SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/96/2010
Hearing Dates: 1-4 April, 2014
Date of Judgment: 18 December 2014

Before:

THE HONOURABLE MR JUSTICE IRWIN
UPPER TRIBUNAL JUDGE JORDAN
MR WILLIAM FELL CMG

Between:

K2

Appellant

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

JUDGMENT

MR H SOUTHEY QC and **MS A WESTON** (instructed by **Birnberg Peirce and Partners**) appeared on behalf of the Appellant.

MR T EICKE QC and **MR A DEAKIN** (instructed by **the Treasury Solicitor**) appeared on behalf of the Secretary of State.

MR A McCULLOUGH QC and **MR M GOUDIE** (instructed by **Special Advocates' Support Office**) appeared as Special Advocates.

Introduction

1. This Appellant was born in the Sudan and became a naturalised British citizen in 2000. His wife has British and Sudanese dual nationality as does his child. In early 2009 the Appellant became involved in street demonstrations in London. He was subsequently charged with violent disorder in relation to the street protest and was bailed to appear at a magistrates' court in London. He breached his bail. The Security Service assessment is that he travelled to Somalia in October 2009. Subsequently, he moved to Sudan in 2010. He has remained there since.

2. On 11 June 2010 the Secretary of State notified the Appellant of her intention to make an order under Section 40(2) of the British Nationality Act 1981 depriving him of British citizenship on the ground that such deprivation would be conducive to the public good. Such an order was signed by the Secretary of State on 14 June 2010, and the order was sent by post to the Appellant's home address in the UK. Subsequently the Secretary of State certified the case under Section 40A(2) of the 1981 Act, specifying that the deprivation decision had been taken in part, relying on information which should not be made public for reasons of national security and it follows that his right of appeal was to this Commission. By further letter of 14 June 2010, the Secretary of State informed the Appellant that he was to be excluded from the UK because his presence was not conducive to the public good. The reasons given were that:

> "Her Majesty's Government assesses that you:
>
> - are involved in terrorism-related activities; and
> - have links to a number of Islamist extremists."

Procedural History

3. The Appellant's case has already gone through a number of stages. Initially he sought to appeal to SIAC on the basis that he would be rendered stateless. He withdrew that basis of appeal after obtaining a nationality certificate and Sudanese passport from the authorities in Sudan. He sought judicial review of the decision to exclude him. The grounds of that challenge were threefold:

> "i) The statutory scheme impliedly excludes the exercise by the Defendant of the prerogative power to exclude an individual who has been deprived of British citizenship on conducive grounds.
>
> ii) To permit the Claimant to conduct his appeal against the decision to deprive him of British citizenship, the Defendant must make arrangements for him to return to the United

Kingdom to give instructions to his lawyers and to appear personally at the hearing of his appeal.

> iii) The decision to exclude the Claimant from the United Kingdom unlawfully discriminates against him as a former British citizen."

4. That challenge was dismissed by Mitting J sitting in the Administrative Court (see *G1 v SSHD* [2011] EWHC 1875 (Admin)). The Appellant appealed from the decision of Mitting J, contending:

> "i) That the prerogative power to exclude a person from the United Kingdom, pending an appeal against a decision of the Section 40(2) have been impliedly extinguished;
>
> ii) That the decision to exclude him was procedurally unfair, because he would only be able to conduct his appeal from outside the jurisdiction; and
>
> iii) He lacked the right to an effective remedy, guaranteed by European law."

5. The Appellant's appeal was dismissed. The Court of Appeal holding:

> "(1) There had been no statutory abrogation or modification of the Crown's prerogative power to exclude an alien from the United Kingdom. The repeal of s 40A(6) of the 1981 Act had extinguished the suspension of the Secretary of State's power to make a s 40(2) order while an appeal against the deprivation decision was pending or could be brought; nothing in the statutory provisions applicable after the repeal of s 40A(6) touched upon the prerogative power to exclude the claimant once the s 40(2) order had been made.
>
> (2) The dictates of procedural fairness did not generate a right to be present at a SIAC appeal; moreover, in the instant case the claimant was asserting a positive claim that the court should direct the Secretary of State to facilitate his return to the United Kingdom in circumstances where there was no warrant in the legislation or rules for any such obligation.
>
> (3) The law of the European Union was not engaged in the instant case. Accordingly, the appeal would be dismissed." (see *R(G1) v SSHD* [2012] EWCA Civ 867)

6. On 8 February 2013, the Supreme Court refused permission to appeal in the judicial review proceedings.

7. The SIAC appeal had been stayed whilst the judicial review proceedings were pursued. On 30 May 2013 the Appellant amended his grounds of appeal. A number of the points raised in the amended grounds were addressed by way of

preliminary issue, giving rise to a judgment of the Commission of 24 October 2013: see *G1 v SSHD* SC/96/2010, 24 October 2013. In that judgment the Appellant raised three discrete issues as follows:

> "(1) the engagement of EU procedural obligations on the issues arising in G1's appeal including *Ruiz Zambrano v Office National de l'emploi [2012] QB 265 (C-34/09)*;
>
> (2) the engagement of the equivalent procedural obligations by operation of Article 14 taken with Article 8 ECHR;
>
> (3) the impact of ZZ on SIAC's approach to disclosure and future directions."

8. All three submissions amounted to an argument that EU procedural law applied to the decision to deprive the Appellant of his national citizenship since such a loss also entailed a loss of his (parasitic) EU citizenship or as a consequence deprived his wife and child of the "genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union". The Commission rejected the submissions, principally on the basis of the decision by the Court of Appeal in this Appellant's case with the conclusion that his appeal is not subject to any procedural requirements derived from European Union law.

9. In March 2014 directions were given for a substantive hearing of the appeal. This is a case where the national security case against the Appellant has been made fairly fully in OPEN on behalf of the Secretary of State. The first OPEN statement on behalf of the Secretary of State of September 2013 was amended and updated in November 2013. In very brief summary, it is assessed that the Appellant left the UK for Somalia in October 2009 with two named extremist associates, Berjawi and Sakr. Both his associates had been deprived of British nationality and excluded from the UK. The Security Service assessment is that whilst based in Somalia the Appellant, with his two associates, engaged in a variety of terrorism-related activities linked to Al Shabaab activities, including terrorism-related training and fighting against AMISOM forces. Berjawi and Sakr had previously travelled to Kenya in February 2009. The OPEN case includes the Security Service assessment that this earlier travel had been to make contact with extremists in East Africa and prepare the ground for the trip later, including the Appellant. Berjawi and Sakr were arrested in Nairobi in early 2009 and deported from Kenya to the UK.

10. The Appellant made three submissions in his appeal, which were helpfully placed at the head of the skeleton argument prepared by his counsel. They read as follows:

> "(i) The Appellant has a positive case that he wishes to put in rebuttal of the Security Service assessments and the Respondent's conclusions;
>
> (ii) That the Appellant's positive case demonstrates that he does not pose any (or any sufficient) risk to national security

> and, accordingly, that there is no adequate basis upon which he should be deprived of his citizenship; and
>
> (iii) The Appellant is unable to provide his instructions as to the national security case against him and/or to participate meaningfully in his appeal for the reasons set out below as it is unsafe for him to do so."

