Appeal Nos: SN/2/2014, SN/3/2014, SN/4/2014 and SN/5/2014
Hearing Dates: 12 and 13 June, 2014
Date of Judgment: 18 July, 2014

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE IRWIN
UPPER TRIBUNAL JUDGE PETER LANE
SIR STEPHEN LANDER CB KCB

"AHK and Others"

APPELLANT

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

RESPONDENT

PRELIMINARY ISSUE JUDGMENT

For AHK:	Ms A Weston
Instructed by:	Bates Well Braithwaite
For MA and AS:	Ms S Harrison QC and Mr E Grieves
Instructed by:	Birnberg Peirce & Partners and Fountain Solicitors
For FM	Mr R de Mello
Instructed by:	Broudie Jackson Canter
For the Respondent:	Mr R Phillips QC, Mr C Bourne QC and Mr J Blake
Instructed by:	The Treasury Solicitor for the Secretary of State
Special Advocate Representative:	Ms J Farbey QC and Mr M Goudie
Instructed by:	Special Advocate's Support Office

Mr Justice Irwin :

Introduction

1. Section 15 of the Justice and Security Act 2013 added to the jurisdiction of SIAC. The amendments introduced to the Special Immigration Appeals Commission Act 1997 ["the SIAC Act"] mean that, where the Secretary of State certifies that the direction or decision was made in reliance upon information which, in the opinion of the Secretary of State should not be made public, SIAC has jurisdiction to conduct a statutory review of a direction to exclude a non-EEA national (SIAC Act, Section 2C) or a decision to refuse naturalisation (SIAC Act, Section 2D).

2. The amended SIAC Act provides a statutory definition of the review, identically worded, in Sections 2C(3) and 2D(3), stipulating:

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

3. Amendments to the SIAC (Procedure) Rules 2003 make express provision as to the disclosure obligations which arise in SIAC statutory reviews. The obligation to conduct exculpatory searches arising in SIAC appeals under Rules 10(A) and 10A(1A) are expressly disapplied in statutory reviews.

4. This group of cases was brought together so that guidance could be given as to the proper approach to these categories of case. Despite a late indication given in a subsequent hearing the Secretary of State, that different arguments are in respect of exclusion cases, it is agreed by all parties that the same principles and the same broad approach arise in respect of both exclusion cases and naturalisation cases. There are differences between the documentation and the underlying decision-making processes in the two classes of case, a matter which is addressed in the CLOSED judgment. As we make clear below, there may be cases where, because of the particular facts, a more intense scrutiny and/or extended obligations of disclosure may arguably arise. This ruling does not preclude such argument. However, the Commission will normally follow the approach set down in this judgment. Any different approach will require specific application and justification.

5. We address two principal issues: the approach to a statutory review and the obligations of disclosure by the Secretary of State. As we indicated in the course of the hearing, they are inter-connected. The proper approach must also be apt to the peculiar procedures in SIAC: in particular the fact that the Appellant in a SIAC review, unlike the Claimant in conventional judicial review, is never informed of all the evidence relied on in the decision adverse to his interests, and is often not informed of any of the most important evidence against him. Aside from any other factor, this can mean that the Appellant and his open representatives are hampered in addressing omissions in disclosure. That will be addressed by the Special Advocates (and usually effectively so), but this feature is important in considering the conduct of reviews.

6. The approach must also reflect the importance of the decisions under consideration. The significance of exclusion is obvious; the significance of naturalisation we address below.

7. Another specific provision relevant to the issue is Rule 4(3) of the SIAC Procedure Rules. This lays a duty on the Commission, subject to the need to ensure that information is not disclosed contrary to the public interest, to "satisfy itself that the material available to it enables it properly to determine proceedings". This is an important provision. The Commission has a direct duty to ensure that it is possessed of the evidence needed to do justice in a given case.

8. Following discussion with the parties, this judgment is deliberately as concise as possible. We avoid a parade of learning. We have in mind utility, the warnings of both parties that specific cases may call for a somewhat different approach and the general strictures from the higher courts as to the risks of decisions based on hypothetical facts. However, it is essential to lay out the broad approach to be followed in statutory reviews before SIAC.

