SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal Nos: SC/163/2019; SC/172/2020; SC/174/2020; SC/175/2020
Hearing Date: 18th June 2021
Date of Judgment: 20th July 2021

Before

THE HONOURABLE MR JUSTICE JAY

Between

Shamima Begum, C8, C10 and D4

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

JUDGMENT

Samantha Knights QC and **Tim James-Matthews** (instructed by **Birnberg Peirce**) for SB

Julianne Kerr Morrison (for **C8, C10** and **D4**) (instructed by **Birnberg Peirce**) appeared on behalf of the remaining Appellants

David Blundell QC (for **SB**), **Rory Dunlop QC and Jennifer Thelen** (for **C8, C10** and **D4**) (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Adam Straw QC (for **SB**), **Rachel Toney** (for **C8**), **Alex Jamieson** (for **C10**), and **Jennifer Carter-Manning QC and Anita Guha** (for D4), (instructed by **Special Advocates' Support Office**) appeared as Special Advocates

MR JUSTICE JAY:

Introduction

1. These appeals have been listed for a case management and directions hearing at my instigation and at short notice. Although each appeal will turn on their individual facts, collectively they share a common theme. The appellants have been deprived of their British citizenship pursuant to the power contained in s. 40 of the BNA 1981. Each is being held at the Al-Roj camp in NE Syria in dire conditions. The political scene in the region is not static but it is reasonable to suppose that their *de facto* incarceration is indefinite. Some of these appellants have young children who are by no means responsible for their plight.

2. Given their present circumstances, the Appellants cannot give any meaningful instructions to their lawyers. It follows that they cannot advance their primary grounds of appeal which are, in a nutshell, that the national security case against them is without foundation and that deprivation is in any event disproportionate in all the circumstances. Following *Begum* in the Supreme Court, public law principles must be applied to the consideration of these grounds, but the point for present purposes is that the Appellants cannot properly advance them and they therefore seek a stay, which is not contested by the Respondent. Instead, the Appellants seek to advance narrower public law grounds for which client instructions are not required.

3. The Respondent does not dispute that the Appellants, save for Shamima Begum ("SB") whose case raises a further issue, may advance these public law grounds; but there are profound differences between the parties as to timetabling, sequencing, and the matters which can appropriately be raised by the Appellants in the context of these particular grounds.

4. I have delayed handing down my judgment in this case until I was able to examine the CLOSED material which I requested. I have now done so but have decided that it is not necessary to provide a separate CLOSED judgment. What I can say in general terms is that the CLOSED material is relevant to the issue of timetabling and practicalities.

Shamima Begum

5. The facts of SB's case are well known. One recent development has been mentioned in the confidential Annex to the witness statement of Daniel Furner.

6. SB was deprived of her citizenship on 19th February 2019. By her Re-Amended Grounds of Appeal filed on 31st May 2019, she contended that the deprivation decision was legally flawed in terms of its assessment of the risk SB posed to national security, was disproportionate, and constituted an abuse of power and a violation of her human rights, in particular those under articles 2, 3, 5 and 8 of the Convention. I have considered these grounds in the light of the replacement grounds that have been filed and for which SB accepts require my permission.

7. Following the filing of these Re-Amended Grounds, SIAC ordered the determination of a number of preliminary issues. These were primarily directed to the question of whether SB

should be granted an entry clearance to return to the UK in circumstances where it was accepted that she could not give effective and proper instructions from outside.

8. The decision of the Supreme Court in *Begum* was handed down on 26th February 2021. It was determined that the Respondent was not required to issue SB with an entry clearance, and that if this meant that her appeal could not be effectively prosecuted, it would have to be stayed. It is not clear whether the Supreme Court formally stayed SB's case (para 137 of the judgment of Lord Reed PSC does not suggest that it did) and in my view that does not matter for present purposes. If the Supreme Court did not grant a stay, SB's legal team can run such points as they see fit subject to the Respondent's objections in principle and any case management rulings by me. If the Supreme Court did in fact stay the appeal in SB's case, I would treat her application to file replacement grounds as including an application to lift the stay for that purpose. On either hypothesis, I am still required to rule as to whether permission should be granted and the manner in which any permitted replacement grounds may properly be advanced in the present circumstances.

9. As I have said, the Supreme Court decided that an appeal under s. 2B of the 1997 Act must be determined applying administrative law principles. There is an issue between the parties as to whether this represented a sea-change in approach.

