Appeal No: SC/116/2012
Hearing Date: 13 and 14 February 2014
Date of Judgment: 15 April 2014

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE IRWIN

"D2"

APPELLANT

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

RESPONDENT

JUDGMENT ON PRELIMINARY ISSUE: DISCLOSURE

For the Appellant:	Mr H Southey QC and Mr Edward Grieves
Instructed by:	Wilson Solicitors LLP
For the Respondent:	Mr Tim Eicke QC and Mr Robert Wastell
Instructed by:	The Treasury Solicitor

Mr Justice Irwin :

1. In this judgment I address a preliminary issue in the appeal, namely what is required as a minimum by way of disclosure in these proceedings. The Appellant seeks to establish, by one or both of two discrete legal routes, that there is an obligation imposed on the Respondent to disclose "an irreducible minimum" of the national security case against the Appellant. Mr Hugh Southey QC for the Appellant argues firstly that by reason of developing jurisprudence of the European Court of Human Rights, the decisions of the English Court of Appeal in *IR(Sri Lanka) and others v SSHD* [2012] 1 WLR 232 and *R(BB) v SIAC and SSHD* [2013] 1 WLR 1568 are wrongly decided. As a further argument, Mr Southey submits that the decisions of the Court of Justice of the European Union in *ZZ(France) v SSHD* [2013] 3 WLR 813 (Case C – 300/11) and the Court of Appeal in *ZZ v SSHD* [2014] EWCA Civ 7 have the effect of importing an obligation of an "irreducible minimum" of disclosure of the national security case, effectively the same as that which has been held to arise where the facts of a case engage the prohibition on arbitrary detention contrary to Article 5(4) of the ECHR, as decided by the Strasbourg Court in *A v United Kingdom* (2009) 49 EHRR 29 and confirmed by the House of Lords in *AF(No.3) v SSHD* [2010] 2 AC 269.

Summary of Factual Background

2. The Appellant is a Russian citizen of Chechen origin. He arrived in the United Kingdom in 1999 and on 30 July 2002 was granted asylum and indefinite leave to remain. He subsequently travelled from the United Kingdom on several occasions, and left in November 2009. His family remained. On 11 May 2010 the Secretary of State directed that the Claimant should be excluded from the United Kingdom on conducive grounds. The Appellant appealed against that decision, and brought judicial review proceedings in early 2011. Those proceedings were dismissed on 31 March 2011. SIAC dismissed the Claimant's appeal on 20 April 2011. The Appellant appealed against both the judgment of Mitting J and that of SIAC. In March 2012, the Court of Appeal allowed an appeal from the judgment of Mitting J in the judicial review, meaning that the Claimant would enjoy a limited period to enter the UK in order to appeal to SIAC. In consequence, it was agreed there was no need to determine the merits of the appeal from SIAC's determination.

3. On 29 February 2012 the SSHD issued a fresh notice cancelling the Claimant's indefinite leave to remain. This notice entitled the Appellant to a fresh appeal. The notice informed the Appellant that he had a right to travel to the UK to commence the appeal. He did so, arriving in the United Kingdom on 7 March 2012. He was detained on arrival and remained in detention, following two failed applications for bail to SIAC.

4. On 13 September 2012 the Appellant wrote to the authorities at HMP Long Lartin indicating that he wished to travel from the UK to Russia. He was, in fact, removed to Russia on 6 October 2012. Before his removal he had been warned that the removal would involve the withdrawal or abandonment of his SIAC appeal. On 24 September 2012 the Appellant issued a further claim for

judicial review (CO/10149/2012), in essence challenging the propositions that the Appellant had withdrawn or abandoned his SIAC appeal, or that it fell to be treated as abandoned or withdrawn, by operation of law. I sat on the judicial review in a hearing listed consecutively with the preliminary issue in the instant appeal. Judgment on the judicial review is handed down with this judgment.

5. In the judgment in the judicial review, I have concluded that the Appellant did indeed withdraw or abandon his appeal. In the alternative, it fell to be treated as abandoned, pursuant to Section 104(4) of the Nationality, Immigration and Asylum Act 2002 ["the 2002 Act"].

The Strasbourg Jurisprudence: Are *IR* and *BB* wrongly decided?

6. The Appellant accepts that SIAC is bound by the Court of Appeal authority in *IR* and *BB*. Nevertheless both sides invited me to consider the issue afresh, the Appellant inviting me to express a view, if so persuaded, that those decisions must be regarded as no longer good law. Indeed Mr Southey QC went further and invited me, if so persuaded, to abridge all necessary periods of time and sit immediately in the Administrative Court, so as to grant permission to the Appellant to apply for judicial review challenging the effect of *IR* and *BB.* I would, in any event, have declined to follow such a course if the situation arose. I turn to the substance of the issue.

7. It is important to emphasise that the basis of the application is accepted to be the procedural requirements arising from the engagement of Article 8, not Article 5(4) or Article 6 of the Convention.

8. In *Al-Nashif v Bulgaria* [2012] 36 EHRR 655, the ECtHR addressed the minimum procedural requirements where Article 8 was engaged by the deportation of the Claimant from Bulgaria. The factual context and the Bulgarian law in play are important in understanding the remarks of the Court.