11. The Commission naturally anticipated that all of these issues would be addressed in the substantive appeal. However, at the beginning of the appeal, firstly in CLOSED and then OPEN hearing, the Special Advocates acting for the Appellant indicated that they felt unable to address the substantive case on national security. They requested that a statement of their position should be communicated to the OPEN representatives in the following terms:

> "The SAs have considered the approach that they should adopt to further the interests of K2 in the circumstances of this appeal. There are two sets of issues which arise:
>
> (1) The substantive case on national security on which the SSHD's decision to deprive K2 of his citizenship was based;
>
> (2) The procedural fairness of the appeal.
>
> In the absence of any instructions from K2 as to the substance of the SSHD's OPEN case on national security, the SAs consider that they are not realistically able to make any submissions or challenge in relation to that case in CLOSED beyond expressing general support for K2's position in that regard (as set out in the Opening Note lodged on his behalf). In the circumstances, the SAs do not consider that it could advance K2's interests for them to seek to engage with the CLOSED national security case.
>
> Notwithstanding the position in relation to the national security case, the SAs will seek to advance K2's position in CLOSED in relation to issues of procedural fairness."

12. Following discussion in CLOSED session, the Commission considered the position adopted by the Special Advocates and the proper way to proceed. Several points must be addressed here. Firstly, we recorded our respect for the care and scrupulous approach adopted by the experienced Special Advocates in this case. Secondly, we recorded our own view that the Special Advocates were in fact well-positioned to represent the Appellant by testing the case of the Secretary of State. Next, we indicated our view as to the importance of the role of Special Advocates in ensuring fairness, given the constraints of SIAC procedure. Next, we acknowledged that there are precedents for the view taken by the Special Advocates: such a situation has arisen previously, perhaps most notably in 2004 and 2007 in relation to the SIAC appeals by Abu Qatada. Finally, the Commission accepted (as did Mr Eicke QC on behalf of

the Secretary of State) that, until the moment when the Appellant's submissions in the appeal had finally crystallised in the form of the skeleton argument at the opening of the appeal, it was not appropriate for the Special Advocates to take a final position as to their own role in the appeal.

13. With these considerations in mind, and despite a considerable sense of frustration, we concluded that we should proceed only with the third issue advanced on behalf of the Appellant, namely, whether he is or is not able to provide instructions as to the national security case against him and/or to "participate meaningfully in his appeal". The hearing therefore proceeded to address the procedural fairness issue only. As a matter of fact, the majority of the evidence sought to be advanced in the hearing bears on this rather than on the substantive national security issues. That decision was accepted by Mr Eicke QC as appropriate in the unusual circumstances.

14. We therefore turn to that aspect of the case. As we do, it is important to bear in mind one matter of context. As Laws LJ observed, in the course of the appeal in judicial review proceedings:

> "In addition I consider that Mr Eicke QC for the Secretary of State was right to submit that the reason why the Appellant must conduct his appeal from outside the United Kingdom is not, in fact, the Secretary of State's decision to exclude him. The Appellant had, it will be recalled, fled the United Kingdom before he was required to surrender to his bail in 2009. Once the Secretary of State's order under s 40(2) of the 1981 Act was made, the Appellant would have required an entry clearance to enter this county: he no longer had a right of abode as a British citizen and had no subsisting leave to enter or remain. He would plainly have been refused entry clearance given the Secretary of State's substantive view that his exclusion was conducive to the public good… In those circumstances Mr Southey's case on this part of the appeal must be that the Secretary of State owes his client a positive statutory duty to facilitate his return, outside the Immigration Rules, to conduct his appeal. There is no statutory provision which begins to have such an effect." (see *R(G1) v SSHD*, paragraph 16)

The Issue of Procedural Fairness

15. The Appellant's complaints as to the practical fairness of the proceedings can be summarised as follows. He continues to live in Khartoum North. He says he can communicate with his UK solicitors only by intermittent mobile telephone calls. He is fearful for his safety given the allegations against him that he is a terrorist. These have been made by the UK authorities and he believes may have been communicated by them to the Sudanese authorities or indeed to the United States. Some allegations are in the public domain. He "is unable to speak to his representatives about the detailed reasons as to his fears and specifically, why and from whom". He is fearful that his movements and communications either are subject to surveillance, or are likely to be, by the Sudanese security authorities and perhaps by other counter-terror agencies.

As a consequence he believes that by seeking to communicate with his representatives or the court by video link or by other remote means, he will be placing himself at serious risk of harm. Hence he is "prevented from participating in his appeal" and his appeal rights are ineffective.

16. In the course of the judicial review proceedings the possibility was raised by Mitting J that, if the Appellant was concerned about confidentiality in communications from Sudan, he might travel to a third country to give instructions. The Appellant has raised concerns about this possibility as well. In a letter from his solicitors of 27 November 2013 the suggestion is raised that he is the subject of a flight ban preventing travel. The letter suggests that there is an obligation on the Secretary of State to confirm whether the UK government has sought to secure a flight ban or other travel restrictions.

Statements from the Appellant and his Solicitors

17. The Commission received written statements from a number of the solicitors who have acted for the Appellant. All are, or were, working for Messrs Birnberg Peirce and Partners. On 14 September 2010 Smita Bajaria explained that she had been instructed on behalf of the Appellant in the judicial review proceeding since June 2010. She had been in "email correspondence and mobile contact" with the Appellant and with his wife and considered it was very difficult to be sure that these are secure forms of communication. She reported that the Appellant was worried for his own personal safety because of his own father's political history in the Sudan. The Appellant informed her that he had been advised by a lawyer in Khartoum that it would be potentially dangerous to communicate with the Sudanese authorities so as to try and obtain a passport. Ms Bajaria reported delays in obtaining the legal aid forms which had been sent to the Sudan for completion and signature.

18. Ms Gareth Peirce made a statement on 3 June 2011. It is not clear that she has had any direct dealings at any stage with the Appellant. Her statement is general, suggesting that face-to-face contact with clients is desirable and that in cases where national security is involved "it is impossible to engage in the task of detailed discussion unless and until those persons we represent have developed a significant degree of trust in us as their solicitors and have essential assurances that the circumstances in which they are speaking to us are not overheard by any other person".

19. A further witness statement from Smita Bajaria has been submitted, made in a different case. We have read it nevertheless. The burden of the witness statement, dated 11 February 2011, is to set out the difficulties encountered "when representing those who, for whatever reason, are prevented from conducting their appeal from within the United Kingdom". The statement deals in general terms with difficulties arising where face-to-face contact is not possible and where there either is a lack or is thought to be a lack of secure and reliable means of communication.

20. We have also received a statement from Benjamin Croft, dated 3 June 2011. He states that he took over conduct of the SIAC appeal from Ms Bajaria in February 2011, subsequently also becoming responsible for the judicial

review. He has never met the Appellant. Mr Croft indicates that he has found telephone communication with the Sudan unreliable: only around half of the attempts to telephone the Appellant have been successful. Telephone conversations can frequently be cut off. Mr Croft explains that both Ms Bajaria and he have taken advice on the possibility of their travelling to the Sudan. We infer from some of the content of the statement that the advice received was from a gentleman called Peter Verney. Mr Croft explains that the advice received was that there was "a potential risk to legal advisers" derived from the "often seemingly arbitrary nature of the responses of the Sudanese authorities to the presence of foreigners". Foreign visitors might be regarded with suspicion by the authorities and the visit interpreted as corroboration of the suspicions as to the applicant. As a consequence of that advice, and having considered the Foreign and Commonwealth Office advice on travel to Sudan with other publicly available material, the solicitors concluded it was inappropriate to visit the Appellant to take instructions.