The Significance of Naturalisation

9. In the generality of cases, the applicant for Naturalisation already has indefinite leave to remain in the UK. Hence refusal of Naturalisation of itself should not normally disrupt their existing family life or imperil their leave to remain. However, refusal may have a number of consequences. Without British nationality, the individual is exposed to removal if there is good cause. They lack the protection afforded by British nationality abroad. Often the individual will have no other EU or EEA nationality, and so refusal prevents the acquisition of such European rights. It may often be the case that the family of the disappointed applicant are British and so the non-British family member will face administrative and other problems not faced by a British spouse or children.

10. In addition the Appellants stress that refusal can often cause embarrassment and loss of reputation, particularly within minority ethnic communities in the UK: Why has X been refused? What has he done wrong?

11. Ms Harrison QC developed a further argument, based on EU law. She cites Articles 78 and 80 of the Treaty on the Functioning of the European Union ["TFEU"], Council Directive 2004/83/EC ["the Qualification Directive"] and in particular Article 34 of the Geneva Convention as placing an obligation, she says now enshrined in EU law through the Qualification Directive, in the following terms:

> "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the …… costs of such proceedings."

12. We return to this argument below, and consider how far this affects the law. For present purposes, Ms Harrison relies on these obligations to show that naturalisation is intended to be the ultimate destination for the refugee who remains exiled, lending weight to the proposition that refusal of naturalisation is a serious matter, particularly for the successful asylum-seeker. Thus far we accept her argument.

13. Mr Phillips QC for the Secretary of State emphasises that nevertheless it is well-established law that naturalisation is a privilege not a right, and the award is discretionary: see *Macdonald Immigration Law and Practice, 8th Edition*, paragraph 2.65 and, for example *R v SSHD ex parte Al Fayed* [1998] 1 WLR 763 ["*Al Fayed No 1*"]. No appeal lies against a refusal to naturalize: see *Macdonald* paragraph 2.73. The wording of the legislation granting a review before SIAC is clear: a review following judicial review principles, not an appeal, despite the rather curious fact that the relevant Rules describe the individuals challenging such a decision before SIAC as an "appellant". Such a challenger before the Courts would be a claimant prosecuting a claim for judicial review, as indeed were all these Appellants before certification of their cases. Therefore whilst accepting that there may be serious implications for the individual from a refusal to naturalize, Mr Phillips emphasises that there remains no appeal, merely a statutory review following judicial review principles.

The Approach to Statutory Review

14. We are clear from the statutory language, from the fact that grant of citizenship is a privilege not a right, and from authority, that the function of SIAC is to apply a conventional judicial review approach to such decisions, subject to the procedures of SIAC and the demands of the individual case. What does that mean? Unless persuaded otherwise, it would naturally mean that the Commission should review the facts and consider whether the findings of fact by the decision-maker are reasonable. If they are, the Commission should then consider whether the decision is reasonable, in the *Wednesbury* sense, based on the facts found. We deal now with a number of arguments to the effect that, even within judicial review, the Commission should adopt a less traditional approach to its task.

15. A series of arguments based on European law were advanced, orally and in written submissions. We have already touched on some of this material. We intend to deal with this aspect briefly. We are not convinced that the objectives and obligations arising under the Refugee Convention or the Qualifications Directive amount to any alteration of judicial review principles in this context. The Convention is decades old. The Qualifications Directive has been in place since 2004. Neither these instruments, nor the TFEU, have been held to alter the nature of judicial review in this context.

16. In *R(AHK and Others) v SSHD* [2009] EWCA Civ 287; [2009] 1 WLR (Practice Note), the then Master of the Rolls, Sir Anthony Clarke addressed the approach to this very category of case, and by reference to the first case before us. This case post-dated the Qualification Directive and, self-evidently, the earlier instruments. There is no indication that the Court considered such

European law altered the approach at all: no such argument was advanced, despite many Counsel in common between that case and the hearing before us. We are not persuaded that the objectives set out in the Refugee Convention or recitals to the Qualification Directive carry the weight suggested. They are not imported into English law. We accept that the objectives do give some indication of the importance of the decision. Our view is they do not alter our approach.