10. On 24th May 2021, very nearly three months after the Supreme Court's judgment, nine replacement grounds of appeal were filed on behalf of SB. 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 the Commission also has power to strike out *inter alia* a notice of appeal if it does not disclose reasonable grounds for bringing an 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.

11. By way of crude summary, SB's replacement grounds of appeal are as follows:

    (1) GROUNDS 1 and 2: the Respondent failed to investigate the obvious possibility that SB was the victim of trafficking.
    (2) GROUND 3: the Respondent failed to consider the issue of *de facto* statelessness.
    (3) GROUND 4: the deprivation decision was procedurally unfair because SB was not given the opportunity to make representations.
    (4) GROUND 5: the Respondent was guilty of predetermination.
    (5) GROUND 6: the Respondent failed to exercise her *Padfield* duty to make proper inquiry into the national security case.
    (6) GROUND 7: the Respondent was in breach of her public sector equality duty ("PSED").
    (7) GROUNDS 8 and 9: the Respondent erred in concluding that SB constituted a threat to the national security of the UK and/or the deprivation decision was disproportionate.

12. Ms Samantha Knights QC on behalf of SB submitted that only Grounds 8 and 9 needed to be stayed; the remaining grounds could proceed. She submitted that Grounds 1-5 were fit to be determined on an expedited basis in November 2021. She further submitted that grounds 6 and 7, or indeed any of her grounds excepting Grounds 8 and 9, should not be stayed until the case of C11 had been heard in this Commission in March 2022, as the Respondent submitted they should be. This would mean in practice that SB's appeal would not be heard until well into 2023.

D4

13. D4 was deprived of her British citizenship in December 2019. She is currently detained with her two adult daughters, one of whom is C8, in Al-Roj camp. D4 contends that she suffers from asthma, Type-2 diabetes and from the effects of Covid-19.

14. D4 has advanced five replacement grounds of appeal which were filed on 24th May 2021, viz.:

    (1) GROUND 1: the Respondent is in breach of her *Tameside* duty in relation to the possibility that D4 was the victim of trafficking; the Respondent relied on submissions which did not reflect the available evidence as to the risk constituted by Syrian returnees; the Respondent failed to make reasonable inquiries into the extreme vulnerability of women in NE Syria.
    (2) GROUND 2: the Respondent breached her PSED.
    (3) GROUND 3: the Respondent's assessment of the national security risk was irrational.
    (4) GROUND 4: the Respondent failed to consider the article 2 and 3 risks in D4's case.
    (5) GROUND 5: the deprivation decision was disproportionate.

15. Ms Julianne Kerr Morrison on behalf of D4 submitted that Grounds 1 and 2 should be expedited and the remainder stayed. She emphasised that the power under s. 40 of the 1981 Act was a draconian one with profound consequences for an individual who was languishing in inhumane conditions and required urgent access to a court. She strongly opposed the submission that D4's appeal should await the outcome of C11's. Ms Morrison further submitted that any delays in this case are being caused by the Respondent's insistence that the substantive national security issue be determined in the context of Grounds 1 and 2 on the footing that, even were there some public law failing in the decision-making process, the outcome would inevitably have been the same.

C8

16. C8 is D4's daughter. She was deprived of her British citizenship in April 2017. She is currently detained at Al-Roj camp with her two daughters, aged 3 and 4. It is said that C8 suffers from back pain and that the elder daughter has respiratory problems.

17. C8 has advanced six replacement grounds of appeal which were filed on 24th May 2021. Her Grounds 4-6 are the same as D4's Grounds 3-5, and like her mother she wishes these to be stayed. Grounds 1 and 2 are similar to D4's Ground 1 although they include an averment that the Respondent has failed to consider the best interests of her children. C8's Ground 3 is the same as D4's Ground 2.

18. The position of C8 as to the immediate future conduct of her appeal is the same as D4's: see para 15 above.

C10

19. C10 was deprived of her citizenship in April 2017. She is currently held at Al-Roj camp with her daughters aged 18, 16, 12 and 4. It is alleged that C10 has back pain, that her eldest daughter has left-sided pain, and that her youngest daughter has eczema and allergies.

20. C10's replacement grounds of appeal are to all intents and purposes the same as C8's.

C11

21. There was a case management and/or directions hearing in C11's case on 17th May 2021 where I presided. C11 had been in Al-Roj camp since 2019 with her four year old son. C11 was contending that three of her grounds should be expedited and the remainder stayed. A transcript of the OPEN hearing has been made available, and it is therefore unnecessary for me to summarise in this judgment what happened.