21. Mr Croft goes on to explain that the Appellant's views are also highly mistrustful of communications. The Appellant feels unable to engage with the appeal process. Mr Croft reports that the Appellant would not wish to take advantage of video conferencing facilities in the larger hotels in Sudan as these cater for diplomats and high-ranking Sudanese officials, not for local Sudanese people. He reports that the Appellant fears attracting attention in attempting to enter such hotels. He believes it would not be possible to reserve video conferencing facilities without the reason for the reservation becoming known, particularly in the light of the need for repeat sessions. Mr Croft explained that the Appellant had said he was unwilling to provide information over the telephone. Mr Croft expresses concern that taking instructions which might not be confidential might breach his professional responsibilities.

22. The latest statement from a solicitor is that of the Appellant's current solicitor, Ronald Graham. He has had conduct of the SIAC appeal since February 2012. He confirms that his experience corresponds with those of the earlier solicitors. He is in contact with his client by telephone, speaking to him about three times a month. It can be difficult to reach him, and the client is clearly anxious about speaking on the telephone. Mr Graham adds this:

> "He has made it clear to me that he has a positive case he wishes to make to explain his circumstances, but that he is frightened and isolated and does not feel safe to do so. He is very guarded as to what he will discuss with me in relation to the case."

23. SIAC practice requires that parties should submit a position statement summarising their case. In the position statement drafted by Mr Graham of 7 December 2013, Mr Graham set out what he said are the obstacles to secure communication at length. He has "exhaustively discussed" communication with the Appellant. The means of communication so discussed include telephone, email, Skype, video-link, asking a visiting family member to bring back instructions in person and the use of the courier service, DHL. The Appellant instructs Mr Graham that he has reason to fear that none of these

means of communication is safe. He believes that his telephone calls are subject to monitoring and "he does not trust electronic communication devices, and I have no basis on which I am able to reassure him that they are secure". The post is thought to be subject to interception and, likewise, DHL. The Appellant went on:

> "He does not want to rely on visiting family members to bring back in person instructions to his lawyers in the UK as he considers that he would put them at risk in doing so."

24. Mr Graham states that he has not felt it possible to establish what can and cannot be discussed with his client. He gives the example of the two men who, according to the Secretary of State, were the Appellant's associates. Mr Graham has not mentioned the names of these two men to the Appellant, for fear that the names would "trigger adverse attention". He is unaware whether the Appellant knows that they have been killed. Mr Graham has not even obtained instructions about who the Appellant travelled with in October 2009.

25. Mr Graham is clear that he has instructions to the effect the Appellant wishes to make a positive case, rebutting the allegations against him.

26. The Appellant's case is of course a denial of Islamist extremism. However, part of his concern is that the Sudanese authorities may believe him to be an Islamist extremist because of the actions taken by the British government. When he says that he wishes to advance a "positive case" in relation to the substantive allegations, our understanding is that he wishes to deny Islamist engagement and explain in detail why the Home Office suspicions are ill-founded. In our view, it does follow that anything he communicates to his lawyers will be of a nature and intended to exonerate him, not implicate him in Islamist activity. It may well be that his account would still involve information of interest to NISS or to UK Security Services. However, that is little to the point. His "positive case" must be taken to be exculpatory of activity justifying the decision challenged and thus exculpatory of activity which he fears may bring hostile interest from NISS.

27. We have begun by setting out the evidence of solicitors as to the taking of statements and the position statement drafted on his behalf. Two statements from the Appellant do exist. The first is unsigned and undated but clearly pre-dates the obtaining of Sudanese passport and identity documents in 2011. In the course of that witness statement the Appellant explained he has approached the Sudanese civil registry and the Ministry of the Interior and was informed that he was not a Sudanese citizen. He pursued the matter with a lawyer who declined to assist and "advised me not to pursue my enquiries on the grounds that it could make problems for both me and him with the authorities if I am persistent in raising these matters owing to my father's political problems". This statement goes on to deal with the Appellant's fear of communication. It was deployed in the appeal to seek to show the Appellant would be stateless. As we have said, he subsequently has approached the authorities, obtained the passport and is not stateless.

28. A second witness statement, again unsigned and undated, is submitted. The Appellant describes how he left England in panic at the prospect of what he believed would be a lengthy prison sentence arising in the case of violent disorder. The Appellant describes his life in the Sudan as very quiet and he keeps a low profile. He teaches part time, goes to the gym, watches television and plays football. He says he is socially isolated. He avoids travel but sees his extended family regularly. His routine changes when his mother comes to visit in Sudan. He describes the deterioration in the political and economic situation in the Sudan. He describes a "general climate of suspicion, particularly of newcomers or strangers". At the time of this statement the Appellant communicated with his wife, when she is in England, mostly through the internet-based software "WhatsApp".

29. The Appellant acknowledges that he has a Sudanese passport but states that he understands it is not possible for him to travel outside Sudan using this passport: "I do not want to go into that". He states that he knows of no way to communicate safely with his lawyers, even by buying a new SIM card for a mobile phone. When buying a new SIM card in Sudan there is an obligation to register it in your name with the seller and show your identity document. He would not use someone else's phone to communicate with his lawyers because he would fear this would put them at risk.

The Appellant's Family

30. Another dimension to the Appellant's concern appears to arise from his family history. As indicated, we have two short statements from the Appellant, and we also have statements from his mother and brother. None of them – even the statements from relatives living in the UK – set out the circumstances of the Appellant's father's political engagements in relation to Sudan. However, one of the expert witnesses in this case (who we shall call Mr B) was instructed about the Appellant's father by his solicitors in the following terms:

> "K2's father had fled Sudan and claimed asylum in Britain previously, was granted settlement as a refugee, and is an UMMA party member and a journalist with a track record of opposition to the Bashir regime."

That history does not appear to be challenged by the Secretary of State. The evidence of Mr Larkin, summarised below, is consistent. As we understand it, the Appellant's anxiety about giving instructions and conducting his case from Sudan is compounded as he fears that his father's political engagement may mean more negative attention for him. As we shall see below, at least one of the expert witnesses addresses this issue in somewhat different terms.

31. In his witness statement of 24 June 2011, made in the judicial review proceedings, Philip Larkin, a senior official with the UK Border Agency, dealt with the father's position based on sight of the father's asylum claim. Mr Larkin accepts that the father sought asylum successfully in the United Kingdom due to a fear of persecution at the hands of the Sudanese authorities because of criticism of the regime. The Appellant's father entered the UK in 1991 with the Appellant's mother. After a short stay in the UK, the

Appellant's mother returned to the Sudan. The Appellant's father remained and was granted refugee status on 1 April 1993.

32. Mr Larkin notes that at the time of the asylum claim there was little or no suggestion that the Appellant's family were at risk as a result of the Appellant's father's actions. When the father left Sudan all the children remained behind in the Sudan. The mother returned voluntarily to the Sudan. In considering the father's asylum claim, as Mr Larkin observed:

> "His asylum claim makes minimal mention of problems his family in Sudan faced due to this own political opinions. In particular, just after the father fled Sudan, when presumably interest in him would have been at its highest, the worst the claimant's mother was said to face (according to the evidence of the claimant's father provided at the time) was to have been questioned and occasionally followed with a further unspecified claim that as a family they were being continually harassed and threatened with "fear they would not see each other again", a claim that was never further explained or expanded upon."