17. The decision in *AHK* (Practice Note) was intended to lay down principles for these cases, but because they were to be tried in the High Court without the established procedure of SIAC, the Court had to grapple with the provision of Special Advocates and other safeguards: problems which now fall away following the transfer of the jurisdiction to SIAC. Nevertheless we take the decision to be guidance of great authority for the approach we should take, reinforced by the fact that appellants before SIAC will always have the benefit of Special Advocates and the knowledgeable lay members of the Commission, enabling proper testing and expert assessment of all the relevant material, even of a sensitive nature. For that reason it will be helpful to quote some of the key passages from the decision here, to clarify the correct approach.

> "9. There is no statutory definition of 'good character' in the BNA and no relevant statutory guidance. The Secretary of State has however provided guidance to her officers as to the application of the test…
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> 10. The judge correctly held [2008] EWHC 2525 (Admin) at [41] that no-one has the right to British citizenship, only to have his claim considered fairly under the scheme. It is, however, common ground that the decision to refuse citizenship can be challenged by judicial review. The legal burden of establishing good character is on the applicant, as is the burden of showing that the decision of the Secretary of State is wrong in law. However, there may be circumstances in which the evidential burden shifts to the Secretary of State. All will depend upon the circumstances. It is important to have in mind that there is no right of appeal against a refusal by the Secretary of State. In order to succeed the claimant must show that the decision was legally flawed.
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> …
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> "33. We accept the submission that the effects of a refusal of British nationality may be serious for the applicant. This has been accepted since *R v Secretary of State for the Home Department, Ex p Fayed* [1998] 1 WLR 763, 787, where Phillips LJ said:
>
> > "The refusal of British nationality to one who has, apparently, satisfied all the technical requirements … is likely to carry the natural implication, both in this country

> and abroad, that he has attributes of background character and conduct that are disreputable. I consider that these factors give the applicants stronger grounds for urging a duty of disclosure … The refusal of the benefits of naturalisation and the adverse inferences that will be drawn from such refusal are so serious that, as a matter of natural justice, an applicant should not be visited with them without a fair chance to meet the adverse case that threatens that result."

There are undoubted benefits in British nationality. For example it brings with it the benefits of being a citizen of a member state of the European Union and entitles the citizen to vote and to stand for and, if elected, become a Member of Parliament. In her written submissions the Secretary of State says that she keeps her communications with the applicant confidential so that it is up to him or her to decide whether to make the refusal of citizenship public. We naturally accept that the Secretary of State respects that confidentiality but we do not think that it is realistic that the result of the application will not frequently become known.

34. The issues in particular cases may be different. In some, perhaps many, cases the issue may simply be whether the Secretary of State acted rationally, in which case, at any rate where she had available to her only little material, there may be no difficulty in resolving the issues arising in a claim for judicial review fairly. In other cases, the ECHR may apply and substantive issues of proportionality may have to be resolved. Different considerations may arise in such cases. These are factors which must be taken into account when the judge decides whether to request the appointment of a special advocate. It appears to us that the judge's conclusion that the ECHR is engaged was not made on a sufficiently case-specific basis.

…

45. The above analysis shows that the European Court of Human Rights considers each class of case separately. The issues in this class of a case are a far cry from the issues which arise in the criminal cases discussed by the court in *A v United Kingdom* 19 February 2009. Moreover, without in any way minimising the effect of being refused British citizenship, the consequences of a deprivation of (or even interference with) liberty are plainly very much more serious. In these circumstances we do not think that the approach of the court in criminal cases or in cases of deprivation or interference with liberty can or should be applied directly to this class of case. That is not to say that, as explained earlier, each individual is not entitled to a fair hearing of his application for judicial

review. It is indeed to precisely that end that we have tried to devise a fair procedure in this type of case."

The Standard of Review: Fact and Discretion

18. We deal first with fact. In the written submission of AM, adopted for present purposes by the other Appellants, the submission is made that it is necessary for the Commission to determine for itself whether the facts said to justify the decision are in fact true, because:

    i) The existence of the facts said to justify the denial of nationality is a condition precedent;

    ii) Fact finding is necessary to determine whether there has been a breach of the ECHR and the relevant equalities provisions; and

    iii) Fact finding is necessary to determine whether the procedure adopted is fair.

