Appeal No: SC/100/2010
Hearing Dates: 8 and 9 May, 2014
Date of Judgment: 4 August 2014

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE IRWIN
UPPER TRIBUNAL JUDGE JORDAN
MR CHRISTOPHER GLYN-JONES

"L1"

APPELLANT

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

RESPONDENT

JUDGMENT ON PRELIMINARY ISSUE AND IN STATUTORY REVIEW

For the Appellant:	Mr M Fordham QC and Ms A Weston
Instructed by:	Birnberg Peirce & Partners
For the Respondent:	Mr J Glasson QC and Mr D Manknell
Instructed by:	The Treasury Solicitor for the Secretary of State
Special Advocate:	Ms J Farbey QC
Instructed by:	Special Advocate's Support Office

Background

1. The Appellant entered the United Kingdom in June 1991 at the age of 20. He came from the Sudan and is a Sudanese national. He successfully claimed asylum and was granted exceptional leave to remain ["ELR"] in 1993 and indefinite leave to remain ["ILR"] in 2000. In 2003 he became a naturalised British citizen and acquired the right of abode. He remained in the UK for periods from 2003 to 2009, but with extended periods spent in Sudan. He has a wife and five children, the first four born in the UK and the fifth born in Sudan in May 2011.

2. In May 2010 a submission was put to the Home Secretary asking her to make a decision in principle that the next time the Appellant left the UK he would be deprived of his British citizenship and excluded from the country. On 21 June 2010 the Home Secretary took such a decision in principle. That deprivation and exclusion was to be put into effect if and when the Appellant left. On 3 July 2010, the Appellant and his family did leave the UK to fly to Sudan intending to remain there, on his account, for the duration of the school holiday. On Monday 5 July, a second submission was written for the Home Secretary requesting that the decision in principle should be put into immediate effect. On 6 July the Home Secretary signed a notice of decision to make a deprivation of citizenship order and on Monday 12 July a deprivation of citizenship order was signed. On the same day the Home Secretary personally took the decision to exclude the Appellant from the UK, on the grounds that his presence was not conducive to the public good. The order was finalised on the following day.

3. Those decisions have given rise to a complex web of litigation, which we now summarise. The Appellant sought to institute a SIAC appeal. In a judgment handed down on 3 December 2010, the Commission addressed two preliminary issues: (i) was the Appellant's notice of appeal served in time? (ii) If not, should time be extended? The Commission considered both open and closed material and delivered both open and closed judgments. The conclusions were (i) that the Appellant had been properly served in time, and (ii) the Commission declined to extend the Appellant's time for giving notice of appeal. The reasoning is set out in the judgment *L1 v SSHD* Ref: SC/100/2010 dated 3 December 2010.

4. On 21 June 2011 Mitting J refused permission to appeal from the determinations of 3 December 2010. The Appellant sought permission to appeal from the Court of Appeal. Permission to appeal was refused on paper by Richards LJ, but the application for permission was renewed and was considered by Maurice Kay LJ on 8 March 2012. Following argument as to whether the Court of Appeal should consider a closed judgment in the course of an application for permission to appeal, Maurice Kay LJ adjourned the application for permission and directed that it should be heard by three members of the Court, to be listed later than the hearing in a different SIAC case, that of *G1 v SSHD.*

5. On 4 February 2013 a different constitution of the Court of Appeal (Laws, Sullivan, McCombe LJJ) heard the renewed application for permission to appeal. The Court expressed themselves as being unimpressed with most of the arguments advanced, but also stated that they were:

> "Troubled about one aspect of this case, very troubled, … that it would appear, and SIAC accepted, the Secretary of State deliberately delayed reporting to give notice of the declaration decision until she knew that the Applicant had left for Sudan. SIAC accepted that that was the inference."

6. Following a further hearing, the same constitution of the Court of Appeal allowed the appeal, and ordered that by reason of special circumstances there should be an extension of time in which the Appellant could bring his appeal to SIAC. The case was thus remitted to SIAC for determination.

7. The Appellant had issued separate proceedings for judicial review in 2010, challenging the decision of the Secretary of State to exclude him. He was given permission on paper by Owen J on 31 December 2010. The judicial review proceedings were listed alongside the appeal in the Court of Appeal, given the common factors in the two cases. The Court of Appeal had anticipated that, if appropriate, they would reconstitute themselves as a Divisional Court to deal with the judicial review. In fact, the Court of Appeal directed on 30 July 2013 that the claim was to be stayed on terms which arose from the new provisions contained in the Justice and Security Act 2013 ["the 2013 Act"]. If the claim was certified under section 2C of the Special Immigration Appeals Commission Act 1997 ["the SIAC Act"] as amended by the 2013 Act it should be "transferred" to SIAC where it "should be heard alongside the substantive appeal against the decision to deprive the Claimant of his citizenship". If the claim was not certified, it was then to be listed for mention before Irwin J, sitting as a High Court Judge, for directions.

8. On 18 December 2013 the Commission ruled that any appropriate remedy to be granted as a result of the ruling on the "abuse of power" issue should be decided at the same hearing. At the conclusion of the hearing on 18 December 2013, the Commission, in a formal ruling, also concluded that it would receive closed material in dealing with the "abuse of power" preliminary issue.

9. On 18 December 2013 Irwin J gave directions as Chairman of SIAC and as a High Court Judge in the judicial review. The directions were amended and then given in final form on 20 January 2014. The principal order was for a trial of the issue as to the alleged "abuse of power". Procedurally, that issue arose as a preliminary issue in the SIAC appeal. It was also central to the judicial review initiated in 2010, which was listed to be heard alongside the preliminary issue in the appeal.

10. On 6 November 2013, the Secretary of State certified the decisions challenged under section 2C of the Special Immigration Appeals Commission Act 1997. The certificate purported to terminate the judicial review and notified the Appellant that he could apply to SIAC to set aside the exclusion. As a consequence, the Appellant gave notice on 2 January 2014 that he sought a statutory review of the decision to exclude before SIAC ["the statutory review"].

11. In *Ignaoua v SSHD* [2014] 1 WLR 651, [2013] EWCA Civ1498, the Court of Appeal ruled that such a Ministerial Certificate was effective in stipulating that the relevant decision was based on material which could not be revealed in open evidence by reference to the national interest, but ineffective in terminating judicial review proceedings: the latter was for the Court, not for a party. The Court went on to

observe that the Court would be likely to stay such proceedings, on the ground that SIAC was the preferable forum. *Ignaoua* was remitted to the Administrative Court.

12. On 21 February 2014, adopting a consistent approach, Richards LJ stayed the appeals in *AHK and Others v SSHD* [2014] EWCA Civ 151, indicating that the Appellants should pursue statutory review before SIAC. When *Ignaoua* came before the Divisional Court (Ouseley and Irwin JJ) the Court ruled that the judicial review should be stayed in favour of statutory review, see: *R(Ignaoua and others) v SSHD* [2014] EWHC 1382 (Admin).