33. We return to Mr Larkin's evidence later in the closed judgment.

34. The Appellant's mother begins by describing the appellant's departure from the UK in October 2009. On her account she was unaware of where he had gone until the police informed the family that the Appellant had left the UK. On this account neither the Appellant's mother, father nor his wife, knew where he was.

35. Some months later, in March 2010, K2's mother went to visit her brother, living in Sudan, who had recently had a stroke. The Appellant's wife "volunteered to come with me to support me". It was also the case that the trip would allow K2's wife to visit her grandmother in Sudan. Before leaving the airport the mother was questioned and informed the authorities that she did not know where the Appellant was. Her statement goes on to explain that rapidly after arriving in Khartoum she found out from her oldest sister that the Appellant was in Khartoum, staying at the sister's house. Her account goes on:

> "… but she didn't tell me how long he had been there. She said [K2] had stopped her telling me any earlier, over the phone, that he was in Sudan. This was because he was very scared because he had run away to avoid his trial. He had told them he would leave them if they told me he was there. They were worried about what would happen to him if he did that. I telephoned [K2's wife] and told her to come to my brother's house where I was staying and when she got there I told her that [K2] was in Khartoum. She was so happy to hear he was safe and he was there so she could see him too."

36. The Appellant's mother travelled to Sudan again a number of times before making her statement, in May 2010, February 2011, April 2013 and December 2013. From the first visit the Appellant's wife remained in Sudan and says she lived with her husband in Khartoum, becoming pregnant. The wife returned to England to give birth in February 2011. For periods during 2012 and 2013 the Appellant was living with his in-laws in Sudan. His wife returned to Sudan after the birth and, according to the mother's evidence, then went to stay in Saudi Arabia. When his mother came for her visit in April 2013, she and the Appellant then rented a flat in Khartoum. On her account she felt that she was being watched during this period and she describes a number of episodes which gave her that impression.

37. When the mother returned to Sudan for the fifth visit in December 2013, she stayed for a period of six weeks in the same flat, living with her son. The Appellant's younger brother and sister were also there. The Appellant's mother paints a picture of the Appellant as being tense and sad when his family eventually returned to the UK in early 2014. However, she gives no evidence in relation to this last visit suggesting that her son or the family were under any surveillance.

38. The Commission has received an undated and unsigned witness statement from the Appellant's older brother. He is a pharmacist. He confirmed the account that the family was not aware where the Appellant had gone when he breached his bail. On his account also, it was when the mother reached Sudan that she found that her son was there. This brother describes travelling to Sudan in 2010 when his uncle was ill. His statement recounts how he tried to see his K2:

> "… but I couldn't get to see him. My mother told me [K2] wasn't well. He was very depressed. He was terrified the authorities were going to come after him because of his court case and was very afraid and wouldn't go out."

39. The older brother states that he does not speak to K2 often on the telephone but "we do message each other". He never talks about his brother's case:

> "I have never felt that I could talk to him on the phone about his case in any way at all."

Publicly Available Material

40. The Appellant has submitted a large quantity of publicly available material, much of it from the media. It is unnecessary to analyse this in detail. In short summary, the Appellant firstly relies on this material to show that Berjawi and Sakr were killed by drone attacks in Somalia (not the Sudan). There is reporting of other Islamist suspects being stripped of British citizenship. There is public material suggesting cooperation between the security services of the UK and the Sudan, and between the services of Sudan and the US. There is further material suggesting intelligence cooperation between the Sudan and Somalia, and indeed more broadly within the Horn of Africa.

41. More pertinently, there are critical reports from Amnesty International, the US State Department and in the form of a UKBA Country of Origin Report, addressing human rights practices in Sudan and in particular the track record of the Sudanese security service, NISS. A few passages will suffice to give the flavour of this material. The 2012 country report on Sudan from the United States Department of State concludes that:

> "The interim national constitution prohibits such practices; however, government security forces continued to torture, beat, and harass suspected political opponents and others.
>
> … arbitrary arrests and detention, including of UN employees, were common. The UN reported NISS arbitrarily arrested a local UN security guard and UN translator on December 25 in Nyala, South Darfur.
>
> … the government monitored private communication and movement of individuals without due legal process. A wide network of government informants conducted surveillance in schools, universities, markets, workplaces and neighbourhoods. … The government monitored internet communications and the NISS read email messages between private citizens. The National Telecommunications Corporation blocked some websites and most proxy servers deemed offensive to public morality. … During the June and July anti-government demonstrations, authorities blocked access to several popular on-line discussion forums. Security agencies also arrested several bloggers during this period, and commentators speculated the government used social media to track and arrest protestors."

42. The United States Department of State published a further report on 30 May 2013 under the heading "*Country Reports on Terrorism 2012 – State Sponsors of Terrorism: Sudan*":

> "Sudan was designated as a State Sponsor of Terrorism in 1993. Sudanese officials regularly discussed counterterrorism issues with U.S. counterparts in 2012 and were generally responsive to international community concerns about counterterrorism efforts. Sudan remained a cooperative counterterrorism partner on certain issues, including al-Qa'ida (AQ)-linked terrorism, and the outlook for continued cooperation on those issues remained somewhat positive. The Government of Sudan continued to pursue counterterrorism operations directly involving threats to U.S. interests and personnel in Sudan. Sudanese officials have indicated that they view continued cooperation with the United States as important and recognize the potential benefits of U.S. training and information-sharing. While the counterterrorism relationship remained solid in many aspects, hard-line Sudanese officials continued to express resentment and distrust over actions by the

> United States and questioned the benefits of continued cooperation. Their assessment reflected disappointment that Sudan's cooperation on counterterrorism, as well as the Sudanese government's decision to allow for the successful referendum on Southern independence leading to an independent Republic of South Sudan in July 2011, have not resulted in Sudan's removal from the list of state sponsors of terrorism. Nonetheless, there was little indication that the government would curtail its AQ-related counterterrorism cooperation despite tensions in the overall bilateral relationship."

43. On 11 September 2012 the UKBA published its country of origin information report on Sudan. The report cited extremely low rankings for protection of human rights. Much of this concerned the separation of South Sudan from Sudan and the aftermath of that process, or was focused on the very serious regional problems in Darfur. Nevertheless, there can be no doubt that the assessment of human rights is grave. The report deals with the activities of NISS, including local security in the country itself and the suggestion that "NISS has powerful international information-gathering organs", monitoring the international press for the activities of rebel affiliates abroad. A specific section of the report deals with international information bearing on human rights violations perpetrated by NISS, again citing arbitrary arrest and detention and ill-treatment and torture for political detainees. A range of press reports and reports on specific aspects of the Sudan from non-governmental organisations paint a broadly similar picture as to the treatment of political activists.

44. Essentially, this broad picture is not challenged by the Secretary of State. Her case is that the evidence surrounding this individual Appellant means that he is unlikely to be the focus of such hostile attention and that he will be able to conduct his own appeal fairly and effectively, despite the conditions prevalent in Sudan.