9. Mr Al-Nashif was subject to the revocation of his residence permit, and then an order deporting him. The orders emanated from a police department within the Interior Ministry, and no reasons were given for them. On 1 June 1999, the Bulgarian Court rejected his appeal on the grounds that matters declared by the Police Directorate to arise from considerations of national security were simply not subject to judicial review. The Bulgarian Administrative Procedures Act stated that all administrative procedures are to be subject to judicial review, except those "directly concerning national security and defence".

10. In December 2000, following his deportation to Syria, the Bulgarian parliament adopted a new law, requiring Bulgarian courts to interpret Section 47 of the Bulgarian Aliens Act, with the effect that where a deportation was "directly related to national security", the court considering an application must "automatically declare the appeal inadmissible without collecting evidence". It was also a noteworthy part of the history that Mr Al-Nashif was detained, for practical purposes incommunicado, for the immediate period

before his deportation, and was not allowed to meet a lawyer to discuss any possible legal challenge to the measures against him.

11. Against that background, the Strasbourg Court reviewed its own past approach to such questions, noting in particular the earlier case of *Chahal v United Kingdom* (1997) 23 EHRR 413, where the Court found:

> "95. …That even if confidential material concerning national security was used, the Authorities were not free from effective judicial control of detentions. The Court attached significance to the information that in other countries there were techniques which could be employed which both accommodated legitimate security concerns about the nature and sources of intelligence information and yet accorded the individual a substantial measure of procedural justice.
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> 96. In later cases, the Court noted that following the *Chahal* judgment and the judgment in the case of *Tinnelly and McElduff v United Kingdom* (1998) 27 EHRR 249 the United Kingdom had introduced legislation making provision for the appointment of "special counsel" in certain cases involving national security.
>
> 97. Without expressing in the present context an opinion on the conformity of the above system with the convention, the court notes that, as in the case of *Chahal*, there are means which can be employed which both accommodate legitimate national security concerns and yet accord the individual a substantial measure of procedural justice."

12. The remarks of the Court in paragraph 97 quoted above do not represent a detailed affirmation of the conformity of the SIAC system with the Convention, but do represent important broad support for the approach taken in SIAC. The favourable reference in paragraph 96 to the appointment of special counsel must be taken to bear on the level of disclosure required.

13. In extended passages, the Court in *Al-Nashif* went on to acknowledge the State's right to control the entry of non-nationals into its territory, the complexity of the problems which arise when national security is in question, the need for "a measure of legal protection in domestic law against arbitrary interference by public authorities with the rights safeguarded by the Convention" and the need in this context for:

> "122. …safeguards to ensure that the discretion left to the Executive is exercised in accordance with the law and without abuse.
>
> 123. Even where national security is at stake, the concepts of lawfulness and the rule of law in democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings, before an

> independent body competent to review the reasons for the decision and the relevant evidence, if need be with appropriate procedural limitations on the use of classified information.
>
> 124. The individual must be able to challenge the Executive's assertion that national security is at stake. While the Executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful, or contrary to common sense and arbitrary."

14. In *Liu v Russia (No. 1)* (2008) (Application No 42086/05), the ECtHR advanced very much the same approach, using some of the same language, as can be found in the judgment in *Al-Nashif*. Mr Liu lived in Russia from 1994, married a Russian national and had two children. He was a Chinese national. Between November 2002 and March 2005 he was refused a resident's permit. In February 2005 the Khabarovsk Police Department prepared a decision that his presence on Russian territory was undesirable and in August 2005 requested the Federal Migration Service to order his deportation. The Russian courts were not provided with any of the information on which the assertion of national security risk was made.

15. In important passages set out in paragraphs 61-63 of the judgment, the court observed that the national courts –

> "were not in a position to assess effectively whether the decision had been justified, because the full material on which it was based had not been made available to them. The submissions by the local police department were confined to the assertion that it was in possession of information that the first applicant posed a national security risk. The content of the information was not disclosed to the applicant or to the courts on the grounds that it was a State secret."

16. The court recognised that the "use of confidential material may be unavoidable when national security is at stake", but went on to say that there must be effective control from the domestic courts in such a situation, and in a similar passage to that quoted from *Al-Nashif*, recited that techniques can be employed which accommodate legitimate security concerns "and yet accord the individual a substantial measure of procedural justice".

The court again cited *Chahal.*

17. The cases of *Chahal, Al-Nashif and Liu (No. 1)* were all cited to the Court of Appeal in *IR(Sri Lanka) v SSHD* [2012] 1 WLR 232. The *IR* case reviewed four separate applicants seeking to appeal from decisions of SIAC on the basis of inadequate disclosure derived from the established procedures of SIAC and in the context of the engagement of Article 8 of the European Convention. The leading judgment was given by Maurice Kay LJ. The facts of the four

cases were summarised. In paragraph 9, Maurice Kay LJ referred to the case of *PC&S v United Kingdom* (2002) 35 EHRR 1075, a case which referred to the requirement that a parent seeking to challenge a decision by the authorities in relation to the child of that parent must be "placed in a position where he or she may obtain access to information which is relied on by the authorities."

The judge proceeded to examine what was described as "the line of authority which considers this principle in the context of immigration and national security": (see paragraph 10).