22. It should, however, be noted that the three grounds that C11 wishes to pursue were: failure to consider the best interests of the child (Ground 1); failure to "put the whole picture before the Secretary of State" (effectively, the *Tameside* argument that has been advanced in the other cases) (Ground 2); and, breach of the PSED (Ground 3). C11's stayed grounds were more or less the same as the stayed grounds in the other cases.

23. Although Mr David Blundell QC for the Respondent submitted in writing that Grounds 1-3 should not proceed as preliminary issues if Grounds 4-6, including the national security ground, were being stayed, it is clear from the transcript that a measure of common ground between the parties emerged during the course of the hearing.

24. Mr Blundell's final position was that he was content that Grounds 4-6 should remain stayed, and that C11 could be permitted to proceed with her Grounds 1-3, provided that the Respondent was permitted to advance her full national security case by way of defence. By this he meant that (1) national security was relevant to, or at least partially intersected with, Grounds 1-3, and (2) the Respondent in any event wished to be able to contend that the outcome would have been the same regardless of any public law breaches.

25. Mr Blundell did not submit that the consequence of Grounds 4-6 remaining stayed was that the national security case should be taken at its highest.

26. I acceded to the Respondent's submission that the substantive hearing of C11's appeal should take place in early March 2022. I should make it clear that I was troubled by the apparent delay but the reasons for it were fully ventilated and explored during the CLOSED hearing.

27. Given my perception that there was broad consensus between the parties on any issues of principle, I did not deliver a judgment. However, I did expect the parties to agree the directions that would enable the appeal hearing to take place in March 2022. No draft order has been submitted for my consideration, although I understand that it is in a state of advanced preparation.

28. It now appears that my perception that any issues of principle had been resolved or had resolved themselves during the course of the hearing on 17th May is incorrect. There are two possibilities here. Either I had misunderstood the position (Ms Morrison strongly submitted that I had not), or Mr Blundell and his clients have misunderstood the position and wrongly believed that I was agreeing with them. Frankly, it is unnecessary for me to decide which of these possibilities is correct. What I must do now is spell out where we are and why, lest there be any doubt as to the way forward.

The Respondent's case before me

29. Mr Rory Dunlop QC helpfully submitted that I must rule on six issues, viz.:
    (1) SB's application to amend her grounds.
    (2) The Respondent's submission that the national security case must be taken at its highest. In oral argument, the way that this was put was whether preliminary issues should be heard at all, and whether the national security case may be challenged in OPEN and in CLOSED.
    (3) The Respondent's submission that the cases of SB, D4, C10 and C8 should be stayed behind C11.
    (4) The Respondent's submission that these four appeals should not be heard alongside C11.
    (5) The Respondent's submission that the trafficking grounds should not proceed in any event.
    (6) Whether the Respondent need "exculpate against" the national security case.

30. Submissions on these, and related, topics were advanced by both Mr Blundell and Mr Dunlop. It is unnecessary for me to set these out. I took a full note and I would expect a transcript to be obtained if necessary.

31. I will be addressing all the issues that the parties wish me to cover, but I will be taking my own course.

Analysis

32. The Appellants' lawyers' inability to run their national security and proportionality cases stems from the professional constraints that are applicable by virtue of a lack of instructions. It may be helpful to lay bare their reasoning. In order to run a positive case on national security and proportionality, client instructions would be required, and these are lacking. However, there is a subtler way in which the Respondent's national security case could be assailed, and for this detailed client instructions would not be required. In theory, any appellant might decide to do no more than to deny that s/he constitutes a risk to national security, and leave it to the Special Advocates to seek to undermine the Respondent's evidence as advanced in CLOSED. Given that many appellants can only surmise what the national security case against him or her comprises, detailed factual instructions may often make little or no difference to the work of the Special Advocates, who would be undertaking a purely forensic exercise. Without express and specific instructions from their clients, the Appellants' lawyers could not adopt the (subtler) stance that the Special Advocates in the present cases may simply be unleashed onto the CLOSED material relevant to the national security and proportionality grounds – unless, that is, they were satisfied that this course would be in their best interests. At the time this judgment was being prepared, it would seem that none of the Appellants' lawyers had reached that conclusion. It follows that, however this issue is envisaged, the irrationality challenges to the national security and proportionality cases must be stayed.