45. Some of the publicly available material produced is of more direct relevance to this Appellant. In 2013 a newspaper carried the reports of four men, including the Appellant, being stripped of citizenship. The first two were Berjawi and Sakr. The report continued in relation to this Appellant:

> "A third friend, [K2], 31, also from west London, has been linked by the Ugandan media to bombings claimed by al-Shabaab in Kampala in July 2010. A total of 74 people died in the attacks as they watched the World Cup final at two bars.
>
> [K2's] father [.....] told us that his son had also been stripped of his British citizenship. But he denied that [K2], who came to the UK from Sudan aged 10, had ever travelled to Somalia or had joined al-Shabaab. "He has never been involved in such a thing," he said.

> [K2's] father claimed his son had moved back to Sudan five years ago and was appealing against the decision to remove his British passport."

46. The other reports were in almost identical terms. In each case, the report carried the denial of Islamist activity by this Appellant made by his father.

47. The final section of the publicly available material consists of print-outs of a small number of Nigerian on-line news sites or blogs. They all date from late September 2012. A Nigerian airline, Arik Air, was apparently in major dispute with Nigerian regulators, aviation workers' unions and the Federal Airports Authority of Nigeria [FAAN]. The airline was heavily indebted and unable to meet all its financial obligations. As a part of this dispute, Arik Air issued an updated list of passengers banned from Arik Air flights. The list contained 22 names in all, the first name being that of the Managing Director of FAAN. However, on the list were a number of individuals who were banned "for terrorism", including K2 who was identified by name and nationality. There is no evidence before the Commission that this publicity ever reached mainstream British media or Sudanese media or was drawn to the attention of NISS. There is no evidence as to whether Arik Air ever flies to, or from, the Sudan. There is no evidence suggesting that any other airline has placed the Appellant on a blacklist.

48. The Commission has been shown a copy of a RALON AIRLINE INFORMATION ALERT. The RALON notice produced is a sample in respect of a different individual. However the Secretary of State's case is that such notices are in standard form. The relevant text reads as follows:

> "The above-named has been excluded from the United Kingdom (UK) at the direction of the Home Secretary. He has also had his British citizenship withdrawn and his British passport is therefore no longer valid for travel. He is understood to be in Sudan and is likely to attempt to travel on a direct or indirect route to the UK using either the British passport or a Sudanese passport.
>
> <u>He is not eligible to travel to the UK, even in transit</u>. Should he be carried he will be refused entry and the airline will be liable for detention and removal costs.
>
> Any airline carrying him to the UK may be liable to a charge of £2000 under Section 40 of the Immigration and Asylum Act 1999 (as amended) and to costs related to detention and removal."

49. The Commission understands that such a notice was issued in respect of the Appellant, and may have been the basis of Arik Air's blacklist. The Secretary of State points out that such a RALON notice does not seek to ban the subject from flying on any airline, or to any destination except the UK.

Expert Witnesses for the Appellant

50. The Appellant called three expert witnesses to give oral evidence and submitted two written reports from a fourth. Jo-Anne Prud'homme is a senior researcher with the organisation One World Research, a public interest research firm based in London and New York. Ms Prud'homme has no individual expert knowledge of Sudan. She has a Masters degree in International Human Rights Law and has extensive experience as a project-based researcher with a special focus on human rights.

51. Ms Prud'homme was asked in October 2013 to research the capacity of the Sudanese government's intelligence and security services. She did so by carrying out interviews with eight individuals with knowledge of Sudan. There is no indication they knew the Appellant or the detail of his story. Following a request by the Commission, she identified them accurately by description as follows:

> "Interviewee A is a human rights lawyer currently living outside Sudan in exile, with family members still living in Sudan.
>
> Interviewee B is an NGO worker and international expert on Sudan, living outside of Sudan.
>
> Interviewee C is a lawyer and social rights advocate currently living outside Sudan in exile, with family members still living in Sudan.
>
> Interviewee D is a lawyer and academic currently living outside Sudan in exile, with family member still living in Sudan.
>
> Interviewee E is an NGO worker and social rights advocate currently living outside Sudan in exile, with family members still living in Sudan.
>
> Interviewee F is a researcher and international expert on Sudan, living outside of Sudan.
>
> Interviewee G is a youth and social rights advocate currently living outside Sudan.
>
> Interviewee H is a researcher and international expert on Sudan, living outside of Sudan."

52. The interviewees gave their assistance on the basis of an undertaking of confidentiality. It follows that all of the evidence presented by Ms Prud'homme is hearsay and some of it is material suggested to the informants by others and thus double hearsay. Ms Prud'homme was able to say that the information she was presenting was consistent with her own knowledge of Sudan but could say no more. Before undertaking the research she had not

been briefed as to SIAC procedures and the capacity to receive closed evidence.

53. Dr YZ is a lawyer at a significant NGO, in addition to being a lecturer in law. Dr YZ has visited Sudan several times. He has a special interest in criminal law and human rights in Sudan.

54. The third expert who gave oral evidence we have agreed to call Mr B. The Commission has seen full details of his identity and curriculum vitae. He is a scientist of Sudanese nationality now living in Europe, but in close touch with the Sudan. He does not know the Appellant or, indeed, his identity. When compiling his evidence and, indeed, giving much of the oral evidence he did, Mr B was under the impression that his evidence would be confidential. It is for that reason we have agreed to anonymise him. His concern was that if the evidence became known to the authorities in Sudan it might excite NISS suspicion and he might, as a consequence, be interrogated. He made it clear he would still return to the Sudan even if that was in prospect.

55. The picture given by the three experts is broadly consistent with the published material we have already summarised. In relation to the character and capacity of NISS, Dr YZ emphasised the formal responsibilities and powerful constitutional position of NISS, stating that:

> "NISS is considered as one of the most powerful bodies in Sudan. The director has traditionally been a leading figure close to the presidency. In situation of extreme threats … it was the NISS that was deemed the most reliable, rather than the army. The NISS itself is provided with a large budget and is well-equipped."

56. Dr YZ confirmed that there have been established cases of torture at the hands of NISS personnel and cited reports from Human Rights Watch, Amnesty and the United Nations. He has been detained himself by NISS but not mistreated. He felt that Sudanese detained by NISS were at more risk. Part of his overall account was to emphasise the lack of accountability for mistreatment. So far as he was aware there had been no prosecutions for such mistreatment and the level of complaints was significantly depressed through fear.

57. Mr B presented a consistent general picture of NISS. Its record of torture, detention and sequestration of detainees in "ghost houses" was established. The population was cowed in the face of NISS. The organisation had the right under Sudanese law to detain for up to four and a half months without judicial review. He emphasised that it was objectively hard to judge how NISS would behave in a given situation.

58. The experts variously considered the capacity for surveillance by NISS. We begin with telephone intercept. Ms Prud'homme's interviewees believed that NISS had the capacity to intercept telephone calls. There was a legal requirement to register cell phones on purchase so that the state had a record of the identity of the individual. Ms Prud'homme agreed that there was an established market in unregistered SIM cards and at least at one point, the state

had threatened to discontinue or disrupt the use of SIM cards which were unregistered.

59. However, under cross-examination Ms Prud'homme agreed that there were ways around this registration. The law was not properly enforced. She was unable, on the basis of the information given to her, to state how sophisticated the NISS intercept capacity might be. It certainly happened on occasions. There was a consistent picture of international calls showing on a mobile telephone as being of local origin. The explanation which had been communicated to her was that the local number of NISS came up on the display. More than one informant told her that the telecommunications companies were closely connected to the state and their employees were screened before being employed. Dr YZ was unable to give any further evidence on this since he was not an expert on the point, but he was aware from the cases he had done that NISS had tried to improve its technical capacity. Mr B's evidence did not focus on technical capacity at all.