13. At the commencement of this present hearing therefore, three cases were listed concurrently: the SIAC appeal, and the statutory review, both before SIAC, and the 2010 judicial review before Irwin J in the Administrative Court. The decision of the Divisional Court in *Ignaoua and others* was handed down at the same time as the combined hearings opened, but counsel for the Appellant/Claimant had been permitted to be told of the content of the Divisional Court judgment during the period of embargo. By consent, Irwin J stayed the judicial review, following an indication that applications to lift the stay could be made, if that was necessary to obtain any relevant interlocutory relief which was not within the power of SIAC, given the provisions of s.2C(4) of the amended SIAC Act.

14. By that rather convoluted route, this hearing proceeded before the Commission both as a preliminary issue in the appeal and as a statutory review of the decision to exclude, the Commission in these circumstances being content to treat the parties' Grounds in the judicial review as sufficient particulars of their contentions in the statutory review.

The Abuse of Power Issue

15. The central issue can be stated as follows:

> "Was it lawful and within the powers of the SSHD, on the facts of this case, to await the departure of the Appellant from the United Kingdom and then to serve notice of deprivation of citizenship and notice of exclusion from the United Kingdom, followed by the making of an order depriving him of citizenship and an order excluding him from the United Kingdom, with the intention that the Appellant should remain out of the United Kingdom during the currency of his appeals."

Preliminary Issue and Statutory Review: Our Approach to the Evidence

16. We remind ourselves when considering the evidence presented to the Home Secretary in June 2010 and in July 2010 that we are not now conducting the substantive appeal, assessing this evidence ourselves. Both for the purpose of the preliminary issue in the appeal and for the purpose of the statutory review, we look closely and anxiously at the facts relied on by the SSHD. In the statutory review we follow the approach identified by SIAC in *AHK and Others v SSHD* (SN/2-4/2014). In the appeal we adopt a similar approach at this stage of a preliminary issue. It is appropriate to do so since the test for abuse of power is one of conspicuous unfairness, as we set out later in this judgment. For such a test it is appropriate to consider whether the material

placed before the Home Secretary could reasonably form the basis for her decision and, provided that it could do so and it was reasonable for her to act on the basis of that material, then to consider whether her actions can fairly be said to constitute an abuse of power.

The Facts

17. It will be necessary for us to analyse the facts in a little detail, but the overall picture can be simply stated. There is no issue but that the Secretary of State authorised a conscious plan, on the advice she was given, intended to ensure that the Appellant would be out of the country when the final decisions were taken to deprive him of British nationality and exclude him from the United Kingdom, and would be out of the country when he was notified of those decisions. The intention was that he should only be able to prosecute an out of country appeal, since the right to an in-country appeal only arises for individuals who are in the United Kingdom when the appeal is mounted. The Respondent's case is that this approach was adopted exclusively for national security reasons, and was fully justified. The Appellant's case is that the plan was formed for mixed reasons. The Appellant accepts that there were motivations of national security but submits that the proper inference is there were those within the relevant government teams who saw an unfair legal advantage to be obtained.

18. The Commission heard evidence from Philip Larkin, who is head of a unit within the Office for Security and Counter Terrorism, part of the Home Office. Mr Larkin has given evidence in a number of previous SIAC cases. He manages a team responsible for British citizenship and the removal of British citizenship. Mr Larkin has made four open witness statements in this case, successively dated 12 November 2010, 17 November 2010, 5 July 2013 and 4 April 2014. As before, the Commission found Mr Larkin a scrupulous and honest witness.

19. In his third witness statement, that of July 2013, Mr Larkin makes the background clear. He confirmed that the Security Service put forward a recommendation to the Home Office that L1 should be deprived of British nationality and excluded on the ground that his presence in the UK was not conducive to the public good. The recommendation letter informed the Home Office that L1 was:

> "6. ….a long term subject of interest of the Security Service and was assessed to be a committed Islamist extremist who, over a significant period of time, had been involved in a range of terrorist, extremist and other illegal activities, both in the UK and overseas. It was further assessed that he was an associate of a wide range of significant Islamist extremists, both in the UK and worldwide.
>
> 7. The recommendation letter also set out that L1 had largely resided in Sudan since 2005. He had travelled to the UK in 2009 with one of his wives and it was assessed that he intended to remain in the UK permanently. The Security Service were concerned that L1 would seek to increasingly use the UK as a platform from which he would be able to engage in terrorism-related activity and support the activities of other extremists. Accordingly, the Security Service assessed that the deprivation

> of L1's British nationality and his exclusion from the UK would be in the interests of national security by disrupting the risk which L1 posed in the UK."

20. In cross-examination, Mr Fordham QC for the Appellant asked the witness when the initial recommendations had been formulated. Mr Larkin could not recall the precise time but confirmed that there had been a period of time during which the various parties in government were working towards making the "in principle" recommendation. Subsequently, an e-mail of 10 July 2009 was identified recording that "UKBA are at an early stage" in considering the case. An e-mail of 1 September 2009 speaks of "our position (so far) on handling the deprivation/exclusion papers". We have set out a consistent, but fuller, timetable in the CLOSED judgment.

21. The first submission to the Home Secretary was dated 26 May 2010. A redacted version is in the open evidence in the case. The submission is from Rod McLean, Deputy Director of Special Cases in UKBA. The submission is directed to the Home Secretary, with a number of others copied in, including Mr Larkin. The open parts of the recommendation in the document read as follows:

> "V. When [L1] leaves the UK, he should be deprived of his British citizenship and that decision be certified in accordance with section 40(2) of the British Nationality Act 1981 (BNA 1981), because it was taken partly in reliance on information which in your view should not be made public because its disclosure would be contrary to the public interest;
>
> VI. An official can sign and make the deprivation order which would take effect immediately, once notice of the intention to deprive him is served on [L1];
>
> VII. Following deprivation, [L1] should be excluded from the UK."

22. The recommendation goes on that, if the Home Secretary agrees, then when –

> "[L1] travels out of the UK, thereby presenting an opportunity to act, we will return to you to advise you of any developments in the case and seek your final approval. The FCO will submit to the Foreign Secretary in parallel on whether he agrees to support this act."

23. In further detail, the Home Secretary was informed that L1 was a committed extremist with a significant period of engagement and a broad range of "terrorist, extremist and other illegal activities both in the UK and overseas". The submission recorded that the national security case against him was "strong". The Security Service assessment was that deprivation and exclusion would be conducive to the public good and "would further have a disruptive effect upon his activities and ability to engage in terrorism-related activity in future". The team making the submission had considered a number of factors to assess whether the recommended action was appropriate. Those considerations were set out in an annex but:

> "… in summary these include the nature and strength of his connections to the UK – including whether depriving him of British citizenship would render him stateless; whether his family living in the UK, including those who are British citizens; the strength of his continuing links to Sudan; ECHR issues – [L1] has serious (potentially terminal if untreated) health problems and our action will deny him access to NHS medical treatment; the potential community reactions in the UK to [L1's] deprivation and exclusion; and issues relating to the UK's relations with Sudan and foreign relations generally."