19. The Secretary of State meets these submissions firstly by relying on the various authorities ascribing to the Secretary of State the responsibility to resolve fact and exercise her discretion, even in the case of an asylum claimant. Mr Phillips cites *R v SSHD ex parte Bugdaycay* [1987] AC 514, and relies on the speech of Lord Bridge at page 5319. Mr Phillips goes on to submit that:

> "… as a matter of domestic law, whilst the level of review may vary, any consideration of merits or "anxious scrutiny" is reserved for the most serious of cases. A refusal of naturalisation does no more than preserve the status quo and is in no way akin to a breach of a fundamental human right: see *Fayed (No 2)* at [93]."

20. Mr Phillips adds that it would not be appropriate in the present hearing to determine whether the Appellants' rights under the European Convention of Human Rights are in fact engaged or interfered with. That should be a question to be addressed in a specific case, if it is said to arise. Until the ground for that is laid in a specific case, that basis for a duty on the Commission directly to determine the facts is absent.

21. Mr Southey's submissions, reinforced by Ms Harrison, add the suggestion that Ouseley J was in error in *AHK & Others v SSHD* [2013] EWHC 1426 (Admin) when he concluded in his analysis of the application of Convention rights (paragraphs 30 to 79) as follows:

> "45. A submission that the mere nature or degree of effect of a refusal of naturalisation, without some further quality of arbitrariness or discrimination, suffices to engage Article 8, seems to me ill-founded on the ECtHR jurisprudence. It has not actually held, so far as I am aware, that where the refusal of naturalisation impacts sufficiently seriously on any of the aspects of life covered by the full width of Article 8, it is then for the state to prove why

> it should not be granted. That would mean in effect that there would be a right to naturalisation, notwithstanding that the ECtHR has accepted that there is no such right, and notwithstanding the entitlement of a state to set the terms for and apply its tests to any application for naturalisation. To hold that a refusal of naturalisation, in the absence of an arbitrary or discriminatory decision, interferes with Article 8 rights would be to advance beyond what the ECtHR has held. That is not for the domestic Courts. That is very different from holding that interference can arise where naturalisation is refused on an arbitrary or objectionably discriminatory basis."

22. Drawing these threads together, in the absence of an arbitrary or discriminatory decision or at the very least some other specific basis in fact, we conclude that refusal of naturalisation will not engage Convention rights. It will be for a given appellant to lay the groundwork for such a claim, on the basis of specific fact. We reach no conclusion here as to the individual positions of these Appellants. In the absence of such a claim based on the ECHR, Mr Southey's second ground for a duty to find precedent fact falls away.

23. We are not persuaded as a matter of common law or ordinary public law that the existence of the facts said to justify the "denial of nationality" is a condition precedent, or that fact-finding by the Commission is necessary to determine whether the procedure adopted is fair.

24. We pause to note that even if Convention rights are engaged, the Secretary of State argues that the requirement arising is an adjudication of the proportionality of the decision, not a full merits review. Mr Phillips relies on the speech of Lord Steyn in *R(Daly) v SSHD* [2001] UKHL 26, [2001] 2 AC 532, at paragraph 27, and in that he says is the proper analysis of *R(Wilkinson) v Broadmoor Hospital* [2001] EWCA Civ 1545; [2003] 1 WLR 419. In the absence of some special factor affecting the individual case, we agree.

The Standard of Review: Anxious Scrutiny

25. The traditional *Wednesbury* approach was applied to refusal of naturalisation in *Al Fayed (No 2)*: see the remarks of Nourse LJ at paragraph 40. An example of the recent application of this approach is found in the decision of Lang J in *R(DA)(Iran) v SSHD* [2013] EWHC 279 (Admin).

26. Do ordinary public law principles require us to adopt an approach of "anxious scrutiny" here? The Appellants argue such an approach should arise from the bifurcated proceedings in SIAC: Mr Al Fayed knew of all the material which was used against him, these Appellants do not. The Appellants rely on the application of "anxious scrutiny" in the approach adopted by the Proscribed Organisations Appeals Commission ["POAC"] in its only ever case, reviewed and approved by the Court of Appeal in *Secretary of State v Lord Alton and Others* [2008] 1 WLR 2341. POAC described themselves as adopting that approach perhaps principally because they had all the material and the Appellant did not. We address the approach to disclosure below, but the

operation of SIAC Procedure Rules 4(1) and 4(2) will necessarily produce the same outcome here in terms of differential access to information.