60. Ms Prud'homme addressed the question of surveillance of internet communications. Her informants suggested that Sudanese authorities were able to tap into the internet and, in particular, email, texts and social media. Those who were detained were often asked to provide passwords they had used in relation to social media. Her informants were not able to describe the extent of NISS capacity to tap into the net and she was unable to say in cross-examination if NISS was able to access social media without being given the relevant password. She did report a common stratagem amongst her informants of using alternative text messaging systems, such as WhatsApp and Viber, as a means of avoiding surveillance. Neither Dr YZ nor Mr B could add anything on this topic.

61. In relation to communication through Skype, Ms Prud'homme was able to say that many of her informants thought it was insecure, but there was no clear basis for this belief. Other interviewees did not think that the Sudanese authorities could monitor Skype. Neither of the other experts could add anything on this front.

62. In relation to personal surveillance, Ms Prud'homme's informants certainly confirmed that this was actively used by NISS. Straightforward "tailing" happens regularly. Variously it was suggested to be a means of gaining information or perhaps simply an effort to intimidate those being watched. On this topic Dr YZ did add that informing was fairly widespread within the Sudanese community. Both he and more than one of Ms Prud'homme's informants emphasised that Sudanese culture is very public. Western/Anglo Saxon notions of privacy were foreign to Sudanese society. People would listen to conversations of others and pass them on through neighbourhood groups or committees. The authorities were regularly given information in this way.

63. All three experts were able to give some information about the focus of interest by NISS. All three echoed material in the published evidence that the central focus of NISS was on internal opposition. That might be defined fairly widely, including human rights activists or civil society activists, and Dr YZ

added to that list "extremists". Ms Prud'homme's informants suggested that Islamists, even extreme Islamists, were not generally targeted unless they were dissidents or splinter groups from the NCP. That point was reinforced by Mr B. NISS would be more inclined to be interested in an Islamist if asked to take an interest by the US or the UK. Dr YZ was of the same view.

64. The experts were then asked to focus on the question of whether NISS would have specific interest in the Appellant. Ms Prud'homme indicated she really could not help on this issue. She could only give generic indications. Dr YZ and Mr B both gave thought to the Appellant's father and family background. Neither gave any evidence to suggest that the Appellant would be positively at risk because of his father's activities. Mr B did say that the Appellant's father's position would mean that that side of this family at least, would be poorly positioned to mediate with the authorities if NISS did show an interest in the Appellant.

65. Both Dr YZ and Mr B gave evidence quite strongly that they would assume the Appellant had already been under surveillance, that NISS knew him, knew of the allegations against him and had likely been monitoring him since his arrival. Yet he has been neither detained nor, indeed, approached. Mr B stated that it was "fanciful to assume that the Sudanese authorities are unaware of K2's alleged record". Mr B felt the Appellant would be stopped at a border crossing and that the intelligence agency would attempt to stop him leaving the country.

66. Dr YZ stated that the risk would rise if the Appellant took steps of interest to the authorities or did anything which appeared to be damaging to Sudan or to the ruling party. He agreed that the period of time now elapsed without any interference might "give some reassurance". Dr YZ stated that to leave the country, the Appellant would need an exit visa. Leaving required security clearance. An attempt to leave might well bring the Appellant to the attention of NISS. Mr B agreed.

67. Dr YZ was asked directly whether letters transported by the family or sent to the family in the UK would be secure, whether phone calls to England would be likely to be secure, whether letters to lawyers in England would be secure, and in each case he said that he was unable to say. He was also unable to say if meetings with Sudanese lawyers would be secure. Mr B did say that contact with foreign lawyers might be "interpreted as passing information to foreign agents".

68. Both Mr B and Dr YZ were asked to focus on the fact that NISS had not approached the Appellant over, what is now, four years in the country and against a backdrop of the assumption that NISS knew about him and knew the allegations against him. Dr YZ did not accept that there was no risk to the Appellant. The recent attack in Kenya had lifted awareness in the region of Al-Shabaab. The risks to him from NISS were dependent on what he was thought to be engaged in and what he might be discussing in any conversation of which NISS became aware. The risks to him and his family depended on their continuing conduct. If the Appellant did nothing hostile to the authorities they might simply monitor his movements and that would be all. It was put to

Dr YZ that the Appellant was known, that he had been quiet whilst in Sudan, that his family came back and forth, that he had obtained an identity document and a passport and that it was clear nothing had happened more than monitoring of his movements. Dr YZ agreed nothing else might occur.

69. Both Dr YZ and Mr B were clear that the Appellant's historic British nationality would be protective of him. As Mr B put it, the Appellant would be "shielded by his disputed UK passport". That would make a difference to the Sudanese authorities: as long as it is subject to litigation they will "hold back until that is decided". That evidence was consistent with the view of Dr YZ.

70. The Appellant further submitted two statements from Dr AD, who is an advocate and international human rights lawyer. He is himself Sudanese and has had a distinguished career abroad. He has for some time now been able to move between Khartoum and Europe.

71. Dr AD's first statement consists of answers to questions. He, too, paints a negative picture of the state of human rights in Sudan. He notes that the regime in Sudan is itself a fundamentalist Islamic regime although "it dare not openly protect jihadist or fundamentalist elements. The reason for this is the pressure (both political and economic) brought upon the government by the US and other western powers, which the regime cannot stand against". Dr AD stated that he did not "believe that a discreetly arranged meeting with British or other lawyers in Sudan would in itself necessarily expose K2 to any risk or hazard unless of course K2 himself feels he is already under continued supervision and watch in which case it may trigger interest. In that case, he is likely to be questioned about his reasons for meeting foreign (or national) lawyers or persons." Dr AD's view is that there is no guarantee that telephone or internet communications are immune from surveillance. That risk depends on whether the NISS "consider him a security risk to the Sudan. Surveillance of correspondence, telephone tapping, etc is usually aimed at what the NISS considers as active opponents of the regime. Islamic fundamentalists as such are not so classified at present." Dr AD also notes that persons such as K2 "who do not pose a threat to the government, may only be watched in case they prepare … to leave the country".

72. Dr AD makes the general point that NISS can produce "oppressive reactions on little evidence". He notes that the Minister of Interior may prevent the issue of a passport or of an exit visa. In his first statement he concluded as follows:

> "Concerning the national security allegations made against your client and reported in the media, it is almost certain these are known by the NISS. So is the fact that his father is a known political opponent with refugee status in the UK. K2's intention to leave the country may in the circumstances be looked upon adversely, or even prevented, by the security organisation."

73. In his supplementary statement Dr AD was asked to comment on the feasibility of establishing a video link, particularly using one of the multinational companies or five star hotels in Khartoum. Dr AD was not aware of any lawyers in Sudan who have such a facility. His view is that it would not be possible to use a video link from a video conferencing suite or hotel "without the permission of the NISS". A request to communicate via video link with London would "undoubtedly" be referred by hotel staff to the NISS and permission would be withheld.