33. But it does not follow, in my judgment, that these appeals must be stayed across the board, as I think Mr Blundell came close to submitting at one point.

34. I see no reason in principle why public law points which do not require a full investigation into the national security cases against each Appellant may not be pursued. Conversely, matters which are dressed up as public law points but which in fact require an investigation into the strength of the underlying national security case may not be pursued. Ultimately, the Commission is doing no more and no less than exercising its case management powers.

By permitting certain matters to proceed, it is not carving out preliminary issues as such: it is enabling an Appellant to have appropriate access to the court in circumstances where she would otherwise be held indefinitely in dreadful conditions without hope of legal redress. To deny her such access would not be fair. I use the word "indefinitely" because I see no prospect of any Appellant being permitted to return to the UK for the purpose of prosecuting her appeal, and for the foreseeable future I see no prospect of her travelling to a safe third country to which her legal advisors might also travel to take proper instructions.

35. On the other hand, I agree with the Respondent that it would be an abuse of the process of the Commission to allow an Appellant what would amount to two substantive appeals. If a public law point is treated as being the gateway to an examination of the merits of the national security case in CLOSED through the Special Advocates, then there is at least the possibility that some years further down the road the Appellants might be in a position to give proper instructions to their lawyers and mount a direct challenge to the national security and proportionality cases through the channels which are currently stayed. It would be wrong to allow that to happen. There would have been two bites of the metaphorical cherry, assuming that is that the Appellants lose at stage one.

36. What is, or is not, a challenge by proxy to the substance of the national security and proportionality cases must be a question of fact and degree. I will explain that in more detail subsequently. But the Respondent is right to remind me that *Tameside* is a sub-set of *Wednesbury*, as is a failure to take account of relevant considerations etc. In case managing these cases, in particular the case of C11 whose appeal by pure happenstance has been listed first, I will not lose sight of the overriding objective in this very specific public law context.

37. Another facet of the overriding objective is to recognise the relatively limited value of the non-stayed public law points from the Appellants' perspectives. If the Respondent failed to take into account a relevant consideration or failed in her *Tameside* duty of inquiry, the most that an Appellant could properly aspire to is that her appeal would be allowed, the deprivation decision would be set aside, and the Respondent would have to reconsider. The Respondent's fresh decisions would have to reflect SIAC's reasons and conclusions, but the possibility – putting the matter at its lowest – of adverse fresh decisions cannot be excluded. Moreover, if the Respondent were to succeed on her *Simplex* argument, there would – subject to any further submissions put forward by the Appellants - be no relief at all, and these cases would end there. If, on the other hand, SB were to succeed on either or both of her eighth or ninth grounds (and the other Appellants on their similar grounds), the Respondent's options would be constrained. Hence, the Appellants are, perforce, staying the grounds which are of real practical value to them, and proceeding with the grounds that have only limited utility. This is a factor that weighs against the Appellants at least to some extent when I come to make the necessary case management decisions that are currently demanded of me. I will be returning to this point.

38. The effect of *Begum* in the Supreme Court is that the focus must be on the material that was placed before the Secretary of State when s/he made the relevant decisions. This is not an appeal *de novo* on the merits, contrary to the clear view of a previous Chairman of this Commission, Flaux LJ (itself contrary to the equally clear view of my preceding Chairman, Elisabeth Laing J as she was then). The consequence of the application of public law principles to this s. 2B appeal must also be made explicit. In order to answer the Appellants' public law arguments, the Respondent need disclose (likely almost wholly in CLOSED) only the material that was actually put before the Secretary of State or was considered by

officials for the purpose of background briefing papers or summaries. Evidence that was within the "corporate knowledge" of the department, or of the agencies, need not be disclosed if it was not in fact before the decision-maker – subject to the one refinement I will be explaining below.

39. This refinement may be illustrated by examining the appeal of C11. It will be heard in March 2022 with a time estimate of five days. C11's case raises, as I currently see it, four issues.

40. The first issue is whether the Respondent considered the best interests of her child. Put in these narrow terms, this issue does not require an examination of the national security case.