18. Maurice Kay LJ then reviewed *Al-Nashif* and *Turek v Slovakia* (2006) 44 EHRR 861, following which the judge said, in paragraph 13:

> "These concepts of "effectiveness" and "guarantees against arbitrariness" coupled with "the benefit of adversarial proceedings" were reiterated in *Lupsa v Romania* (2006) 46 EHRR 810, paras 34-38; *Liu v Russia* (2007) 47 EHRR 751, paras 59-62; and *CG v Bulgaria* (2008) 46 EHRR 1117, para 40. Equally, they all acknowledge that, in cases concerned with national security, there may need to be "appropriate procedural limitations on the use of classified information"."

19. The submission of the applicants in *IR* was that that approach required to be reassessed in the light of *A v The United Kingdom* and *SSHD v AF(No.3)*.

20. Maurice Kay LJ went on to conclude as follows:

> "16. In my judgment, these recent authorities on Articles 5(4) and 6 do not call into question the *Al-Nashif* line of authority. It is, as I have said, well-settled and there is no reason to suppose that it will or should now be developed in the manner for which the appellants' counsel contend. So far as this Court is concerned, that would involve marching ahead of what Strasbourg jurisprudence has established. In *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, Lord Bingham said (at paragraph 20):
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> > "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."
>
> 17. In *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26 [2008] 1 AC 153 Lord Brown suggested (at paragraph 106) that the wording might well have ended "no less but certainly no more", not least because a member state cannot take its case to Strasbourg after a national court has construed a Convention right too generously. In these circumstances, I conclude that the relevant Strasbourg principles in the context of Article 8 remain those propounded in the *Al-Nashif* line of authority.

18. The question now, therefore, is whether the procedure deployed by SIAC in these cases complies with that line of authority. I am entirely satisfied that it does. In *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10, [2010] 2 AC 110, the House of Lords gave a clear bill of health to the SIAC procedure in an Article 3 case. Lord Hoffmann said (at paragraph 178):

> "The same is *a fortiori* of the claims of a potential violation of Articles 5, 6 and 8."

See also Lord Hope (at paragraphs 229-233).

19. Notwithstanding the subsequent jurisprudence on Articles 5 and 6, there is no reason to suppose that the position in relation to Article 8 has changed. What the relevant authorities require is "independent scrutiny of the claim". That language goes back to *Chahal v United Kingdom* (1996) 23 EHRR 413 (paragraph 151) dealing with the concept of "effective remedy" under Article 13. Independent scrutiny is a *sine qua non* of the protection against arbitrariness demanded by *Al-Nashif*. The need for "some form of adversarial proceedings" (*Al-Nashif*, paragraph 133) is satisfied by the proceedings in SIAC. To the extent (and it is often, as in some of these appeals, a considerable extent) that the proceedings are closed, the use of special advocates from the independent Bar reduces the risk of unfairness. No one suggests that the procedure is perfect. However, it is consonant with Strasbourg jurisprudence, from *Chahal* (where it was anticipated) to the more recent cases which, in relation to deportation or exclusion on national security grounds, countenance "appropriate procedural limitations on the use of classified information" (*Al-Nashif*, paragraph 133). Even where the Strasbourg Court focuses on Article 13 (which has not been incorporated into English law but is relied on in the present case as informing the procedural aspect of Article 8), it proceeds on the basis that "effective remedy" is one that is "as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance": *Klass v Federal Republic of Germany* (1979-80) 2 EHHR 214. That which applies to secret surveillance applies equally to other forms of intelligence in the context of national security.

20. To encapsulate what I have said about the point of principle in this case: the procedural requirements of Article 8 do impact on a case of deportation or exclusion for national security reasons (assuming that there is an interference with family or private life) but they do not equiparate with the procedural requirements of Article 5 or Article 6. They have the more limited content set out in the *Al-Nashif* line of authority. The

> procedure in SIAC, as developed in the domestic jurisprudence, satisfies those requirements."

21. Following the decision in *Liu (No. 1)*, in August 2008 the Russian Federal Migration Service annulled its decisions of 2005 to the effect that Mr Liu's presence in Russia was undesirable and rescinded the order for his deportation. Mr Liu was informed that he was unlawfully residing on Russian territory and he was required to leave for China, obtain a Russian entry visa, and then apply for a resident's permit. Mr Liu requested the Russian courts for a reconsideration of his case. His case was remitted to the Khabarovsk Regional Court which had competence to review documents containing State secrets.

22. As the report in *Liu v Russia (No. 2)* (2012) (Application No 291574/09) makes clear in paragraph 27:

> "During the hearing the Khabarovsk Regional Court examined the classified documents from the Federal Security Service containing information about the security risks allegedly posed by the first applicant. The first and second applicants were informed of the contents of those documents after they had undertaken not to disclose that information. They asked the court to call the police informants who had accused the first applicant of subversive activities to the witness stand and have them questioned. Their request was, however, refused."

23. The regional court went on to hold that the refusal of a resident's permit to the first applicant had been lawful. This, however, was on the basis that effectively a certification that the individual concerned represented a threat to national security. As the regional court found that the law "does not require that the security services reveal the substance of the threat". The judgment goes on to point out that:

> "The court takes into account that issues relating to national security are special, in particular because the factors that represent the threat to national security are assessed by the competent authorities on the basis of information received from various sources, including sources not subject to judicial scrutiny.
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> ….
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> The competent security services have discretion in classifying various actions of a foreign national as a threat [to national security]. Thus, there are no reasons to hold that the refusal by the Khabarovsk Regional Department of the Federal Security Service or permission to grant a three year resident's permit to Liu Jingcai."

