SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/163/2019, SC/172/2020, SC/174/2020, SC/175/2020, SC/182/2020
Determined on written submissions
Date of Judgment: 29th November 2021

Before:

THE HONOURABLE MR JUSTICE JAY

Between:

SHAMIMA BEGUM, C8, C10, C11 & D4

APPELLANTS

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

JUDGMENT

Mr Dan Squires QC and Ms Jessica Jones (instructed by Birnberg Peirce Solicitors) appeared on behalf of C8, C10 and D4

Mr Dan Squires QC and Mr Tim James-Matthews (instructed by Birnberg Peirce Solicitors) appeared on behalf of Shamima Begum and C11

Sir James Eadie QC, Jon Glasson QC and David Blundell QC (instructed by the Government Legal Department) appeared on behalf of the Secretary of State in SB's appeal

Mr Rory Dunlop QC and Jennifer Thelen (instructed by the Government Legal Department) appeared on behalf of the Secretary of State in the appeals of C8, C10 and D4

David Blundell QC and Andrew Byass (instructed by the Government Legal Department) appeared on behalf of the Secretary of State in the appeal of C11

Mr Tom Forster QC and Mr Adam Straw QC (instructed by Special Advocates Support Office) appeared as Special Advocates but made no submissions

Introduction

1. I have now provided two rulings in these cases, on 20th July and 19th October 2021 respectively. I will be referring to these for ease of reference as the first ruling and the second ruling. The need for the second ruling had been created, at least in part, by the complexity of the issues and culminated in what the SSHD has politely described as an evolution of thinking on my part. I might add that this state of affairs has come about, at least in part, by the shifting sands of the parties' submissions.

2. Since the second ruling, there have been further written submissions. On 25th October 2021 the SSHD invited the Appellants (excepting SB, who had decided to prosecute her appeal on all grounds) to agree to a proposal that I had tentatively suggested during the course of the hearing on 6th October – that the public law grounds should be heard in advance of any *Simplex* defence. On 28th October Birnberg Peirce firmly rejected that offer in the context of C11's appeal which is due to be heard in March 2022. On the same day, Birnberg Peirce in separate submissions asked me to clarify what I had said about the Appellants' ability to challenge the national security case in my second ruling. On 8th November the Court of Appeal handed down its judgments in *P3 v SSHD* ([2021] EWCA Civ 1642) and I immediately invited further submissions. On 9th November the SSHD filed detailed submissions in response to my invitation and also in reply to Birnberg Peirce's correspondence. On 17th November Birnberg Peirce filed detailed submissions in response to my invitation and in development of their contention that the national security case should be capable of limited challenge in connection with the unstayed grounds. Finally, there were further submissions from both sides on 19th November dealing with disclosure issues in C11's appeal.

3. I have reflected on the parties' written arguments for which I am grateful. I continue to recognise that this litigation generates strong feelings for reasons which are wholly understandable. On the one hand, the Appellants are ensconced in Syria indefinitely and may never be in a position to give confidential instructions to their solicitors. Their personal difficulties do not require further elaboration. On the other hand, the SSHD has exercised statutory powers in the public interest; and, if national security so dictates, the outcome may well be "draconian", to use an adjective deployed on one of the Appellant's behalf in oral argument, but still within the scope of those powers.

4. I am not swayed by any of these feelings, although I cannot deny that these are anxious cases. I have tried at all material times to steer a mid-course between the submissions of the parties, some of which have taken too high a moral ground.

5. I will defer consideration of the ramifications of *P3* to a later stage of this third ruling.

6. In my judgment, there is one issue which is absolutely central to the proper determination of these issues. That issue concerns the extent to which some of the Appellants' unstayed grounds amount to an attack by proxy on the national security case.

7. There is a material difference – at least of emphasis - between the first ruling and the second ruling on that key issue. In the first ruling, I held that, although the Appellants could not challenge the national security assessment through the medium of the unstayed public law grounds, they could challenge some of the inferences that may have been drawn by the SSHD, for example the inference that because C11 would be remaining in Syria for the foreseeable future, the best interests of her child tracked the physical location of his mother. I said that this inference did not raise a national security issue but could be envisaged as requiring a judicial or evaluative assessment. In the second ruling I repeated my conclusion, perhaps with greater force, that the national security case could not be challenged and must be assumed to be correct. By "the national security case", I meant the submissions and connected material that were placed before the Secretary of State when the deprivation decisions were made. This material remains in CLOSED and I must re-emphasise that I have not seen it. In my second ruling I explained that the Appellants could advance three *Tameside* grounds in the context of their public law challenge under that rubric but in doing so could not deploy these as challenges by proxy to the national security case.