24. The conclusion was that the risk L1 posed to the UK national security outweighed any of the contrary issues identified. The submission went on to recite a number of more specific matters to be borne in mind. These included presentational issues, one of which was that:

> "The breadth of the "conducive" deprivation power has been controversial in some parliamentary and legal circles in the past and NGOs and human rights groups will be concerned to see it used here in combination with exclusion whilst the individual is out of the country."

25. A specific annex set out the Home Secretary's prerogative power of exclusion, pointing out, amongst other considerations, that exclusion is not always desirable on policy grounds (by implication even where the criteria are made out); that individuals of concern who are not excluded can be placed on "the watch list". The Home Secretary was specifically briefed as to her powers of deprivation under s.40 of the British Nationality Act 1981.

26. L1's particular circumstances were set out fully in Annex E to the submission. The Home Secretary was made aware that although L1 had resided largely in Sudan with his wives and children, he had travelled to the UK from Sudan in late 2009 and the assessment was that "he will remain here on a more permanent basis". His wife "with whom he entered the UK has been granted six months leave to enter whilst her application for Indefinite Leave to Remain" was considered. However, the Secretary of State was informed that "she has limited ties of her own to the UK". The briefing continued:

> "whilst all [L1's] children hold British citizenship and are present in the UK, they have only resided in this country for a short period with the remainder of their time spent in Sudan. Our assessment is therefore that they too have minimal ties to the UK. The same legal advice that confirmed [L1] remained a Sudanese citizen, confirmed that all of his children will also hold citizenship of Sudan".

27. The Home Secretary's attention was drawn specifically to matters arising under the European Convention on Human Rights. She was advised that the Appellant might claim Article 8 rights, but that the claim would be difficult given that he had been "living primarily in the Sudan with both his wives and three of his children since 2005". She was also advised that action to deprive L1 of his citizenship whilst he was

abroad would not bring him within the UK's jurisdiction for the purposes of the ECHR. The Secretary of State was informed that L1 suffers from "arterial venous malformation" resulting in epileptic attacks. Deprivation and exclusion would deny him access to the NHS and untreated his illness might be terminal. She was advised that exclusion and deprivation nevertheless would not breach Articles 2 or 3 of the ECHR.

28. Under the rubric of "Additional Factors" the Home Secretary was advised further in relation to the Convention that if L1 argued there was breach of his Convention rights "there is a risk that the Courts could find that the ECHR is extra-territorial and consider we still have obligations under the Convention. If so, we are confident that our fall-back arguments show that there will not be a breach of [L1's] Article 3 rights".

29. The Home Secretary was advised as to the Appellant's right of appeal from the decision proposed. She was advised that due to the information relied on, the appeal would be before SIAC, and:

> "As we intend to exclude [L1] from the UK, he would need to pursue any appeal from abroad. We are content that he will be able to do this, indeed we have taken legal advice from lawyers in Khartoum ourselves on the issue of Sudanese citizenship, so we are confident that should he wish to do so, [L1] could take action to pursue his legal right to appeal our decision whilst he is living in Sudan."

30. The Home Secretary was advised in detail as to the recommended means of proceeding. Given the concern of the Court of Appeal and the way the Appellant argues this point, it is helpful to cite three paragraphs of the submission in full:

> "35. Under the law, the deprivation order cannot be signed until notice has been served on [L1] that such an order will be made. [L1] would be deprived of his British citizenship as soon as the deprivation order was signed, enabling exclusion to occur immediately thereafter. Should the opportunity arise, we would return to you to sign a notice advising [L1] that you intend to deprive him of his British citizenship. We would then recommend that you agree an official (who may be one of your officials at the appropriate level, or the Chief Executive/Deputy Chief Executive of UKBA, or an official of the Secretary of State for Foreign and Commonwealth Office affairs) should make, sign and serve the actual order on your behalf after giving [L1] the required notice. This would avoid any delay between service of the notice and the signing of the order (and thus the removal of citizenship) and would mitigate the risk such a delay would result in [L1] travelling to the UK earlier than planned, frustrating our plans to exclude.
>
> 36. In the recent deprivation case of […] Treasury Counsel advised that there is a good arguable case that there is no requirement before serving the notice to provide such an

> opportunity, given the operational desire not to allow an individual chance to return to the UK in these circumstances, Treasury Counsel [advised] we would not be acting unlawfully or inappropriately by not giving opportunity for representations to be made before taking deprivation action.
>
> 37. There is a legal risk in not allowing this opportunity to make representations as it opens up an additional ground to challenge our action should [L1] appeal the decision. […] raised this point as part of his appeal against deprivation, however as his appeal was dismissed out of time, the Courts never ruled on the issue. However from an operational perspective, it is unlikely that we would be able to successfully deprive and exclude before [L1's] return to the UK were we to provide him opportunity to make representations. Were he to return to the UK he could still be deprived of his British Nationality and deported but in that case he would have an in-country right of appeal against deportation that might take years to progress through the courts."

31. In the CLOSED judgment we have been able to amplify the matters placed before the Home Secretary and reach conclusions as to the balance of material placed before her.

32. On the basis of that submission, the Secretary of State did indeed, on 21 June 2010, take the decision to deprive and exclude in principle, with the intention that those actions should be confirmed by her and put into effect if L1 did leave the UK: See Mr Larkin's third statement, paragraph 11.

33. As we have indicated, the Appellant left the country with his family on 3 July 2010. On 5 July, a second submission was made by officials to the Home Secretary and simultaneously to the Security Minister Lady Neville-Jones. Most of the material supporting this submission was repetitive of the first submission and reliant upon the decision taken in principle. The submission was marked "urgent", and officials made it clear it was desired to act before the Appellant could return. The proposal was that if the Secretary of State agreed with the recommendations, the Appellant would be called to the Khartoum embassy and served with the deprivation order. The submission acknowledged that it might not be possible to obtain the Appellant's attendance at the embassy or indeed make contact with him. The proposal in that event was to send the deprivation order to his home address in the UK, which would permit deprivation 48 hours after the letter was sent.

34. The submission identified a number of risks for the consideration of the Home Secretary. In summary, they were that the Appellant might return before deprivation and exclusion was effective, or he might return on false documents with a view to defeating exclusion. A presentational risk and legal risk was identified in that the department "will need to defend our action during any appeal by relying on closed material in proceedings against [the Appellant]." There were in addition resource implications of the need to defend the action. The legal risk was identified in the following terms:

> "… advice from Legal Advisors' Branch indicates that there is at least a medium to high risk that [the Appellant] could successfully challenge either the deprivation or exclusion decision or both. This is particularly the case as we have chosen to wait until [the Appellant] has travelled out of the UK (so that we can achieve greater operational benefit by also being able to exclude him from the UK) before acting against him. If successful we will be forcing into permanent exile an individual who arrived in the UK aged 20 and has spent most of the subsequent 20 years in this country, seven of them as a British citizen; suffers from ill health and whose access to continued free medical treatment will be stopped; and has four British citizen children … Additionally our decision not to allow [the Appellant] an opportunity to make representations against deprivation before we remove his citizenship is a further area where we could face legal challenge to our action."