24. The regional court therefore dismissed the Applicants' claims in full.

25. The Applicants appealed to the Russian Supreme Court, relying upon *Edwards and Lewis v The United Kingdom* ([GC], Nos 39647/98 and 40461/98, ECHR 2004 - X) and *A and Others v The United Kingdom* ([GC], No 3455/05, ECHR 2009 -) claiming that the refusal to disclose the relevant evidence had violated their right to a fair trial. The Russian Supreme Court rejected the Applicants' appeal. The Supreme Court was convinced that the security services' assertion that the First Applicant was a danger to national security had a basis in the facts. In those circumstances the public interest had absolute priority over any private interests that might be involved. The Supreme Court relied on the fact that the instruction from the Federal Migration Service and the classified materials from the security services –

> "Had been examined by the regional court in the Applicants' presence and had been attached to the case file. Accordingly, the Applicants had had full access to those materials."

26. When the ECtHR came to consider the appeal by Mr Liu, its essential reasoning is set down in paragraphs 87-91 of the judgment. The Court noted the requirement for "sufficient procedural guarantees…. even where national security is at stake". "The individual must be able to challenge the Executive's assertion that national security is at stake". The Court relied on *Al-Nashif* for that purpose.

27. The Court considered that there had not been sufficient procedural guarantees afforded to the Applicants:

> "88. …the domestic courts refused to examine whether the actions imputed to the first applicant were indeed capable of endangering national security, finding that in the absence of a definition of the notion of "national security" in domestic law, the security services had unfettered discretion in determining what amounted to a danger to it".

28. The domestic judgments concerning the refusal of a resident's permit had made no mention of the factual grounds on which they were made. The domestic courts had specifically declined to verify the factual basis for the allegations against the applicants. The Court observed that:

> "89. ….The domestic courts confined the scope of their enquiry to ascertaining that the security services' report had been issued within their administrative competence, without carrying-out an independent review of whether the conclusion that the applicant constituted a danger to national security had a reasonable basis in fact. They rested their rulings solely on uncorroborated information provided by the security services and did not examine any other pieces of evidence to confirm or refute the allegations against the first applicant. They thus failed to examine a critical aspect of the case, namely whether the authorities were able to demonstrate the existence of specific facts serving as a basis for their assessment…. These elements lead the Court to conclude that the national courts confined

themselves to a purely formal examination of the decision to refuse a resident's permit."

29. The Strasbourg judgment continues, at paragraph 90:

> "It transpires from the submissions by both parties, however, that the applicants were given only an outline of the national security case against the first applicant. The disclosed allegations against him were of a general nature, principally that he was aiding the Chinese security services to collect information about the political, social and economical situation in the Khabarovsk region, as well as information about the military facilities situated in that region and the roads leading to them. No specific allegations mentioning the locations and dates of the actions allegedly committed by the first applicant were divulged to the Applicants, making it impossible for them to effectively challenge the security services' assertions by providing exonerating evidence, for example an alibi or an alternative explanation for the first applicant's actions…
>
> 91. Although the Court observes that some of the procedural defects indicated in its judgment of 6 December 2007 were corrected during the new examination of the applicants' case it cannot but note that when correcting those defects, the domestic authorities preferred an approach which might be described as formalistic…. However, the analysis of the domestic judgments reveals that the Courts considered themselves incompetent to verify the factual basis for the finding contained in those materials that the first applicant constituted a danger to national security. It also appears that, given the general nature of the allegations against the first applicant, the applicants were not in a position effectively to challenge them. The Court therefore considers that, although during the new examination of their case the applicants were afforded certain procedural guarantees against arbitrariness, those guarantees were not adequate and sufficient to satisfy the procedural requirements of Article 8."

30. The next key case in sequence is *R(BB)(Algeria) v SIAC (No2) (CA)* [2013] 1 WLR 1568. The leading judgment was given by Lord Dyson MR. Mr Southey QC was arguing for that Appellant and submitted that both Article 6 and Article 8 were engaged. The Court rejected the engagement of Article 6 and went on to review the procedural requirements attendant upon Article 8. The Court considered all of the critical authority including those cases to which I have made reference in this judgment. The proceedings concerned the bail orders made in respect BB who was a SIAC Appellant. It was accepted by the Secretary of State that the bail conditions interfered with his Article 8 rights. It was accepted that, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to interference must be fair and afford due respect to the interests safeguarded to the individual by Article 8: see paragraph 40.

31. The principal submission made by Mr Southey in *BB* was that the decision in *Liu v Russia (No. 2)* represented a significant development in the approach of the Strasbourg Court and that, since *Liu (No. 2)* post-dates *IR(Sri Lanka)* the Court was not bound by the latter decision.