27. The central passage in *Lord Alton's* case is the judgment of the Court of Appeal at paragraphs 41 to 46. The starting point was that the Court distinguished the case as one of "significant interference with human rights": paragraph 43. They concluded that the question "whether an organisation is concerned in terrorism is essentially a question of fact": paragraph 43. The Secretary of State failed to persuade the Court that this was a similar exercise to "consideration of whether an individual is likely to be a threat to national security": paragraphs 42 and 43. The Court approved POAC's approach in adopting "anxious scrutiny" but did not conclude that POAC should have themselves found the facts.

28. Ms Harrison relies on the approach to the review of control orders laid down in *Secretary of State v MB* [2006] EWCA Civ 1140, which involved consideration of whether there were "reasonable grounds for suspecting that the controlled person is or has been involved in terrorist-related activity", (paragraph 57) which was "an objective question of fact" (paragraph 60). She says the same should apply here, and the Commission should find the facts for themselves.

29. We consider that the rather theoretical debate here sometimes smacks of scholasticism. There is in our view no general requirement for the Commission to conduct a fact-finding exercise of its own. Parliament's intention here was that the review should be conducted as a judicial review. There is no straight-forward factual issue, such as the age of an asylum claimant, which should be regarded as a "precedent fact".

30. However, we conclude that in all such cases the factual basis for the judgment exercised by the Secretary of State must be scrutinised very carefully or "anxiously" by the Commission. This is an appropriate safeguard as in conventional judicial review proceedings, given that much of the important factual information is withheld from the Claimant. The facts cannot be tested as easily as in conventional judicial review proceedings by either the Claimant, who does not have all the information, or the Special Advocates, who may not be able to get instructions in response to the CLOSED material. For that reason, we regard the responsibility on the Commission to review the facts with care as clear.

31. It is still a review, not an appeal on the facts. If a close and anxious review of the evidence produces the outcome that the facts or factual inferences reached by the Secretary of State were reasonable, then there should be no interference on that ground, even if the Commission would reach different conclusions. If any more interventionist approach were followed, the review would become an appeal.

32. Once the facts and inferences of fact have been reviewed, and if the factual or evidential conclusions drawn by the Secretary of State are found to be reasonable, the Commission should proceed to review the judgments made by the Secretary of State based on that factual picture. In the review of fact there

is no place for "deference" to the Secretary of State. In the consideration of a judgement based on the reviewed fact, public law principles do support a degree of deference to the decision of the Secretary of State, for well established reasons. The Minister has democratic responsibility and answers to Parliament; the Minister is entitled to formulate and implement policy; the Minister has expert advice to assist her conclusions. Here, the task of the Commission is to interfere when and if the Secretary of State has been unreasonable, allowing for due deference paid.

33. If and when a proper basis is laid demonstrating that the decision engages Convention rights, the Commission will go on to consider whether an otherwise reasonable decision represents a disproportionate interference with the relevant Convention rights. As has been said on many occasions, and as Ouseley J restated in the passage quoted above, it will be very rare in this context that there will be a breach of Article 8 rights, in other words that interference with private or family life will be disproportionate, given the level of public interest in enforcing a legitimate immigration policy. If the decision were found to be arbitrary or objectionably discriminating, it would fail the *Wednesbury* test in any event. The consideration of whether it is disproportionate may in fact add little, at least if it is Article 8 which is engaged.

Review: Disclosure

34. We deal with this question in a more detailed way in the CLOSED judgment. However, it is important that the principles of the approach are made clear in OPEN. Here we bear particularly in mind the obvious fact that disclosure into OPEN will inevitably be partial. We bear in mind the obligation on the Commission to ensure it has all the material needed to reach a just conclusion. We have already observed that the inequality of disclosure means that the Commission will examine the facts and the factual inferences drawn by the Secretary of State with particular care, or "anxious" scrutiny, although aware that the process remains a review, not an appeal.