The Appellant's Submissions

74. The Appellant accepts that the judgment of the Court of Appeal in this case means he cannot argue it was unlawful to exclude him once deprived of his nationality nor can he argue that an appeal exercised from abroad is inevitably unfair. Mr Southey QC relies on the decision of the Court of Appeal in *R(Q and others) v SSHD* [2003] EWCA Civ 364, where the Court of Appeal addressed the minimum requirements of a fair procedure, emphasising that fairness depends on the context and circumstances of the case. Mr Southey took the Commission to paragraph 70 of *Q and Others*, where the Court quoted from the well-known passage in the speech of Lord Mustill in *R v Home Secretary ex parte Doody* [1994] 1 AC 531 at 560 to that effect.

75. Mr Southey also relies on Rule 4(3) of the SIAC Procedure Rules 2007 and in particular that the Commission "must satisfy itself that the material available to it enables it properly to determine proceedings". He submits that, in the context of appeals to SIAC where some departures from normal principles of fairness have been authorised by parliament, the Commission "should be particularly zealous in safeguarding other aspects of fairness". The importance of procedurally fair decisions was addressed by Lord Reed in *R (Osborn) v The Parole Board* [2013] 3 WLR 1020 at paragraphs 67-71 where, in the different context of Parole Board hearings, it was held that those affected "ought to be able to participate in the procedure by which the decision is made provided they have something to say which is relevant to the decision to be taken…" (see paragraph 68). Mr Southey draws those different strands together and makes the overarching proposition that:

> "Where an appellant is unable to participate effectively or at all in proceedings and is denied an adequate opportunity to rebut the case against him because of legitimate and well-founded fears that to do so would create a risk of serious harm, the Commission is unable to ensure that all relevant material is before it. It therefore cannot effectively review the lawfulness of the decision under appeal or comply with the statutory duties summarised …. This results in a fundamental breach of national justice and fairness such that the procedure cannot be regarded as lawful."

Submissions of the Respondent on Law

76. The first key proposition advanced by the Secretary of State is that the Appellant is wrong that the decision of the Court of Appeal in relation to this

Appellant is confined to matters of principle: the decision was, Mr Eicke QC submits, a decision on the facts. The Court of Appeal quoted from the decision of Mr Justice Mitting at paragraphs 9-11, with the effect that there are ways in which the Appellant can give his evidence. Mr Eicke relies on the observation of Mitting J that:

> "It must as a matter of principle be for the Claimant to demonstrate…"

that he cannot do so (see paragraph 11).

77. Mr Eicke relies on the approval by Laws LJ in paragraph 25 of the Court of Appeal judgment that the burden of proof on this issue lies upon the Appellant, since he:

> "was and is asserting a positive claim that the Court should direct the Secretary of State to facilitate his return to the United Kingdom in circumstances where there is no warrant in the legislation or rules for any such obligation."

78. Mr Eicke also relies upon the approval of the observations by Mitting J that an order to return the Appellant:

> "…would, if he were found to pose a threat to national security, frustrate a decision which would, by then, have been established to be lawful and justified. In my judgment, the Defendant cannot be criticised for refusing to take a step which would, in all probability, have the effect of frustrating a decision which, if upheld on appeal, would have been lawfully and properly taken in the interests of national security."

79. Mr Eicke submits that the fact that the Commission is concerned with a "full merit statutory appeal" is immaterial: that was what was in question before Mitting J and the Court of Appeal. Section 6 of the Human Rights Act carries the matter no further. Insofar as the Appellant is relying on any risk to him in the Sudan derived from the conduct of his appeal, that is plainly outside the jurisdiction of the ECHR and Section 6 is not engaged. Even in the absence of a principle of *res judicata* or issue estoppel in public law, the same issues arose before the Court of Appeal as arise in this hearing before the Commission, and if not strictly binding, the approach taken by the Court of Appeal must operate powerfully in the considerations of the Commission.

The Submissions on Fact

80. Although the Appellant made full submissions on fact, both orally and in writing, we do not need to rehearse them all. We have analysed the evidence closely earlier in this judgment. In summary, the Appellant submits that surveillance by phone tapping, monitoring of emails and internet traffic is "extensive and sophisticated". It is likely that K2 is already subject to surveillance. Travel to a third country is not feasible without an unwarranted risk and the proposed video link from within Sudan is also too risky. The

Sudanese regime is repressive and NISS in particular is powerful and dangerous. The family background means that the Appellant will be associated with his father in opposing the regime and will not be able to draw on support if difficulty with the state arises. The identification in the Nigerian Airline material accentuates his risk. The fact that the authorities are almost certainly aware of the Appellant and yet have not approached him or brought any difficulty for him is not an indication of what they may do if he seeks to leave or to communicate.

81. No assumption should be made about what would be in the Appellant's instructions. The Commission must assume that the instructions will have some sensitive content because "they plainly could be" sensitive. For example the Appellant might wish to make allegations about others in whom NISS would be interested, he might wish to raise a defence of duress, and it is overly simplistic to claim that a denial of involvement in terrorism will reduce or abolish the interest of NISS.

82. In reply, the Secretary of State makes a number of points. The asserted risk, says Mr Eicke QC, is not supported by the Appellant's own evidence. He points to the first witness statement, where the Appellant indicated he would put himself at risk if he (even) sought further information about "whether he was a Sudanese citizen". That expression of concern was very wide of the mark, since he has since obtained not merely confirmation of Sudanese citizenship but a Sudanese passport. The Secretary of State observes that it is the Appellant's own case, partly based on the evidence of the experts, that he is known to NISS, along with the allegations against him and his father's political history. Despite that, he has obtained confirmation of nationality and a passport. Insofar as the Appellant has sought to raise the "targeted killings" of his travelling companions to Somalia, those are said to have taken place in Somalia and not in the Sudan. There is no evidence of such a risk in Sudan.

83. The Secretary of State suggests the Sudanese authorities are clearly aware of K2's presence in Sudan, but there is no evidence that he is presently under surveillance or that quiet and discreet contact with lawyers or reliable third parties will attract the interest of NISS. There is no basis for considering the Appellant will be perceived as opposing the ruling regime. His Islamist beliefs do not represent a threat to the Sudan. None of the evidence supports the implication that the regime would regard Islamists as a direct threat to them, rather that for the most part interest in groups such as Al Shabaab is a response to western partners.

84. The evidence about telephone surveillance is not entirely clear. The evidence does suggest that unregistered numbers are still available and can be used. If passwords are essential for interference with electronic communication by email or social media, that implies that unless passwords are obtained, NISS will be unable to intercept such communications. Further, there is no cogent evidence to demonstrate that a letter posted to the United Kingdom would be intercepted. Dr YZ's evidence, once explored, was that a parcel sent to the Sudan by a UK human rights organisation had been opened: he had in fact no knowledge of a letter posted to the UK from Sudan being opened.

85. Further, the Secretary of State submits that even if one assumes effective surveillance of the communications between the Appellant and his lawyers, it still remains for the Appellant to satisfy the Commission that that would increase his risk of ill-treatment. If it is assumed that the Sudanese authorities are aware of K2's background, of his travel to Somalia and the suggestion that he is an Islamist extremist, then the Secretary of State submits it is extremely difficult to see how NISS interceptions of the instructions he must be presumed to give would put him at risk. NISS would know that he had brought an appeal to have his citizenship reinstated, and it must be assumed would know he would be in contact with foreign lawyers to pursue such a case.