35. Despite the risks identified, the submission recommended an immediate move to deprive and exclude. Again, we have been able to amplify the description of the material before the Home Secretary in the CLOSED judgment.

36. The submission to the Home Secretary identified legal risks in the terms quoted above. In his evidence, Mr Larkin emphasised that the objective was operational. In the early part of his witness statement of July 2013, Mr Larkin sought to set the context for the decision-making in this case. In summary he recited how, where it was not possible to prosecute individuals who pose a risk to national security, the Home Secretary would consider a range of options in order to seek to disrupt the activities of such individuals and minimise the risk posed by them. Such "disruptive options" include measures such as terrorism prevention and investigation measures, deprivation of British citizenship, removal or exclusion from the UK. Mr Larkin indicates that in certain circumstances deprivation may not be conducive to the overall public good, and there may be a greater public interest in covert coverage of an individual. The choice of approach is essentially tactical and operational, once it is established that the threshold for deprivation and/or exclusion has been met. Mr Larkin's evidence was that the alternative to deprivation action against the Appellant whilst out of the country would have been deprivation whilst in the UK, to be followed by deportation but:

> "The practical effect of this would likely have been to confine L1 to the UK for a period of years pending any appeal, during which time his presence in the UK would be likely to continue to pose a risk to national security."

37. In his second witness statement of 4 April 2014, Mr Larkin expressed his evidence as to the objective of the plan simply:

> "As set out in PL1, the Security Service assessed that L1 intended to remain in the UK more permanently and it was considered that L1 could seek increasingly to use the UK as a platform from which to engage in terrorism-related activities. The operational objective of serving the deprivation notice

> while L1 was abroad was to mitigate the risk of L1 establishing himself in the UK in order to use the UK as a platform for terrorist-related activities." (paragraphs 4 and 5)

38. In the course of his evidence Mr Larkin introduced two documents which he had discovered in the course of reading, preparatory to the second day of his oral evidence. The documents were a draft memorandum from the Security Service and a covering letter, both dated 22 November 2010 and faxed to Mr Larkin. On 18 November, during a SIAC hearing, the Commission had requested that the Secretary of State should "confirm whether it was known that [the Appellant] was outside the UK when the deprivation and exclusion decision was taken". The Security Service representative proposed a Form of Words for comment by Mr Larkin. The relevant passage reads:

> "SIAC will recall that it was not possible to give definitive confirmation at the hearing that the Secretary of State knew that [the Appellant] was in Sudan when the relevant decisions were taken. It can, however, be confirmed that this was indeed the case. There was a legal and operational advantage in waiting for [the Appellant] to travel and the decision had been delayed for this purpose."

39. Mr Larkin's evidence was that the manuscript note, written by him at the time on the document, challenged the suggestion of a legal advantage. He wrote:

> "Queried with Adam [the representative of the Security Service]. I see no legal advantage in our approach. It was all operationally motivated/driven."

Mr Larkin relies on this note as confirmation of his approach, at any rate, in giving advice to the Home Secretary.

40. Mr Larkin's protest at the wording was of no avail. The letter was sent to the Commission on 22 November 2010 in the terms challenged by Mr Larkin.

41. In the course of the closed proceedings in this appeal, there was extensive consideration of the documents to see if any further material could be brought to bear on the motivation for the decision that was taken. Two material references in two documents were found. Those references are dealt with in the closed judgment. It seems likely that neither document was ever placed before the Home Secretary.

42. Another issue raised by the Appellant in connection with the substantive decision is the suggestion that the Home Secretary was given an over-optimistic picture of the capacity of the intelligence agencies to effect service on the Appellant. The Appellant argues that the implication of the submission of 3 July is that officials would in fact be able to "call [the Appellant] into our embassy in Khartoum later this week" acknowledging, as the document does, the Appellant might not come or that "we are unable to make contact with him". Mr Fordham lays emphasis on one of the documents disclosed, a paper headed "Service of Deprivation Documents". This is a plan, or script, for the approach to service on the Appellant. The outlined procedure begins with the sentence "we hope to obtain a telephone number to contact the

individual". This document has to be seen alongside a memorandum of 1 July 2010 from a member of the Special Cases Directorate of UKBA. It is worth quoting from this document a little more extensively:

> "… hopefully to settle FCO concerns, it might be helpful to clarify the position from a UKBA perspective as to how we believe we should serve the document on the individual. Our preferred option is to contact the guy and call him into the embassy and serve the notice on him in person. As a fallback, should we not be able to contact him by telephone, or we can but he refuses to attend the embassy for service in person, and we do not have a reliable/current foreign address for him and/or he refuses to provide one when asked (assuming we have a contact telephone number for him), then we would serve… on his last known UK address. We would also advise him of the notice in any conversation where possible. Should he refuse to come to the embassy or we cannot contact him but somehow we have obtained a reliable/current foreign address, then we would have to consider posting the notice to his foreign address."

43. The memorandum goes on to make clear that UKBA would not wish to send staff to the Appellant's home address in the Sudan, that the postal system exists in name only and does not function, and that "while DHL operate in this country, the service is very limited and it is most likely that they will not cover the area where the guy lives". Therefore the proposal was that "having tried out best to effect service we would resort to serving on his last known UK address".

44. There is some material addressed in the closed judgment bearing on this aspect of the case.

45. In short, the submission is that the Home Secretary should have been more fully informed as to the real risk that the Appellant would not be served in Sudan and would therefore be ignorant of the decisions to deprive and exclude him until after they were taken and effective. We have not concluded in the CLOSED judgment that this suggestion is made out.

46. As indicated, the Secretary of State took the decision and signed the notice of intention to make a deprivation order herself on 6 July 2010, authorising an official to sign the actual deprivation order on her behalf, once the Notice of intention had been served on the Appellant. As Mr Larkin outlines in his second witness statement, a UKBA official in Khartoum attempted on several occasions during 7 and 8 July to make telephone contact with the Appellant via a mobile telephone number. These efforts were unsuccessful.

47. On 9 July, under cover of a letter dated 8 July, the notice of intention to deprive was posted to the Appellant at his last known address in London. The notice and appeal forms were sent by recorded delivery and duplicates sent to the same address in the normal first class post. On 12 July, acting on the belief that at least the duplicate notice of intention sent by first class post would have been left at the Appellant's address in accordance with the regulations, Mr Larkin signed the order to deprive the

Appellant of his British citizenship. Later the same day the Home Secretary had made the decision to exclude the Appellant and on the following day, 13 July, a further letter was sent to the Appellant at the London address indicating that he had been excluded.