32. The Master of the Rolls rejected that submission and concluded that *Liu (No. 2)* did not represent a shift in the thinking of the Strasbourg Court. In paragraph 46 he said:

> "Part of the judgment in the *Al-Nashif* case 36 EHRR 655 articulated the principal that an individual should be able to challenge the decision based on national security grounds. This was not news. One of the reasons given in *Liu (No. 2)* for holding that the procedural requirements of Article 8 were not satisfied was that, on the facts of that case, the Applicant was not able to make an effective challenge to the allegation that national security was at stake. If it were a requirement of Article 8 that the same Article 6.1 protections are necessary imported into Article 8 as are imported into Article 5.4, that would surely have been stated explicitly. No decision of the Court of Human Rights has been cited to us which makes this statement explicitly or impliedly."

33. In paragraph 50 of the judgment, the Master of the Rolls emphasised that *Liu (No. 2)* simply represented a further application of the "well-settled line of Court of Human Rights Authority" applied in *IR(Sri Lanka)*. The fact that the reasoning in *Liu (No. 2)* had only a single reference to *A v The United Kingdom* shows that this was regarded as no more than an illustration of a case involving the impossibility of an effective challenge.

34. The Master of the Rolls went on to emphasise that he agreed with the decision and reasoning in *IR(Sri Lanka)* in the event:

> "What is required to enable an individual to make an effective Article 8 challenge in the context of national security is not spelt out in *Liu (No. 2)* or any other authority to which our attention has been drawn. It is well-established that an Applicant must be able to make an *effective* challenge. What is required for an effective challenge will depend on the facts of the case."

35. Much as he did in respect of *Liu (No. 2)* and in the course of *BB*, Mr Southey now submits to me in the instant case that the course of Strasbourg authority has been altered in the decision of *Amie and Others v Bulgaria* (2013) (Application No 58149/08). Mr Amie was Lebanese but his wife Kuwaiti, and from 2001 they were living in Bulgaria. In November 2001 the family was granted refugee status. In February 2006 the head of the Ministry of Internal Affairs National Security Service made an order for the First Applicant's expulsion on the grounds that he represented a serious threat to national security. He was barred from residing in Bulgaria. The order was based on a "classified proposal" setting out connections with extremist organisations from

Lebanon and alleging drug trafficking. He was detained and sought judicial review of the order. The case came to the Bulgarian Supreme Administrative Court, who sustained the order. After various successive hearings, Mr Amie was in fact released by the Sofia City Administrative Court exercising its powers under newly enacted statute. Because of his detention, the case engaged Article 5 of the Convention. However, it was also accepted that the claim engaged Article 8. The Court considered previous Strasbourg authority which I need not rehearse. In paragraph 95 the Court said this:

> "The Court accepted that the use of confidential material could prove unavoidable where national security was at stake, and that it could sometimes be necessary to classify some or all of the materials used in proceedings touching upon such matters, and even parts of the decisions rendered in them. However, it went on to say that the publicity of judicial decisions constituted a basic safeguard against arbitrariness. It also noted, with reference to *A and Others v the United Kingdom*, that other countries which had already suffered from terrorist violence had chosen to keep secret only those parts of their courts' decisions in such proceedings whose disclosure would compromise national security or the safety of others, which showed that there existed techniques which could accommodate legitimate security concerns without rendering nugatory fundamental procedural guarantees such as the publicity of judicial decisions."

36. In paragraph 98, the Court considered the facts in *Amie*. In considering those circumstances the Court kept in mind "that in a number of previous similar cases that Court failed effectively to scrutinise allegations that an alien represented a national security risk". The judgment recited a series of Bulgarian cases and continued to conclude that the Court was not persuaded there had been a genuine enquiry into the allegations and that, in addition, some of those allegations were too general to have given the Appellant an opportunity effectively to challenge them.

37. I am not persuaded that the case of *Amie* adds anything to the previous run of Strasbourg authority. With great respect, I find Mr Southey's interpretation of the authority to be strained. Not only am I bound by the decision in *BB(Algeria)* but I am fully persuaded of the logic set out in the judgment of the Master of the Rolls. His remark in paragraph 46 of *BB(Algeria)* to the effect that, if the Strasbourg Court was intending to import the same protections into Article 8 as are imported into Article 5.4 that would have been done explicitly applies with as much force to the judgment in *Amie* as it did to the case of *Liu (No. 2).*

38. After the conclusion of this hearing, and when the preparation of this judgment was advanced, the Appellant alerted the Commission and the Respondent to the decision of the ECtHR in *I.R. and G.T. v UK,* 14876/12 and 63389/12. The parties were given permission to make further written submissions in the light of that decision.

39. In *I.R. and G.T.* the ECtHR reviewed exactly the line of authority I have analysed in this judgment and, explicitly and in considerable detail, reviewed the procedures of SIAC. Both *I.R.* and *G.T.* were foreign nationals excluded by the UK on "conducive" grounds. Their SIAC appeals and ECtHR appeals were based on alleged violations of Article 8. They are, for present purposes, cases very closely parallel to the instant case.

40. In the case of *I.R.*, the Applicant had been told "very little of the national security case against him" (paragraph 12). In the case of *G.T.*, he was informed that the Security Service "assessed [him to be] a Libyan Islamist extremist" (paragraph 19) who was "closely involved with a network of Islamist extremists based in the United Kingdom and overseas" (paragraph 20). There was therefore in each case a very limited amount of information given to the Appellant/Applicant. The SIAC appeals were heard in 2009. The Court of Appeal dismissed the Applicants' appeals in June 2011: see *I.R. and G.T.* (op. cit.). The Supreme Court refused permission to appeal.