35. To do that exercise properly, the Commission must see in CLOSED all of the relevant material bearing on the facts. We made clear in the course of the hearing that this was our provisional view, and we confirm that now. As we put the matter in the Note given to Counsel, intended to focus argument in the OPEN hearing:

> "There is an interrelation between disclosure obligations and the nature of the SIAC process – is it a traditional judicial review in SIAC or SIAC coming to its own conclusion on the substantive issue? With that in mind, there is a critical issue on disclosure? Is disclosure of the summary sufficient, even if SIAC's function is a "Wednesbury" type Judicial Review, because the decision taken by the SSHD is to withhold a privilege rather than to grant a right? The decisions are not personal ministerial decisions but taken in the name of the SSHD. A summary is prepared and then a decision is taken by an official. If the rationality of the final decision by the HO

> official were all that is to be considered, arguably the whole review would miss the substance of what has been decided. It is possible, but unlikely, that a HO official might reach a conclusion that was irrational, given the contents of the summary. The real substance is: is the content of the summary rational, based on the material available to the writer of the summary? If SIAC is to review the substance of the SSHD decision, then our provisional view is this can only be done if the Commission reviews the material available to the writer of the summary. We bear closely in mind R4(3) where because of the unusual procedures in SIAC, there is placed a positive duty on SIAC to satisfy itself that the material available to it enables it properly to determine proceedings."

36. We confirm that view now. It will not be sufficient for the Commission and Special Advocates to be shown only a summary prepared for the Home Office official, plus any other documents not before the summary writer but taken into account by the Home Office official taking the decision in the name of the Minister.

37. We indicate that the same principle will apply in respect of decisions reviewed by SIAC which have been taken by a Minister. Anxious scrutiny of the facts is only possible where the Commission is possessed of the evidence.

38. There remains the question of what evidence can pass from CLOSED into OPEN and therefore be available to the Appellant.

39. In providing for these cases to be adjudicated by SIAC, Parliament must clearly have intended them to be tried within the SIAC process, with a CLOSED material procedure, and subject to the SIAC Rules. As we have already reminded ourselves, Rules 4(1) and 4(2) place a duty on SIAC so to conduct proceedings, now including such statutory reviews as are here in question, whilst securing that information is not disclosed "where disclosure is likely to harm the public interest".

40. There is by now well-established authority that the SIAC processes and safeguards are compliant with the requirements of the ECHR: *IR and GT v United Kingdom* (2014) 58 EHHR SE14. In English public law and in conformity with Strasbourg jurisprudence, there is no absolute requirement that the details of allegations which would be disclosed in normal litigation, should be disclosed where the interests of national security require secrecy: *Tariq v The Home Office* [2012] 1 AC 452. But in cases where the liberty of the subject is directly in question, the law requires a minimum of disclosure or of communication to the individual of the essence of the case against him: *A v United Kingdom* (2009) 49 EHHR 29 and *SSHD v AF (No 3)* [2010] 2 AC 269. The distinction between cases involving the liberty of the subject and other cases is emphasised, for example, in the judgment of Lord Mance in *Tariq* at paragraph 27.

41. It is the practice of SIAC in any event to disclose as much as possible to every Appellant, an approach set out in the Practice Note for Proceedings before SIAC, promulgated in November 2013.

42. The real argument advanced by the Appellants is that an obligation may arise for minimum disclosure in these cases, even though they do not involve a deprivation of liberty. Hence Ms Harrison argues that there is support for an obligation for disclosure of the "*AF (No 3)*" minimum even outside the cases involving loss of liberty. She cites *IR and GT* (Supra) paragraph 61:

> "It follows that the procedural guarantees inherent in Article 8 of the Convention will vary depending on the context of the case in question and in some circumstances may not be as demanding as those which apply under Articles 5 and 6."

She relies on *Tariq* as authority that the proper minimum level of disclosure is a function of context and the gravity of the impact of the decision on an individual, meaning that a balancing exercise is appropriate, considering the impact of the decision on the individual as against the requirements of national security.

43. Submissions have been made on behalf of AM by Mr Southey QC which seek to advance an equality claim based on the Equality Act 2010 and a parallel equality claim based on Articles 10 and 19 of TFEU, Council Directive 2000/43/EC ("the race directive"), Council Directive 2004/113/EC ("the gender directive"), the European Parliament and Council Directive 2006/54/EC, and Article 21 of the Charter of Fundamental Rights of the EU, addressing discrimination. AM was unrepresented in the hearing on these preliminary issues since funding difficulties prevented it. It is hoped that difficulty will be overcome by the time of the substantive hearing in AM. However, for now, we note that on the basis of the domestic and/or EU discrimination claims, Mr Southey submits that additional obligations of disclosure arise in his case, approximating to "*AF(No 3)*" disclosure, based on the authority of *ZZ (France) v SSHD* [2014] EWCA Civ 7. Ms Harrison, Ms Weston and Mr de Mello adopted the written submissions of Mr Southey but did not seek to elaborate on them.