48. On 13 July also, Mr Larkin contacted the Appellant's brother in the United Kingdom and advised the brother of the action that had been taken, indicating that the Appellant should move promptly to appeal against the decision if he wished to do so. The brother was advised of the 28 day time limit, and was asked to relay the message to the Appellant.

49. The Appellant subsequently attempted to return to the United Kingdom but in consequence of the decisions taken was denied a flight. Following that event, on 22 July he attended the UK embassy in Khartoum, where he was given copies of the relevant documentation and the decisions were explained to him by officials. He subsequently initiated an appeal at SIAC.

50. In the course of his witness statement of July 2013, Mr Larkin went on to emphasise that the Secretary of State:

> "…does not have a policy of deliberately waiting for individuals to leave the UK before depriving them of their nationality, although she has the discretion to do so where this is in the public interest. In this particular case the Secretary of State did make a deliberate decision to wait for L1 to leave the UK before making the final decision, but to date this is the only case in which that has occurred."

51. The statement goes on to deal with a number of ministerial statements made in Parliament subsequent to the decisions in the case of L1. Those statements by Lord Taylor and Damien Green MP, Home Office Ministers at the time, post-date the decisions in L1's case, but in both cases the ministers indicated that the power to deprive and exclude was used when the individual concerned was already abroad and when information came to light justifying deprivation and/or exclusion. It is our view that whether or not the ministerial statements in question may be thought to be misleading in any respect, they cannot affect the question as to whether the decisions in this case were or were not an abuse of power in 2010.

52. After the hearing before us had concluded, the Secretary of State asked the Commission to receive a further witness statement from Mr Larkin, which in the circumstances we have agreed to do. The statement, dated 5 June 2014, is in the nature of a corrective. Mr Larkin notes that he had given evidence that L1 was the only deprivation case in which the Secretary of State had waited for the individual to leave the UK before taking deprivation action. He confirms that that remains his belief, but since the hearing before us, Mr Larkin states he has become aware of another case in which this approach was considered by officials, again for reasons of national security. In fact this course was not pursued because it was overtaken by events. Mr Larkin states he cannot be certain that such a course may not have been considered in other cases. However he states that he is clear that L1 is the only case where such a course was agreed by Ministers and was in fact pursued. We have

already indicated our view of Mr Larkin as a witness, and we accept this evidence as being accurate.

The Law

53. The power to deprive a person of British citizenship is statutory. The power arises under section 40 of the British Nationality Act 1981 ["the 1981 Act"] and the right of appeal arises under section 40A. By section 40(2) of the 1981 Act the Secretary of State may "by order deprive a person of citizenship status if … satisfied that deprivation is conducive to the public good".

54. Section 40(5) of the 1981 Act reads:

> "Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—
>
> (a) that the Secretary of State has decided to make an order,
>
> (b) the reasons for the order, and
>
> (c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c. 68)."

55. The relevant provisions under section 40(A) read as follows:

> **"40A Deprivation of citizenship:**
>
> (1) A person who is given notice under section 40(5) of a decision to make an order in respect of him under section 40 may appeal against the decision to [the First-tier Tribunal].
>
> (2) Subsection (1) shall not apply to a decision if the Secretary of State certifies that it was taken wholly or partly in reliance on information which in his opinion should not be made public—
>
> (a) in the interests of national security,
>
> (b) in the interests of the relationship between the United Kingdom and another country, or
>
> (c) otherwise in the public interest.
>
> [(3) The following provisions of the Nationality, Immigration and Asylum Act 2002 (c. 41) shall apply in relation to an appeal under this section as they apply in relation to an appeal under section 82 [83 or 83A] of that Act—

> (a) section 87 (successful appeal: direction) (for which purpose a direction may, in particular, provide for an order under section 40 above to be treated as having had no effect),
>
> (b)…
>
> (c) section 106 (rules),
>
> (d) section 107 (practice directions),]

(6) . . .

(7) . . .

(8). . .”

56. The appeal route is diverted to SIAC where Section 40A(2) applies to deprive the individual of an appeal to the Tribunal. In those circumstances section 2B of the Special Immigration Appeals Commission Act 1997 gives a right of appeal to SIAC.

57. It is important for clarity’s sake to emphasise that there is no appeal from the order depriving the order of citizenship. The appeal is triggered by the notice of the intention to make such an order.

58. An exclusion order is not a statutory creation but a power exercised under the surviving Royal Prerogative. The effect of an exclusion order is provided for in the Immigration Rules, so that if and when an application for entry clearance is made following exclusion it will result in mandatory refusal. Immigration Rule 320 provides:

> “In addition to the grounds of refusal of entry clearance or leave to enter set out in parts 2-8 of these rules… the following grounds for the refusal of entry clearance or leave to enter apply:
>
> …
>
> Grounds on which entry clearance or leave to enter the United Kingdom is to be refused:
>
> …
>
> (6) Where the Secretary of State has personally directed that the exclusion of the person from the United Kingdom is conducive to the public good…”

59. Statute provides that review of an exclusion order made on “conducive” grounds comes to SIAC. Section 2C of the 1997 Act reads:

> “**2C Jurisdiction: Review of Certain Exclusion Decisions**

> (1) Subsection 2 applies in relation to any direction about the exclusion of a non-EEA national from the United Kingdom which –
>
> (a) is made by the Secretary of State wholly or partly on the ground that the exclusion from the United Kingdom of the non-EEA national is conducive to the public good,
>
> (b) is not subject to a right of appeal, and
>
> (c) is certified by the Secretary of State as a direction that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public –
>
> (i) in the interests of national security …"

60. Appeals to the First-tier Tribunal arise by statute where the decision challenged is an "immigration decision" as defined by section 82(1) of the Nationality, Immigration and Asylum Act 2002 ["the 2002 Act"]. Neither a notice of intention to make a deprivation order, nor a deprivation order, nor an exclusion order, fall within any of the categories of "immigration decision" within section 82(1). However, it is accepted by the Respondent that the provision of a right of appeal pursuant to section 40A(1) (and by extension pursuant to Section 2B of the SIAC Act 1997) effectively provides a further category of "immigration decision". That is accepted by the Secretary of State as applying in this case. The decision to intend to make a deprivation order is treated as a section 82 appeal and as such carries with it the normal incidences of such an appeal. It is treated as being subject to section 78 of the 2002 Act, which prevents removal from the United Kingdom while an appeal from such a decision is "pending". Section 78 does not prevent the making of a deportation order or indeed the making of an exclusion order during the currency of an appeal. However, it does prevent the Secretary of State acting upon such orders and removing the appellant from the United Kingdom whilst the appeal is on foot.