41. In paragraphs 28 to 35, the ECtHR summarised the structure and workings of SIAC. In paragraph 53, the Court noted that the Applicants' complaints –

> "were directed solely at the procedure followed by the Secretary of State in making the exclusion orders and before SIAC in examining these appeals. In particular, the applicants complain about an alleged failure to provide adequate information for them to be able to understand and respond to the allegations against them."

The Court then considered it should –

> "examine, in the light of the requirements of Article 8 taken on its own and together with Article 13, the nature and extent of the procedural safeguards available to the applicants during the impugned proceedings." (paragraph 54)

42. The ECtHR then reviewed its own past authority, in the light of Articles 8 and 13, observing that:

> "The requirement in Article 13 of an "effective remedy" is to be read as meaning "a remedy that is as effective as can be" having regard to the restricted scope for recourse inherent in the particular context." (paragraph 54)

43. The Court then proceeded to reach important conclusions as to the practice and procedure of SIAC, which are worth quoting *in extenso*:

> "63. The Court is satisfied that the procedure in place in the United Kingdom is such as to offer sufficient procedural guarantees for the purposes of Article 8. First, SIAC is a fully independent court (A. and Others, cited above, § 219). Second, SIAC sees all the evidence upon which the Secretary of State's decision to exclude an individual is based and forms its own,

independent view as to whether the Secretary of State reached the correct decision (see F.A.K. v. the Netherlands (dec.), no. 30112/09, § 82, 23 October 2012; and compare and contrast Liu (no. 2), cited above, §§ 88-89 and 91). It is thus competent to examine and, if necessary, to reject the Secretary of State's assertion that the appellant poses a threat to national security. Third, there is some form of adversarial proceedings before SIAC, with appropriate procedural limitations – in the form of the special advocates – on the use of classified information. During the closed sessions before SIAC, the special advocate can make submissions on behalf of appellants, both as regards procedural matters and as to the substance of the case. Importantly, Rule 38 of the SIAC 2003 Rules (see paragraphs 30-34 above) provides explicitly for a procedure where the special advocate may challenge the Secretary of State´s objections to disclosure of the closed material (see paragraph 33 above). In this way, the special advocate provides an important, additional safeguard through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure (see A. and Others, cited above, § 219). While contact between the appellant and the special representative generally ceases once the closed material has been served in order to preserve the confidentiality of the information, it is not wholly excluded. There is provision for requesting authorisation from SIAC to permit contact in specific circumstances. In particular, the appellant may still contact the special advocate, through his representative, and the special advocate can then request permission for contact if he deems it necessary (see paragraph 31 above). The system of special advocates was approved in principle by the Grand Chamber in A. and Others, cited above. Fourth, cases before SIAC are primarily concerned with allegations of terrorist activity: there is no evidence that SIAC has allowed the Secretary of State to adopt an interpretation of "national security" which is unlawful, contrary to common sense or arbitrary (compare and contrast C.G. and Others, cited above, § 43; and Raza, cited above, § 53). Fifth, in contrast to Amie and Others, cited above, § 99, only parts of SIAC's judgments are classified (or "closed"). The appellant is provided with an "open" judgment providing as much information as possible on the reasons for SIAC's decision. Further, the "closed" parts of the judgment are disclosed to his special advocate. Finally, SIAC has full jurisdiction to determine whether the exclusion interferes with the individual's Article 8 rights and, if so, whether a fair balance has been struck between the public interest and the appellant's rights. If it finds that the exclusion is not compatible with Article 8, it will quash the exclusion order (compare and contrast Liu (no.2) cited above, §§ 94-95)."

44. In paragraphs 64 and 65 the Court went on to conclude that the SIAC proceedings satisfied the requirements of Articles 8 and 13 of the Convention.

45. In my judgment, particularly in the light of the recent decisions in *I.R and G.T v The United Kingdom*, an effective challenge is fully, or at least sufficiently, open to this Appellant by the efficient use of the SIAC procedures so as to satisfy the test in paragraph 51 of *BB(Algeria)*, the demands of the Strasbourg jurisprudence and the requirements of Articles 8 and 13 of the ECHR.

The Implications of *ZZ*

46. The Appellant has argued on a number of bases, that he is entitled to a minimum level of disclosure in these proceedings pursuant to the decision of the CJEU in *ZZ(France) v SSHD* [2013] 3 WLR 813 (Case C-300/11). The principal basis is that the decision to revoke the Appellant's refugee status and his indefinite leave to remain on national security grounds was unlawful: the principal issue in the judicial review proceedings. The Appellant has failed on that issue as my judgment makes clear. That removes the principal means by which the Appellant claims to benefit from an "irreducible minimum obligations to disclose the essence of the grounds" on which his appeal turns, as the Court of Appeal has confirmed to be the meaning of *ZZ(France)* – see *ZZ v SSHD* [2014] EWCA Civ 7.

47. Mr Southey has advanced alternative bases on which the *ZZ(France)* obligations are said to arise. These relate to "a subsequent decision to refuse the Appellant leave to enter" which he says firstly is a breach of ECHR Article 8. In addition, he says there will be a violation of Article 14 of the Convention on the grounds of discrimination.