44. We also record that further submissions were made bearing on the admissibility of such discrimination claims in the cases of FM and AM, dealing principally with time and jurisdictional points, in a directions hearing before UTJ Lane on 27 June. His ruling following that hearing is handed down at the same time as this judgment. We note here for the sake of clarity, that AM could not be represented in the hearing on 27 June, due to funding difficulties. Detailed written submissions on the case from both sides were before UTJ Lane and he dealt with that case in his ruling.

45. We affirm the directions given by UTJ Lane in his ruling. Procedurally, the directions in the case of FM stand, as the matters were fully argued. In the case of AM, the directions stand, but because AM was not in the end represented at the hearing, AM must have the opportunity to apply to set aside those directions, if he so wishes. In his case, he may apply to set aside the

directions; or indicate that he accepts them and their implications; or reserve his position as to appealing the case hereafter.

46. Although we have read the submissions of Mr Southey and Mr de Mello as to the substance of the discrimination claims advanced and what they submit to be the consequences for disclosure, these matters have not been fully argued. Indeed until the points arising on time and jurisdiction were resolved, they could not have been properly addressed. The Secretary of State has clearly indicated that, even if and to the extent that the hurdles of time and admissibility were to be cleared, such claims would be strongly opposed: Mr Phillips would rely on the decision of the Court of Appeal in *G1 v SSHD* [2012] EWCA Civ 867, and the decision of SIAC in the same case, *G1 v SSHD* SC/96/2010, judgment of 24 October 2013. This judgment therefore does not address the substantive question of whether such claims properly arise, or the question of consequential disclosure obligations, if the claims were to survive.

47. The Secretary of State's response to the argument advanced by Ms Harrison on disclosure is straightforward. There is no basis for any minimum amount of information that must be disclosed to the Appellants: see *R(AHK) v SSHD* [2012] EWHC 1117 (Admin), *IR and GT v United Kingdom* and the decision of SIAC in *D2 v SSHD* (Appeal No SC/116/2012), judgment of 15 April 2014. Mr Phillips adds that even where Article 6 is engaged (which it is not in immigration asylum cases or in these cases) there is no uniform or minimum standard of disclosure to be provided: see *Kennedy v UK* (2011) 52 EHRR and *Tariq*.

48. In our judgment, the Secretary of State is correct in her submissions, with one proviso to which we shall come. In the absence of further obligations arising from properly admitted discrimination claims under domestic or EU law, neither domestic law nor Strasbourg authority requires a minimum level of disclosure to the Appellant, where the case does not involve personal liberty. We so conclude on the basis of *Tariq*, and with the European authority reviewed in *Tariq*. The safeguards in the SIAC jurisdiction are sufficient: see *IR and GT*.

49. The proviso is as follows: Rule 4(3) places the Commission under a positive duty to ensure that the material available to it enables it properly to determine proceedings. That Rule is expressly subject to Rules 4(1) and 4(2), and so SIAC must not produce or countenance a breach of Rules 4(1) or 4(2). Normally Rule 4(3) will arise in the context of obtaining information from the Secretary of State or other arms of government. However, the situation may arise whereby the Commission will wish for evidence ("material") from the Appellant which it is difficult to elicit because of the constraints of Rules 4(1) and 4(2). This might, for example, be the answer to a highly material question which cannot easily be put, because the implications of the question may be thought to disclose information contrary to Rule 4(1).

50. Much of the effort between the Special Advocates and Counsel for HMG goes into ensuring fairness without compromising national security: often striving to enable an appellant to answer questions and give his account properly. The

obligation under Rule 4(3) should mean that the Commission will at all times strive to ensure, by one means or another, that an appellant can in fact give his account fully, and can in fact provide the Commission with the material it needs for a proper determination. If the situation ever arose that the Commission could not be satisfied it had all the material necessary for a fair decision, and found no means of obtaining the material which would not breach Rule 4(1) and/or 4(2), the Commission would be bound to say so.