41. The second issue is whether the Respondent was in breach of her *Tameside* duty to investigate matters said to be relevant to the national security assessment. In my judgment, C11's *Tameside* case (and, indeed, the similar *Tameside* cases advanced by the other Appellants) does not merit a detailed qualitative examination of the strength of the national security case. Nor is there any need to "exculpate against" that national security case. What is required in the context of the *Tameside* ground is only the following: to identify the material that was before the Secretary of State *qua* decision-maker and the officials advising her directly, and – if it be the case – any material that was obviously omitted. The Special Advocates should be able to identify that material, assuming that it is not disclosed in the first instance, with reference to C11's pleaded case. This is the one refinement that I was referring to above.

42. Of course, I fully appreciate the Respondent's concern that the *Tameside* ground runs the risk of being the metaphorical slippery slope. In order to obviate that possibility, there is merit in fixing a further directions hearing in C11's case before the long vacation in order to establish some ground-rules. I have in mind the week commencing 19th July when I will be spending the whole of it in SIAC.

43. The third issue is the extent to which the PSED ground entails an examination of the national security case. Section 192 of the EA 2013 would exonerate the Respondent from violating this statute "only by doing, for the purpose of safeguarding national security, anything it is proportionate to do for that purpose". Whereas I agree with Steyn J in *C3* that that would involve some examination of CLOSED material, I do not think, nor in my view did Steyn J hold, that the proportionality exercise requires a deep exploration of the merits of the national security case for this purpose. Nor do I think is there any need to exculpate against it. Not merely is this right in principle, it would have to be pointed out that a thorough examination of the proportionality decision in the context of s. 192 would cut across C11's wish to stay her general proportionality challenge. Thus what is required is a general rather than a granular evaluation of the national security case in order to see if the s. 192 defence is made out.

44. Frankly, I continue to fail to see why a disclosure exercise along these limited lines should result in an appeal hearing as late as March 2022. The material that was placed before the Secretary of State and her advisors when she made her deprivation decision in C11's case should already be in a file. No extended trawl through the corporate knowledge of the Respondent and the agencies should be required. I have noted the debate between the Respondent and the Special Advocates (most of which is now in OPEN) as to the scale of the likely work involved. Given my approach to what a proper examination of the public law grounds as pleaded entails, it is unnecessary for me to go any further. In any event, the real problem here is the one I am about to discuss.

45. The fourth issue concerns the implications of the Respondent's argument that C11 should be granted no remedy because the outcome would inevitably have been the same.

46. It is the Respondent's wish to defend C11's case on *Simplex* grounds that is generating the scale of the disclosure exercise which is being contemplated. If, as she is fully entitled to, the Respondent seeks to defend the deprivation decision in C11's case on the basis that the outcome would inevitably have been the same regardless of any public law error, certain obvious consequences flow. The first is that this approach under *Simplex* does require the Commission to examine all the material within the "corporate knowledge" of the Respondent and the agencies not through the lens of the latter's decision-making process and any reasons provided, but on the footing that the burden rests on the Secretary of State to prove that the outcome would inevitably or highly likely have been the same. The search is not for the sort of public law errors the Appellants are seeking to make out, but for whether the application of administrative law principles of review to the entire body of evidence and material extant at the time of the Respondent's decision should persuade the Commission that there would be no point in remitting the deprivation decisions to the Secretary of State for determination because there is really only one answer. The second is that this approach under *Simplex* does require the Respondent to "exculpate against" the national security case. By definition, SIAC could not fairly determine whether the outcome would inevitably have been the same unless all relevant evidence is made available to it.

47. My characterisation of the Respondent's fall-back position in these terms does not carry with it any implied criticism. Not merely is the Respondent entitled to defend these cases as she sees fit (as I made crystal-clear on 17th May), there is some advantage to the parties and the wider public interest in SIAC examining all the available evidence as fully as possible. If, for example, the Respondent were to persuade the Commission that the outcome would inevitably have been the same in C11's case, that outcome could have knock-on consequences for the other Syrian appeals. But the precise impact of the acceptance of the Respondent's *Simplex* case on the other Syrian appeals, viewed in terms of both the non-stayed and stayed grounds, would require further submissions from the parties. For present purposes I am doing no more than identifying that possibility.

48. I now turn to consider a separate question altogether, which is whether in C11's case – and indeed in all these Syrian deprivation cases – the Respondent's national security case must be taken at its highest.

49. This was not Mr Blundell's submission in C11 in May, but that in itself is only a forensic point. If the Respondent's submission is right, the overriding objective necessitates that I should say so forthwith.