48. Mr Southey suggests that the matters complained of come within the ambit of Article 8, and thus of a right protected by the Convention, thereby fulfilling the first step of the test formulated in *Michalak v LB Wandsworth* [2003] 1 WLR 617 and *R(S) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196. The next step in the application of the test is to ask if there is a difference in treatment between the groups concerned. For that purpose it is necessary to define the groups.

49. For present purposes the relevant group to which the Appellant must be taken to belong is a Russian citizen, formerly resident in the UK, who abandoned his appeal against exclusion, and against the revocation of his indefinite leave to remain. In my view, even if the Appellant can properly invoke European law to the extent of seeking to claim discrimination in this way, his argument on discrimination is quite hopeless. Differential treatment of the group so defined, to which the Appellant belongs, and those who can show they are subject to the rights and freedoms of the legal order of the European Union, is of the essence of Union citizenship. If it were otherwise the benefits of that special legal order would not exist: see *Moustaquim v Belgium* (1991) 12 EHHR 802.

50. This argument, or variants of it, have been firmly rejected in a number of cases before: see for example Mitting J in *R(G1) v SSHD* [2011] EWHC 1875

(Admin) at paragraph 4; *ZZ v SSHD* [2011] EWCA Civ 440 at paragraphs 25 to 29; *G1 v SSHD* [2012] EWCA Civ 867, in the judgment of Laws LJ at paragraphs 29 to 54 and in my own judgment on a preliminary issue in the remitted appeal of *G1* (SC/96/2010), 24 October 2013. In *ZZ v SSHD* (2011), Maurice Kay LJ described an argument indistinguishable for these purposes as having "no legal or factual basis. Its comparative matrix is fundamentally flawed": see paragraph 29. In *G1 v SSHD* (2012) Laws LJ concluded that "the attempt to engage Article 14 through the gateway of Article 8 is in my judgment artificial and adventitious", see paragraph 54. I see no need to add further comment. I reject this attempt to bring the Appellant within any obligation arising from EU law.

Data Protection Act 1998

51. In a discrete submission, the Appellant argues that he is entitled to disclosure to the standard identified in *ZZ* by reference to the provisions of the Data Protection Act 1998 ("the 1998 Act"). The essential argument is that the constraints on disclosure within the SIAC regime, encapsulated in Rule 4(1), cannot be taken to prevent disclosure of material that "could or should enter the public domain through" the 1998 Act.

52. As the Appellant recognises, Section 28(1) of the 1998 Act exempts from disclosure under the Act "personal data … if the exemption … is required for the purpose of safeguarding national security". Mr Southey argues that the use of the word "required" in that formulation implies there must be an adequate justification for the non-disclosure.

53. The submission is elaborated as follows. The 1998 Act was intended to ensure compliance with Council Directive 95/46/EC, and thus it is said the Act must, so far as possible, be interpreted in conformity with the Directive. Article 13(1) of the Directive enables Member States to –

> "restrict the scope of the obligations and rights provided for in Article[s] … 12 [which governs access to data] … when such a restriction constitutes a necessary measure to safeguard … (a) national security…"

54. Mr Southey argues that the terms of the Directive necessarily imports a proportionality test, and that non-disclosure cannot be proportionate if it results in "a denial of the fundamental rights of the defence" and thus a balancing of the desirability of disclosure against the impact on national security, in relation to the material in hand. The requirements necessary for compliance with fundamental rights were defined in *ZZ*. That approach is fortified by Article 8(2) of the Charter, which stipulates that "everyone has the right of access to" personal data. Mr Southey submits that right must be read as subject to Article 52(1), which provides that any limitation on the exercise of rights recognised by the Charter must be provided by law, be proportionate, necessary, and "meet objectives of general interest recognised by the Union".

55. On that basis it is argued that the restriction of the right of access to personal data must be subject to a proportionality test, even where the restriction

operates to protect national security, and that the application of such a test will necessarily impact on obligations of disclosure of the "essence of the case" in conformity with the conclusions in *ZZ*.

56. The first answer of the Respondent to this argument is that the Appellant has made no application for data under the 1998 Act, and that it is not enough to say, as the Appellant does, that SIAC must be in a position to determine all legal questions which arise in the appeal: this question simply does not arise, in the absence of an application. Request for disclosure under the 1998 Act (or within the Directive) might invoke the considerations advanced: in the absence of such a request, the process does not begin. Secondly, it is argued that the Appellant has elided the right of access to personal data with the right to a fair trial. The questions are legally distinct, and in effect carry quite different policy considerations.

