decisions are withdrawn by SSHD during the review process. Most of these are naturalisation decisions but some are exclusion. If there are good grounds for defending a costs application by the successful party, those are capable of being advanced by SSHD, if necessary in CLOSED, quite briefly.

59. For all these reasons, Ms Giovannetti's alternative submission cannot be accepted.

60. In the absence of any governing rule the basis on which SIAC must exercise its costs jurisdiction must draw on the analogy of judicial review. The relevant principle is set out in the leading authority of *R(M) v Croydon London Borough Council* [2012] EWCA Civ 595; [2012] 1 WLR 2607, at paras 60-61.

61. In that regard, we must address Ms Giovannetti's submission (advanced only in writing) that the costs application should be stayed pending the outcome of the second set of review proceedings. But those proceedings can have no logical bearing on the first. Review proceedings are far more about process than outcome, and FGF effectively achieved what he wanted first time around. The general rule is that FGF should recover all his costs unless there is some good reason to the contrary. SSHD has advanced no

explanation, either in OPEN or in CLOSED, for the withdrawal of his decision. In these circumstances, there is no reason why the general rule should not apply.

62. The order we make is that SSHD must pay FGF's reasonable costs of and incidental to the first review application, including the costs of this hearing, to be subject to a detailed assessment if not agreed. Any detailed assessment will take place in the High Court, not in SIAC.

63. The parties are invited to draw up an order which reflects our judgment.

64. Subject to the Lord Chancellor's better view, the Procedure Rules should be amended to cover applications and orders for costs in review applications under ss. 2C-2F of the SIAC Act 1997. It would be open to the Lord Chancellor to control the exercise of the costs jurisdiction as he sees fit. The scope of the jurisdiction could be quite generous (in line with the principles set out in r. 44.3 of the CPR), or it could be restrictive. In relation to the position of SSHD when his decision is upheld, the Lord Chancellor may think that a rule should be made under ss. 5(2A) and 6A enabling an award of costs to be made on the basis of unreasonable conduct by an applicant. We emphasise, however, that this is a matter of policy for government; it is not for SIAC. However, on any view there should be a rule which says in terms that costs decisions may be made by a single member pursuant to delegated powers under rule 5(1). That could be catered for by a new sub-rule 5(1)(k). Although the presence at the hearing of UTJ O'Callaghan and Mr Roger Golland proved to be invaluable, discretionary costs decisions can usually be made by a High Court Judge.