50. I asked Mr Blundell to characterise the Respondent's national security case at what I called its apogee, but for understandable reasons he declined to do so in OPEN, and has not done so in CLOSED since the hearing. Even so, it would be idle for the parties and the Commission to imagine other than that the Respondent will be saying that these are very strong national security cases. Viewed in those terms, if SIAC were to proceed on that premise it may be difficult to envisage how the appellants could resist the Respondent's fall-back submission that, regardless of any public law error, the outcome would inevitably have been the same. This whole exercise would be an expensive waste of time. National security, thus characterised, would always win through.

51. Be that as it may, I cannot accept Mr Blundell's submission, for the following reasons. The juridical basis for the submission is unsound. If, but only if, C11's Grounds 1-3 entailed a direct challenge to the national security case (and I have ruled that they do not, and will ensure through case management that this remains the position), the correct riposte would be not that the national security case should be taken at its highest but rather that this Appellant's case is an abuse of the process of the Commission. I am not aware of any principle which holds that a party to judicial review proceedings, or to an appeal which applies judicial review principles, is effectively required to concede that the Respondent's case cannot be touched.

52. Within the parameters of the Respondent's separate *Simplex* defence, there can be no basis for taking her national security case at its highest. The reason is obvious. This is a defence (or, more exactly, a basis for denying the Appellant a remedy) in relation to which the Respondent shoulders the burden of proof. The Respondent is not required to raise this defence at all; she chooses to do so. In my judgment, this is not as if the Respondent can somehow place a trump card on the table and then immediately claim the trick. It must be for the Commission to examine whether it is really the trump card that it purports to be.

53. The Respondent is concerned that the Special Advocates might subject the CLOSED material to rigorous examination. That is their duty. In this particular context that duty arises only because the Respondent wishes to defend these cases in a particular manner. Although the impact of the Respondent's forensic choice is, in effect, to bring the subject-matter of the national security case back into the equation (without prejudice to the burden of proof), that does not amount to an abuse. It is the consequence of the Respondent's litigation strategy.

54. I trust that the foregoing explains in general terms the basis on which C11's appeal will be heard in March 2022.

55. The next issue which I must address is the Respondent's submission that the remaining Syrian deprivation cases should be stayed pending the outcome in C11, and the Appellants' contrary submission that not merely should they not be stayed but they should be expedited and heard in November.

56. I must state at the outset that it would not be possible for the appeals of SB, D4, C8 and C10 to be heard before March 2022. I accept the Respondent's submission that she needs longer to conduct the necessary disclosure exercise and to prepare, and the fact remains that this Commission cannot accommodate what would be a 10 day hearing (or even a 5 day hearing) before March. I also reject any compromise solution, not that it was advanced by anyone, that one or two of these four cases could and should be heard before March 2022. That would involve revisiting the discussion that took place in CLOSED on 17th May. I would not necessarily agree with the Respondent's characterisation of what happened in C11's case – that it was effectively being fast-tracked – but that matters not.

57. At one stage I was attracted by the possibility that all five appeals should be heard in March 2022 with a time estimate of 15 days. SIAC could accommodate those dates. However, I accept the Respondent's submission that this would not be a fair or practicable option. She could not carry out all the necessary work within that timeframe (I take into account both what counsel submitted during the hearing and recent CLOSED material), and I suspect that such a hearing – with numerous counsel etc. – would be close to unmanageable. Although the national security case against each Appellant may well be similar with a considerable

basis of overlap, I accept the Respondent's overarching submission that each turns to some significant extent on its own facts. I therefore reject the possibility of what was described during oral argument as a "mega-hearing". C11's case will be have to be heard first.

58. However, I cannot accept the Respondent's submission that the remaining Syrian cases should be stayed. Although each of these cases carries with it obvious resource implications, I accept the general tenor of the Appellants' submission that these are vitally important cases for the individuals concerned and have generated considerable and understandable public interest. I have asked myself what the consequence would be of staying these cases. It would mean that no work in them would be carried out until C11's case had been decided. Assuming that SIAC's judgment in C11 is delivered in April 2022 and that there is no appeal (I cannot factor in that latter possibility for these present purposes), nothing would happen in the remaining Syrian cases until May 2022 at the earliest. There would then be a hotly contested directions hearing against the backdrop of SIAC's diary being full for the best part of the following year and the Respondent saying that each case requires a lengthy lead-in time. It might also be said that the cases should be tried individually rather than as a group. Whatever the Commission's hypothetical case management decisions in, say, May 2022 none of these remaining appeals could be heard before the spring of 2023 at the earliest. A delay of this magnitude would not be acceptable. Hamlet would not be silent – on two grounds. The Commission must strive to do better than that.