57. In any event, says the Respondent, both the domestic and EU provisions contain clear exemptions where national security is concerned. The recital to the Directive makes it clear that processing of personal data related to State security matters does not fall within the Directive:

> "(13) Whereas the activities referred to in Titles V and VI of the Treaty on European Union regarding public safety, defence, State security or the activities of the State in the area of criminal laws fall outside the scope of Community law, without prejudice to the obligations incumbent upon Member States under Article 56 (2), Article 57 or Article 100a of the Treaty establishing the European Community; whereas the processing of personal data that is necessary to safeguard the economic well-being of the State does not fall within the scope of this Directive where such processing relates to State security matters;
>
> …
>
> (16) Whereas the processing of sound and image data, such as in cases of video surveillance, does not come within the scope of this Directive if it is carried out for the purposes of public security, defence, national security or in the course of State activities relating to the area of criminal law or of other activities which do not come within the scope of Community law;
>
> …
>
> (43) Whereas restrictions on the rights of access and information and on certain obligations of the controller may similarly be imposed by Member States in so far as they are necessary to safeguard, for example, national security, defence, public safety, or important economic or financial interests of a Member State or the Union, as well as criminal investigations and prosecutions and action in respect of breaches of ethics in the regulated professions; whereas the list of exceptions and

> limitations should include the tasks of monitoring, inspection or regulation necessary in the three last-mentioned areas concerning public security, economic or financial interests and crime prevention; whereas the listing of tasks in these three areas does not affect the legitimacy of exceptions or restrictions for reasons of State security or defence;"

58. Article 3(2) of the Directive is clear that:

> "This Directive shall not apply to the processing of personal data:
>
> - in the course of an activity which falls outside the scope of Community law such as… **and in any case** [emphasis added] to processing operations concerning public security, defence, State security …"

The reference in Article 13(1) of the Directive to a restriction which "constitutes a necessary measure to safeguard … national security" is underpinned by the categorical exclusion in Article 3(2): the latter simply limits the scope of the directive.

59. Article 52(1) provides that limitations in access to data made for the purpose of protecting national security are justified. Article 52(3) provides that:

> "2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
>
> 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

60. The Respondent also argues that the right to the protection of personal data in Article 8 of the Charter is subject to the limitations set out in the Directive.

> "Explanation on Article 8— Protection of personal data
>
> This Article has been based on Article 286 of the Treaty establishing the European Community and Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31) as well as on Article 8 of the ECHR and on the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by all the Member States. Article 286 of the EC Treaty is now replaced by Article

> 16 of the Treaty on the Functioning of the European Union and Article 39 of the Treaty on European Union. Reference is also made to Regulation (EC) No 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (0J L 8, 12.1.2001, p. 1). The above-mentioned Directive and Regulation contain conditions and limitations for the exercise of the right to the protection of personal data"

61. Thus it is argued that Union Law has not been enacted so as to provide "more extensive protection" than the European Convention, when considering the rights arising in the context of data protection.

62. It is a requirement of European Union Law that Member States provide an independent authority to supervise data (Article 8(3) of the Charter and Article 28 of the Directive), an obligation fulfilled in England and Wales by the creation of the Information Tribunal (and perhaps the appointment of the Commissioner). In addressing a request such as is implied by the Appellant's argument (although no such request has actually been made) the Tribunal's procedure would comprise consideration of whether the exemption applied or not, without prior disclosure of the essence of the information to produce that challenge. The Information Tribunal would not have in mind the requirements of the Citizen's Directive in the light of Article 47 of the Charter, or the right of free movement between Member States of Citizens of a Member State. Thus the basis of consideration would be different from that in *ZZ*. No question of an "irreducible minimum of disclosure" would arise. The Tribunal would simply consider whether the national security exemption was applicable, and, if it was, would apply it.

63. I accept the Respondent's arguments on this issue. There has been no application for disclosure under the 1998 Act. Even if there had been, it seems to me clear that the national security exemption would apply. The exemption is a systemic one; the 1998 Act neither states nor implies a case-by-case consideration of whether a particular application of the exemption is justified or proportionate. It seems to me that neither is such a process implied by the Directive. If the 1998 Act or the Directive were to be taken to extend the protection of the individual beyond that afforded by the European Convention, that would have to be shown in very clear terms, given the language of Article 52(3) of the Charter. That would be so either before SIAC, or before the Information Tribunal, even if they were persuaded that they should go beyond the finding that information was exempt on the ground of national security, and engage in a consideration as to whether such information in a given case must nevertheless be released because it was disproportionate not to do so on a detailed consideration of the facts.

64. I am in any case doubtful if the Information Tribunal would feel themselves equipped to make such a judgement. If any forum is equipped to do so, it is surely SIAC. In making such a judgement, SIAC can and does look at all relevant legal obligations. Those obligations are not altered by the making of

a request under the 1998 Act for data of a kind which is expressly exempt from that Act.

65. For these reasons, I reject Mr Southey's argument that any additional obligations of disclosure arise by reference to the 1998 Act.

Conclusions

66. For the reasons set out above, there are no irreducible, minimum obligations of disclosure arising in this case derived either from Strasbourg authority or from the application of *ZZ(France) v UK*. There is no obligation here to disclose the "essence of the grounds" relied on against the Appellant, if to do so would infringe the Commission's obligations under the SIAC Procedure Rule 4(1).

67. It is worth emphasising that the Commission will, as a matter of law and as a matter of established practice, disclose as much information as possible, provided that Rule 4(1) is not infringed. As paragraph 18 of the SIAC Practice Note of 24 October 2013, and my covering letter, emphasised: "everything must be in OPEN which properly can be". Where the information is not disclosed, every effort will be made by redaction, the provision of summaries and gists, and by any other means, to ensure that the Appellant is able properly to present his case. The Commission will be astute to consider what inferences may or may not fairly be drawn, in the light of what can and what cannot be disclosed.