61. Section 40(5) of the 1981 Act quoted above simply stipulates that written notice must be given of the intention to deprive the person of citizenship "before making an order under this section". No interval is specified between the notice and the making of the order. The requirements of service of such a notice are set out in part by the British Nationality (General) Regulations 2003. These provide as follows:

> "10.(1) Where it is proposed to make an order under section 40 of the Act -
>
> (1) depriving a person of a citizenship status, the notice required by section 40(5) of the Act to be given to that person may be given—
>
> (a) in a case where that person's whereabouts are known, by causing the notice to be delivered to him personally or by sending it to him by post;

> (b) in a case where that person's whereabouts are not known, by sending it by post in a letter addressed to him at his last known address.
>
> (2) If a notice required by section 40(5) of the Act is given to a person appearing to the Secretary of State or, as appropriate, the Governor or Lieutenant-Governor to represent the person to whom notice under section 40(5) is intended to be given, it shall be deemed to have been given to that person.
>
> (3) A notice required to be given by section 40(5) of the Act shall, unless the contrary is proved, be deemed to have been given—
>
> (a) where the notice is sent by post from and to a place within the United Kingdom, on the second day after it was sent;
>
> (b) where the notice is sent by post from or to a place outside the United Kingdom, on the twenty-eighth day after it was sent, and
>
> (c) in any other case on the day on which the notice was delivered."

Application of Statute Law and Regulation

62. The Secretary of State contends that her approach was a strict application of the relevant provisions. The process commenced with the notice of intention to deprive, citing that the decision was based on the criterion of being conducive to the public good. The relevant reasons were provided pursuant to section 40(2) and 40(5). The decision was certified by the Secretary of State thereby diverting the acknowledged right of appeal from the First-tier Tribunal to SIAC, pursuant to section 40A(2) of the 1981 Act and section 2B of the SIAC Act 1997. The deprivation order pursuant to section 40 of the 1981 Act followed as required by section 40(5). At that point, the Appellant ceased to have British citizenship and became eligible for exclusion. The exclusion order followed almost immediately.

63. Notice of the appealable decision was served at the Appellant's last known address in the United Kingdom pursuant to regulation 10 of the 2003 Regulations. This gave rise to the SIAC appeal. The making of the exclusion order gave rise to the review pursuant to section 2C of the 1981 Act.

64. For all those reasons the Secretary of State argues that all technical provisions, including the notice provisions, were complied with. In essence, this is not challenged by the Appellant. The challenge in the case is that technical compliance was achieved by manipulation of the process, which was intended to and did deprive the Appellant of the advantages, perceived or real, of an in-country appeal. It is the tactical approach to the technicalities of the legislation and regulations, it is said with that intention, which it is submitted to be an abuse of power.

The Appellant's Submissions

65. The Appellant begins by referring to a range of authority as to the meaning of abuse of power. "The rule of law requires not only that State power be exercised within the express limits of any relevant statutory jurisdiction, but also fairly reasonably and in good faith" which "imperative … cannot be set aside on utilitarian grounds" (*A (No 2)* [2004] EWCA Civ 1123 paragraph 248 per Laws LJ). All statutory power is conferred on trust and for particular purposes (*Chetnik* [1988] AC 858, 872B-F) and public powers must not be exercised "in a manner inconsistent with the public purpose for which the powers were conferred" (*Magill* [2002] 2 AC 357 at paragraph 19(2) per Lord Bingham), or in a way which fails to promote or serves to frustrate the statutory purpose (*Padfield* [1968] AC 997 at 1030B-D per Lord Reid). Powers will have been "abused" where a public authority has exercised them or declined to exercise them "in order to achieve objectives which were not the objectives for which the powers had been conferred" (*Preston* [1985] AC 835 at 865B per Lord Templeman). Powers are conferred for limited purposes, and authorities who exercise powers may not do so for "an ulterior object … however desirable [the] object may seem to be in the public interest" (*Stewart* [2004] UKHL 16 at paragraph 28 per Lord Hope).

66. The Appellant submits that the purpose of the statutory notice provisions is obvious: the object is to make the individual aware, promptly, of an important notified decision so that they can exercise their rights of appeal. In a "case where that person's whereabouts are known" (Reg 10(1)(a)) there should be personal service. That will effectively communicate the decision and enable appeal. The default provisions are necessary to cover the situation where the individual's whereabouts are genuinely unknown. Here when the "in principle" decision was taken, L1's whereabouts were perfectly well known. It was an abuse of power to wait deliberately until his whereabouts were at best doubtful, and to do so for an ulterior motive: an objective which was not the objective "for which the powers were conferred".

67. The Appellant reinforces that submission by arguing that it:

> "… cannot be lawful and a proper use of statutory powers to wait and then give statutorily-required notice to an address, at the very time when it is known that the person is absent from that address. Fairness and transparency are important to the rule of law, as is effective notification of an adverse decision: cf. *Anufrijeva* [2004] 1 AC 604 at paragraph 26. Effective notification should be promoted, not undermined by deliberately waiting and relying on "the letter of the law" which is a reserve power, second-best and is known will not be effective in the instant case. Public authorities should always act to ensure that rights to be notified should be practical and effective, not theoretical and illusory."

68. Mr Fordham emphasises the dangers in exercising statutory discretionary powers to avoid an "unsatisfactory" situation, at least where there are individuals who rely on the entitlements conferred on them by law. He referred the Commission to the well-known authority of *Hunter v Chief Constable of West Midlands* [1982] AC 529, and to the remarks of Lord Diplock that the Court will be astute to prevent misuse of

process, which "although not inconsistent with the literal application of its procedural Rules, would nevertheless be manifestly unfair to a party" (see paragraph 536).

69. As a secondary argument, Mr Fordham submits that it was also abuse of power to act so as to ensure there would be no temporal sequence of (a) prior notice and then (b) deprivation order. Here he relies on the terms of section 40(5), which we have set out above, as indicating the intention of Parliament: prior notice of the Minister's intentions "before making an order". Parliament did not confer a power to give a "rolled-up" notice: such a power would require express language. The statute requires the Secretary of State to give "reasons" (section 40(5)(b)), and it is to be inferred that that requirement is to facilitate appeal. A sufficient period of such notice has real significance for those affected by notified action, permitting the person affected to have a reasonable opportunity to obtain legal advice and assistance: *R(Medical Justice) v SSHD* [2011] EWCA Civ 1710, see Sullivan LJ at paragraphs 19-24.

70. The third point advanced by the Appellant is that it was an abuse of power to deprive on the ground that L1's presence in the UK was not conducive to the public good, when such a decision did not obtain when he was in fact present in the UK.

71. Fourthly, the Appellant submits it was unlawful, and undesirable in the public interest, to seek to avoid the "durable presence" of the Appellant whilst he pursued his statutory entitlement to an in-country right of appeal. The statutory provisions conferred such a right, deliberately and expressly. The Secretary of State has the duty to protect the public and a range of powers properly exercisable to that end. However the Secretary of State has no right, even in pursuit of a duty to protect the public, to override or displace the right to pursue an in-country appeal where that has been granted by Parliament.