59. On the other hand, I must balance the predicament of these Appellants against the practical reality of the cases they are choosing to run and the overall public interest. I cannot properly judge the merits of any of the judicial review challenges, and as I said during the hearing the strength of the national security cases against them is unknown to me. However, it seems to me that I may properly take into account the following.

60. First, there is, as I have said, a considerable degree of overlap between all these appeals. The personal circumstances of the individual Appellants differ – some have children, others do not; some were under 18 when they went to Syria, others were older; some have poor health, others are in better health – but the Respondent's reason for depriving each of them of their citizenship is likely to be capable of pithy encapsulation. It will be said that the Appellants travelled to Syria of their own free will and associated with ISIL, some perhaps more actively than others. This conduct was so serious, and so contrary to British values, that at the time the relevant decisions were made deprivation was justified as being conducive to the public good.

61. This measure of overlap between these various appeals indicates the importance of SIAC's decision in C11's case. It will not, without more, determine the other cases, but it will form a very important platform from both parties' perspectives. I should make it explicit that C11's case cannot determine the outcome of the other cases not least because in her case there is no trafficking ground and, unlike SB, she was not a child at the time she travelled to Syria; although her case may raise other issues of a similar nature.

62. The second relevant factor is the limited practical value these appeals have for the Appellants. I have already pointed out that success on any of the public law grounds will not, without more, bring about the return of these Appellants to this country. Even if the *Simplex* defence were to fail, the Respondent would retake the deprivation decision in the light of the Commission's ruling. By contrast, the situation would be different if the Appellants were to succeed on their stayed grounds because the Respondent would not be able lawfully to

deprive their citizenship in the face of a judicial ruling that to do so could not be justified on conducive grounds and/or would be disproportionate.

63. There is, however, a nuance which I should spell out. The legality of the Respondent's decision-making must be evaluated on the basis of the material that was or should have been before him or her (as the case may be) when the relevant decisions were made. If the Respondent is compelled to reconsider the deprivation decisions, that would be on the basis of all the material then available.

64. The only point I am making is that the Appellants decision to proceed on narrow public law grounds has certain consequences. I have to take these into account in deciding how to case manage the appeals in the remaining Syrian cases. In this regard I also have to consider the impact on resources, in particular, but not limited to, the relatively small pool of developed-vetted counsel who can perform an exculpatory review.

65. All of these countervailing factors must be evaluated, as must the workload of this Commission in general, the needs of other litigants, and the ability of the agencies to defend other appeals and conduct what I have called its core business.

66. Balancing all these factors, I have decided that the appeals of C10 and D4 will be heard in early July 2022 with a time estimate of 10 days, and that the appeals of C8 and SB will be heard in November 2022 with a time estimate of 5 days. The reason for the shorter estimate is that by late 2022 SIAC's previous judgments in OPEN and CLOSED will have served to narrow the issues. The parties are invited to agree case management directions to that end, failing which I will have to intervene.

67. In pairing the remaining Syrian cases in this way, and taking two ahead of the others, I have considered a number of factors. It is not necessary to make these explicit, but they are not limited to their individual personal circumstances. They include the grounds that are being advanced in the individual cases.

68. The final issue which I am required to resolve is whether SB should be granted permission to advance her public law Grounds 1-7 (as I have said, expedition has been sought only in respect of Grounds 1-5, but that application has been refused).

69. First of all, the Respondent raises the objection that there was no obstacle to SB advancing public law points before *Begum* in the Supreme Court, and that her Re-Amended Grounds filed in May 2019 did include a number of public law arguments.

70. It is certainly true that before *Begum* in the Supreme Court pure public law points were occasionally raised. For example, in *L1 v SSHD* [2015] EWCA Civ 1410, the argument was advanced that public and common law principles prevented the Respondent from waiting until a person left the UK before making a deprivation decision. It may be seen that this was the sort of public law argument which, if successful, would be entirely dispositive of the appeal. Usually, however, appellants did not advance public law arguments because there was no advantage to them in doing so. The Commission regarded itself as exercising a "pure" appellate rather than a reviewing jurisdiction, and even if public law points were raised these would lead nowhere if a consideration of the merits rendered them academic: see, for example, *Al-Jeddah* [2009] SC/66/2008 and *Y1* [2013] SC/112/2011. SB's Re-Amended Grounds, raising arguments about abuse of power, were adjunctive to her primary case that SIAC should decide for itself whether she represented such a risk to national

security that deprivation would be proportionate. As I have said, Flaux LJ in the Court of Appeal had no difficulty with this formulation. Its incorrectness was only conclusively determined in the Supreme Court, interpreting Lord Hoffmann's judgment in *SSHD v Rehman* [2003] 1 AC 153 in a particular way.