Our Conclusions

86. We take the decision of the Court of Appeal in *G1 v SSHD* as our starting point. An out of country appeal in not intrinsically unfair. As Mitting J stated, it is for the Appellant to show on the facts that he cannot have a fair procedure. The Commission must, of course, make all reasonable efforts and arrangements to obtain all the relevant evidence for the appeal, both as a matter of basic principle and in pursuance of Rule 4(3). However, it cannot be sufficient for an Appellant to show that he has a subjective fear about giving instructions or evidence. A necessary premise to a successful application of this kind, we conclude, must comprise clear, objective evidence that he was unable to instruct lawyers or give evidence to the Commission. We have well in mind the remarks of Mitting J, endorsed by the Court of Appeal: an appellant cannot be in a position artificially to frustrate the withdrawal of a passport on national security grounds.

87. We accept that there is much fuller evidence before us as to the conditions in the Sudan affecting the Appellant than was before Mitting J, and it is appropriate for the Commission to consider that evidence carefully with fairness and Rule 4(3) in mind. It is clearly desirable that the Appellant should properly instruct his lawyers and, in some form or other, written if not oral, place his evidence before the Commission.

88. The evidence does suggest firmly that the Sudanese authorities in general, and NISS in particular, are capable of gross breaches of human rights. There is little need to expand on this, since the picture elicited from the published material above is essentially unchallenged.

89. There is a strong consensus in the evidence that the fundamental attitudes of the Sudanese authorities are Islamist, mitigated by the need to maintain reasonable relationships with the US, the UK and other western powers. The expert evidence called by the Appellant and the published material taken together suggest that the Sudanese authorities and NISS are not concerned by Islamist activity in the Horn of Africa unless it threatens the Sudanese regime or the ruling party. Rather, in the absence of such threat, any interest shown by the Sudanese security service in Islamist activity is at the behest of the West.

90. The OPEN evidence is unclear as to some of the capacities of NISS. It is clear that they have a major capacity, often exercised, for physical surveillance focussed on opponents, or potential opponents, of the regime. There is a consensus that they are able to mount telephone intercepts, but that their capacity here is frustrated, or limited, by those who obtain unregistered SIM cards. The balance of evidence here is that it is still relatively straightforward to obtain unregistered phone cards. The very threat to prevent the acquisition of such cards points towards a lack of capacity to intercept such phone calls. There is no convincing evidence in OPEN as to the capacity of NISS to intercept email, Skype, or other social or communication media through the net in the absence of passwords being handed over. It is of course the case that the Appellant himself has frequently communicated with his wife in the UK through WhatsApp.

91. The consensus of the evidence both published and from the experts is that DHL and the postage system is subject to interception by NISS. The extent of such interception and the question as to what might stimulate it is really not addressed by the evidence.

92. The balance of the evidence from the expert witnesses does suggest that if the Appellant were to attempt to leave the Sudan, he might fail to get an exit visa and that the attempt might draw attention to himself. This part of the evidence is not conclusive, however, in our judgment. The Appellant, after all, obtained a passport after a thorough case had been made to suggest he could not do so without great risk. However, the evidence does suggest there would be some risk attached to an attempt to leave the country, in order to communicate by video link elsewhere. There is also a consensus that an attempt to use a video link from a major business enterprise or hotel in Khartoum might be impossible, or subject to surveillance if it was achieved.

93. However, there is in our judgment no evidence that is at all convincing that communications by K2 with a Sudanese lawyer would attract any hostile attention, provided it was done “discreetly”. Dr AD’s evidence suggests otherwise. We note that members of the Appellant’s family have travelled freely between the Sudan and the UK, staying for very variable amounts of time and returning on numerous occasions. There is absolutely no evidence to suggest that they would not be able to carry statements or documentation on behalf of the Appellant.

94. We therefore conclude that there are at least three viable means of communication between the Appellant, his lawyers and the Commission: firstly, instructions given by him to Sudanese lawyers with communications from such lawyers to his UK solicitors; secondly, use of a range of electronic communications whether email or other internet-based system; and thirdly carriage of documents to and from the Sudan by friends or relatives who are travelling from one country to another. We also consider that it might well be feasible for the Appellant to have material posted or sent by DHL, by others acting on his behalf, from Sudan to the UK. By one or other such means, we conclude there is a proper opportunity for the Appellant to communicate with his English lawyers without those communications being intercepted.

95. What is the risk to the Appellant if his instructions were intercepted? Here it is necessary to consider the likely approach to the Appellant by the Sudanese authorities. The history here is important. Firstly, K2 chose to go to Sudan in the first place. He did so before he had acquired a Sudanese passport. The Commission appreciates that he had connections in Sudan and it was in a sense a natural place for him to choose as a destination. However, unless he was completely thoughtless at the time, he cannot have thought that the risks to him of being in Sudan and under the jurisdiction of NISS were high.

96. The Appellant has remained in Sudan for a period of four years. He has lived a quiet life. He has set out to do nothing that might antagonise the authorities. It is the consensus of all the experts that NISS will have been aware of his presence in the Sudan throughout this period and aware of the allegations against him. There is also important evidence from Dr YZ and Mr B that the Appellant will be "shielded by his disputed UK passport". We bear in mind the evidence of Mr B and drawn from Ms Prud'homme's informants that Islamists are not generally targeted unless they are dissidents or are in some way opposed to the NCP. The Appellant is not an opponent or an identifiable threat to the ruling regime. It seems to us that the fact that the Appellant has been untroubled during his time here is consistent with and reinforces the view that NISS have no active interest in him, and are disinclined to take any step in his direction, particularly any step which would interfere with what the authorities must understand to be legitimate British legal proceedings. If there is a protective effect from his disputed continuing British nationality, it must surely extend so as to inhibit interference with a case such as this.

97. We consider that the evidence surrounding the "flight ban" on Arik Air is of little significance and, if it bears any weight, tends to undermine rather than improve the Appellant's case on this issue. The assumption behind the expert evidence is that NISS is already aware of the nature of the accusations against the Appellant which caused the British authorities to remove his British nationality. At its height, this evidence could do no more than reinforce a suspicion which is already likely to be known to NISS. In fact, the natural inference from this evidence, so far as it goes, is that even public allegations have stimulated no active interest in him on the part of the Sudanese authorities. The same goes for the press coverage we have summarised.

98. On the basis of the OPEN evidence, we conclude that it is very likely NISS is aware of the Appellant, aware of the accusations against him, aware that he has a continuing dispute with the UK authorities. The lack of interest in K2 and the continuing protective effect of his "disputed UK nationality", in our judgment, means that the Sudanese authorities will take no step to interfere with the legal process before this Commission or to prevent the Appellant playing his full part in the appeal.

99. These conclusions are in no way weakened, and may be regarded as confirmed, by our conclusions based on the CLOSED material. We therefore consider that even if NISS were to intercept and read communications between the Appellant and his English lawyers, he is not at risk of serious harm as a consequence.

100. It follows that we reject the submission that there can in this instance be no fair proceedings or that the Appellant is unable to partake properly in his case. The appeal should therefore proceed. The Appellant has ample opportunity to submit evidence in writing. The Commission will facilitate any sensible steps to enable him to give evidence orally to the Commission, whether by video link or simply by a telephone link to the hearing room.

101. Although this is an OPEN judgment and will be handed down to the parties in the ordinary way, it may be that the Appellant's representatives will wish publication of the judgment to be delayed until the hearing of the substantive issues. The Commission will therefore arrange for the judgment to be handed down without immediate publicity while the parties consider the position.