72. The Appellant adds, by way of underscoring the practical implications of the challenged decision, that exclusion is a significant matter for him, lent emphasis by his medical condition. It is easier to conduct an appeal in-country rather than out of country, a point recognised by Sedley LJ in *R(BA)(Nigeria) v SSHD* [2009] EWCA Civ 119, [2009] QB 686, see paragraph 21 of that judgment.

73. We have recited reasonably fully the arguments advanced by the Appellant. However, they might be brought to converge as a single proposition: the approach of the Secretary of State was a serious manipulation of the system, with significant consequences for the Appellant, so much so that the Commission should not merely regard it with disfavour but should condemn it as an abuse of power.

Submissions for the Secretary of State

74. The Secretary of State firstly suggests that there are relevant facts to set the context for this decision. L1 had only held his British nationality for seven years at the time of the decision, and he maintained his dual Sudanese nationality. In the years before the decision he had spent the majority of his time in the Sudan, and part of his immediate family resided there, rather than in the UK. It is the Secretary of State's case that L1 has a wife still residing in the Sudan. It is agreed that he has a wife in the United Kingdom. There is an issue here: throughout his unsigned and undated "position statement", L1 speaks only of one wife, named Farida, whom he married in

1998 and with whom he has five children. In paragraph 33 of the statement he denies that he has another wife. It is clear from his own statement, however, that L1 agrees he has spent considerable periods in Sudan being detained there in 2007 and 2009 (paragraph 12). He was moving freely and voluntarily between the UK and Sudan, despite those periods of detention. In paragraph 33 he agrees that:

> "I had been living for certain periods in Sudan but I still regarded the UK as my home. The reasons for which I went back to Sudan at certain times were essentially family reasons."

75. Against that backdrop, the Secretary of State argues that there could be no possible objection to a decision to deprive him of British nationality being taken during one of the lengthy periods when he was abroad in Sudan, or Switzerland for medical treatment, which decision would have likely meant the Secretary of State would have served him at his last known address in the UK. Had that been done, L1 would have had no right to re-enter the United Kingdom to pursue an appeal and no complaint about the procedure adopted.

76. The Secretary of State emphasises that from at least the time of the decision "in principle" to deprive, the assessment by the Security Service has all along been that L1 was a committed extremist who, over a significant period of time has been involved in a range of extremist and other illegal activities. Whilst in the UK, the Appellant had met the relevant threshold of seriousness for deprivation of his British citizenship (see paragraph 4 of Mr Larkin's first statement). Thus, says the Secretary of State, it is an untenable argument to submit that the criteria for deprivation were not fulfilled when the "in principle" decision was taken.

77. The decision to deprive is a power but carries with it no obligation to exercise the power immediately the criteria are fulfilled, or indeed at all. As Mr Glasson QC, for the Secretary of State, put it, the Minister is plainly not required immediately to deprive an individual of citizenship in every case where it would be justified: there may be cogent reasons for permitting an individual to retain citizenship, at least for a period. Provided deprivation is justified, it is a matter for the Secretary of State as to how and when the decision to deprive is taken. We accept that submission. There might be a number of valid reasons for delay in such circumstances. An obvious example is that it might be extremely damaging to national security to reveal to an individual how much was known of their activities. It follows that we reject the third contention advanced by Mr Fordham.

78. Mr Glasson makes four further successive submissions, close in sense to the last. Firstly, he says that the Secretary of State has a broad discretion in relation to which measures are appropriate at any given time to deal with those who pose a risk to national security. Secondly, the Secretary of State has a power to deprive an individual of British citizenship based on national security considerations: a proposition which is accepted by all. Thirdly, Mr Glasson says that power is not limited to circumstances where the individual is currently in the United Kingdom and can perfectly properly be exercised in respect of individuals who are outside the country: again, a proposition accepted by all. His fourth proposition comes close to the kernel of this case: he says that, in considering the **timing** of a decision to deprive an individual of citizenship for national security reasons, the Secretary of State is

equally entitled to have regard to national security considerations. That is an important proposition.

79. The Secretary of State accepts explicitly that in the absence of a legitimate reason (such as legitimate national security considerations) it would be "inappropriate deliberately to choose to serve a notice of deprivation in order to prevent an appeal, prevent access to effective legal advice or indeed simply to increase the Secretary of State's prospects of resisting a successful appeal". However, the Secretary of State submits that is not what happened here. There was and is no question of preventing an appeal or indeed preventing access to effective legal advice. Those advising the Secretary of State before the decision in principle was taken had assured themselves (and reassured the Minister) that L1 could mount an effective appeal from Sudan.

80. Mr Glasson accepts that there may be practical advantages to an in-country right of appeal as opposed to an out of country appeal. Observations to that effect are to be found in *MK v SSHD* [2010] EWHC 2363 (Admin); [2011] EWCA Civ 333 and in *E(Russia) v SSHD* [2012] EWCA Civ 357, 1 WLR 3198. However, to observe that there are practical advantages to an in-country right of appeal is very different from concluding that an out of country appeal does not represent a proper vindication of legal rights or is in some way an abrogation of the right of appeal.

81. Mr Glasson then submits that the Secretary of State was not motivated by any improper consideration such as thwarting the Appellant's capacity to appeal or in some illegitimate way seeking to alter the prospects in that appeal. There is, he says, no evidence on which such a conclusion could be built and the evidence from Mr Larkin is entirely to the contrary. The basis of the decision on timing was quite clearly to avoid a long further period during which L1 was resident in the United Kingdom, as the anticipated lengthy appeal ran its course. But the reason for avoiding his presence over a long period was the legitimate reason of preventing him using the United Kingdom as a base for terrorist-related activity during that time. Mr Glasson submits that it cannot be irrational on the part of the Secretary of State to decide to serve this notice when the individual concerned is out of the country, provided that the national security justification for doing so is sound. In this context Mr Glasson submits that the Commission must give great weight to the views of the Secretary of State in respect of such a judgment, relying for example upon the dicta of Lord Steyn and Lord Slynn in *SSHD v Raymond (Consolidated Appeals)* [2001] UKHL 47 [2003] 1AC 153 at paragraphs 31 and 26 respectively.

82. The Secretary of State also submits that the implication of the supposed purpose or intention behind Regulation 10 of the 2003 Regulations advanced by Mr Fordham is misconceived. Since there is no time period specified between the Notice of Intention to Deprive and the deprivation, it is incorrect and indeed unrealistic to construe a "purpose" of ensuring prompt and actual notice to the individual, before a decision is taken. Indeed it is a natural consequence of the "last known address" provisions in Regulation 10(1)(b) that an individual may not know of a decision prior to the order being signed. Whatever may be the case in relation to other notice provisions, the regulation here is not properly to be interpreted as importing such an intention. Here the Secretary of State relies on the earlier decision of SIAC in this case, of November 2010 where in paragraph 13 (in a point not overturned on appeal) the Commission found that Regulation 10: "… lays down a simple code for giving notice which, once fulfilled, suffices." The provisions in Regulation 10 do not constitute a "deeming"

provision nor do they "impose an additional requirement that the decision must be brought to the attention of the person affected". Hence, the arguments advanced by the Appellant based on *Anufrijeva* and *Saleem* are ill founded.