71. Overall, I would regard the decision of the Supreme Court in *Begum* as moving the law in a different direction. I note that the recent textbook on National Security edited by Ward and Jones, which went to press before *Begum*, regarded Flaux LJ's approach as unremarkable and consistent with cases such as *Rehman*.

72. Secondly, the Respondent raises the objection that the replacement grounds have been conceived by new counsel, and that there is authority for the proposition, at least in a commercial context, that a court or tribunal should be slow to countenance a change of course for this reason.

73. In my judgment, the genesis of most of the replacement grounds is not simply the changed identity of counsel. I consider that any counsel considering or reviewing SB's pleaded case after the Supreme Court had pronounced would have sought to amend the grounds to cast them wholly in the terminology of public law. The fact that new counsel in the form of Mr Dan Squires QC was the architect of these changes is little to the point. Furthermore, in the commercial cases the amendments were being made quite late in the day with an inevitable impact on both costs and the trial timetable. I have already decided that SB's appeal will not be heard until November 2022. The fact that permitting replacement grounds may impact on the resources of the Respondent and the public purse is a factor, but it carries little weight in the particular circumstances. SB's case has proceeded on the basis of the preliminary issues, confined to matters of law, since May 2019. I continue to heed the importance of this case to SB and the seriousness of the consequences for her.

74. Furthermore, when I begin to examine the replacement grounds most of them will not create much additional expense. The *de facto* statelessness ground raises a pure issue of law. The failure to afford SB the opportunity to make representations does not require any close examination of the evidence; it raises a matter of principle. The predetermination ground is very short. These are narrow judicial review points which, taken in isolation, would not take long to prepare or to try. Finally, the principle of the *Tameside* and PSED grounds, in respect of which SB is not seeking expedition although she will now presumably run given that her application for expedition has failed, will almost certainly have been determined in C11, C10 and D4 before November 2022, and SB's particular facts are unlikely to make much difference. I reiterate that there would have been no point raising these particular grounds before February 2021. In my judgment, none of these grounds will burden the Respondent or involve much Commission time. SB has persuaded me that she should be granted permission to advance them.

75. Grounds 1 and 2 create more difficulty. The possibility that SB was trafficked could have been raised before May 2021. This is an allegation of fact, not of law. The allegation that the Respondent failed to "safeguard" SB is a different point. This possibility does not, apparently, turn on any instructions coming from SB herself. The fact that she was a child at the time and might have had her head turned by persuasive voices from overseas is an obvious feature of SB's case, but that does not turn on a specific allegation of trafficking. It is just part of the overall evidential jigsaw. It is very much part of the overall merits argument that SB will be wishing to run, if she ever can, under the umbrella of the presently stayed Grounds 8-9. In my judgment, that is where it belongs.

76. I appreciate that D4 has a trafficking ground that the Respondent does not oppose. This was one of the reasons for listing D4's appeal before SB's.

77. Overall, I am not persuaded that SB should have leave to advance Grounds 1 and 2. She could have done so before, albeit in a slightly different formulation, and – given her Grounds 8 and 9 which are stayed – it would be disproportionate to permit her to run these grounds now. The position may be reviewed after SIAC has handed down its judgment in the case of D4. If D4 were to succeed on her trafficking ground in a manner that would avail SB without requiring a detailed examination of the facts of her case, the Commission may be prepared to think again.

78. I now invite the parties in SB, D4, C10 and C8 to agree directions as soon as possible, and have laid down a timetable for this.

79. After this judgment was provided to the parties under embargo, Birnberg Peirce wrote to the Commission seeking: (1) the lifting of the stay in SB's case relating to her Grounds 8 and 9, and (2) the listing of C8's appeal in July 2022 alongside the appeals of D4 and C10. In my judgment, these matters should not hold up the release of this judgment in the ordinary way. In the event that SB and C8 apply to the Commission to seek these objectives, I would then decide how best to proceed.