83. For the above reasons, Mr Glasson submits that the approach of the Secretary of State in this case was rational, legitimate and not to be criticised in any way.

84. He goes on to argue that on any view the circumstances in this case fall well below the threshold required for the Appellant to succeed in an argument alleging abuse of power. To succeed, such a submission must clear a high hurdle. Unfairness amounting to an abuse of power was characterised by Lord Templeman in *re Preston* [1985] AC 835, as rooted in unfairness. In the course of his judgment in *R v Inland Revenue Commissioners ex parte Unilever Plc* [1996] STC 681 Simon Brown LJ (as he then was) stated that:

> "'Unfairness amounting to an abuse of power'… is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision would be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power."

85. That formulation of "conspicuous unfairness" as a definition of an abuse of power was adopted by Lord Hoffman in *SSHD v Zeqiri* [2002] Imm AR 296 at paragraph 44. Simon Brown LJ's formulation was also approved by Carnwath LJ (as he then was) in *R(S) v SSHD* [2007] EWCA Civ 546 [2007] Imm AR 781.

86. Given the high threshold to be surmounted, Mr Glasson submits that the conduct complained of here cannot possibly amount to an abuse of power consistent with that body of authority. He supplements that submission by reference to what he describes as "previous reassurance from the Courts that it is not unlawful for [the Secretary of State] to wait until an individual has left the country" before making such a decision as this. In the SIAC appeal in *S1, T1, U1 and V1 v SSHD* SC/106-109/11 similar submissions to those made in this case were advanced on behalf of the Appellants to the Commission. On the facts of that case, there was no evidence of a deliberate waiting by the Secretary of State. However in the course of the judgment the Commission said this:

> "Miss Harrison and Miss Weston also submitted that, if the Secretary of State had a policy or pursued a practice of waiting until an individual had voluntarily departed from the United Kingdom before taking the steps necessary to deprive him of his British citizenship, that policy or practice would be unlawful. Assuming, without deciding, that SIAC has jurisdiction to determine that issue, we reject their submission. It cannot be unlawful for the Secretary of State to make a decision and to implement the decision by making an order in circumstances expressly authorised by Parliament: as the Court of Appeal explained in *G1*, the Secretary of State is entitled to decide to deprive an individual of British citizenship and then

> to make a deprivation order even if, by reason of the fact that he is abroad when both steps are taken, he cannot appeal against the decision from within the United Kingdom. Further, on the facts of this case, there is nothing to indicate that the Secretary of State deliberately waited until the appellants had left the United Kingdom before making the decision."

Our Conclusions

87. We have already indicated our acceptance of the truthfulness of the evidence of Mr Larkin. We consider one aspect of closed evidence in the closed judgment bearing on his account to the Commission. For reasons therein expressed, that does not alter the factual conclusion here. We accept that the timing of the decision here was determined by reference to national security considerations. It is clear from the drafter of the letter which stimulated a protest from Mr Larkin that some within the body of officials advising the Secretary of State perceived a "legal advantage" to the timing. We consider this in our CLOSED judgment. That was counterbalanced by quite explicit and detailed advice to the Secretary of State warning her that the proposed course, including the timing of the decision, would be challenged legally and that there were risks for the Government in the challenge.

88. We reject the submission that Parliament must have intended a clear time sequence of notice to be followed by decision, giving effective or actual notice to the Appellant or others in his position. The remarkable feature of the sequence of obligations spelled out in the statute and Regulations is precisely that there is no stipulated period between the notice and the decision. We accept the analysis of the previous constitution of SIAC that this is a "simple code". We do not consider there is a "right to an in-country appeal", rather provision for an in-country appeal where the individual is, in fact, in the country.

89. However, that does not alter the fact of the specific outcome desired and intended by the Secretary of State in acting as she did. Those who advised her anticipated that if notice of the intention to deprive was served whiled L1 was in the United Kingdom, he would be present for an extended period of years while he appealed. They also anticipated, as set out above, that if matters were not handled as planned, there would be a risk that he would return from abroad before the deprivation order was made, and the advantage sought by moving whilst he was abroad would be lost. It is therefore perfectly clear that this was a crafted sequence of events designed to ensure, if possible, that L1 would be abroad from beginning to end of any appeal. That was the objective, and there was careful planning to ensure that end.

90. As the concern of the Court of Appeal emphasises, such an approach is not on the face of it attractive. The issue is whether it is justified, and lawful, because of the national security consideration involved.

91. It did not and will not deprive L1 of an effective appeal process. It may mean more practical and logistical problems for those who represent him and indeed for the Commission. Nevertheless, an extended timetable has been laid down precisely to enable him to have an effective appeal and the Commission will play its part in ensuring that transpires.

92. The fundamental question is whether this approach was "unfair" or so unfair as to represent an abuse of power. We bear in mind the high threshold for such a decision. We accept that national security considerations were the driving motivation. We have naturally reached no conclusion on the substantive national security issues in the case, but we are able to draw from the closed material and our understanding of the serious considerations raised in the mind of the Secretary of State when she sanctioned the approach recommended by the officials. For present purposes the Secretary of State must be taken to be able to act upon those submissions made to her.

93. For all those reasons and after considerable thought, we have concluded that the decision in this case was not an abuse of power. It is our view that it is legitimate for the Home Secretary to bear in mind national security considerations when looking at the timing of legal action. There are clear limits to that. It would be an abuse of power to act so as to prevent or frustrate an effective appeal. However, that is not what took place here. We accept that the consequence of the approach taken is to make the practicalities of appeal more difficult, but that is of a different order of magnitude to the prevention or frustration of an appeal.

94. As set out in the CLOSED judgment the nature of the national security threat here, as submitted to the Home Secretary, meant that presence in the UK for a period of years whilst an appeal ran its course, was a valid national security consideration. We have borne well in mind, in relation to the abuse of power, firstly that it is a high threshold, and secondly the question whether an ulterior purpose lay behind the decision. Here both the preliminary decision, and the decision as to timings, were rooted in national security. It does not in the end seem to us that the approach was "unfair" or "grossly unfair" so as to cross that high threshold. The actions of the Secretary of State were lawful and within her powers.

95. For those reasons, amplified where necessary in the CLOSED judgment, the Preliminary Issue in the appeal is decided against the Appellant, and the statutory review on this ground is dismissed.

96. We are conscious of the length of both judgments in this case. However, given the nature of the evidence and the issue in question, we have considered it right to examine matters in detail.