8. The Appellants have complained that they were not given sufficient warning before 6th October that I was minded to revisit this issue. I thought that I had made it clear that all issues were in the melting pot, but in any case I gave the Appellants a further opportunity to address me in writing on the topic; and they have taken that opportunity.

9. The Appellants' position may be encapsulated as follows. They accept that their *Tameside* grounds depend on it being established that no reasonable decision-maker could have been satisfied, on the basis of the enquiries made, that he[1] possessed the information necessary for the decision. If the SSHD's national security and proportionality assessment must be taken as read because it could not be challenged:

> "… [i]t is very difficult to see how it could *ever* be irrational for the SSHD to have failed to consider some other matter, said to be relevant to necessity/proportionality, where, by definition, that other matter could not have altered the assessment on necessity/proportionality because that has already been assumed to be correct …" (see para 6.3 of the letter of 28th October, which needs to be considered in full)

10. The Appellants therefore invite me to draw a distinction between, on the one hand, the fact that they travelled to Syria and aligned with ISIL (which they accept is not capable of dispute) and, on the other hand, some at least of the SSHD's conclusions which flow from that, including the finding that they would never wish to return to the UK (which they contend may be challenged through the avenue of the unstayed grounds).

11. The SSHD's position may be summarised as follows. She points out that para 6.3 of Birnberg Peirce's October letter means that the Appellants now appear to accept that they are caught between a rock and a hard place. This is because para 6.3 effectively

[1] The relevant decisions were made by the predecessors to the current Home Secretary.

concedes that the Appellants *must* be permitted to assail the SSHD's necessity/proportionality assessment otherwise the litigation of the unstayed grounds would be – the Appellants having adopted my phrase - "an expensive waste of time" (I would point out that the context in which I used that rhetoric needs to be examined closely, but for present purposes this may not matter). So, the rock is the need to challenge the necessity/proportionality assessment within the framework of the unstayed grounds (which I have not permitted), and the hard place is the consequence of my ruling that this assessment may not be challenged if the unstayed grounds proceeded in advance of the stayed grounds (which I have permitted, but would mean that the unstayed grounds must fail).

12. The SSHD's primary submission is that I must reverse my decision that the Appellants can proceed on certain grounds and not others. All the grounds must be stayed until the Appellants are in a position to give confidential instructions. In the alternative, the Appellants must be required to choose between two courses: a stay of all grounds, or pursuit of all grounds. In the further alternative (and this assumes that I reject the primary submission), the Appellants may be permitted to pursue the public law grounds which should be determined before anything else, and in the event that any of these succeed the *Simplex* defence should be litigated at the same time as the currently stayed grounds, but not before.

13. My point of departure is to observe that the parties have, at times, overstated their respective positions, but that perhaps is unsurprising.

14. If my second ruling should be interpreted as saying that at all stages of the analysis and for all purposes, the national security case cannot be challenged, the parties would indeed be correct in submitting (each from their entirely different perspectives) that there would be no point in allowing the *Tameside* grounds to proceed because they would inevitably fail. I continue to focus on those grounds because at first blush they appear to be the most propitious. However, my thinking was, I believe, more nuanced than that. I will be explaining why in a moment.

15. Whatever may be the correct interpretation of my second ruling, the solution to the problem that the Appellants identified at para 6.3 of their letter dated 28th October is not to permit the sort of challenge to the national security case to which they aspire. That would, in my judgment, lead to an abuse of the processes of this Commission.

16. The Appellants say, on the back of para 14 in particular of my ruling given in C11's case on 20th July, that they should be permitted to examine some of the inferences to be drawn from the bare facts that they travelled to Syria and aligned themselves to ISIL. They say that such an examination would not be a challenge to the national security case, alternatively would be only a limited challenge to it.

17. At this stage, I must make it clearer than perhaps I did on 19th October that I now think that para 14 of my 20th July ruling was wrong. Part and parcel of the national security case, indeed the key part, is that the Appellants would constitute a threat to national security were they to return to the UK. The inferences to be drawn from, for example, C11's then intentions at the time the deprivation decision was made, relevant to the best interests of her child, are part and parcel of the national security

case; they cannot be categorised in any different way. The same applies to the subject-matter of the other *Tameside* grounds. Although it could be the position that these aspects of the national security case may not raise issues the disclosure of which should be protected for reasons of national security, those two questions should not be confused.

18. In reality, although the Appellants deny it, what they seek to do is challenge through the unstayed grounds the factual and inferential assessments which are central to the national security case against them. Even if the SSHD would support her national security assessment on the basis of additional intelligence and inferences that will always remain in CLOSED, that does not detract from the reality of the Appellants' aspiration. That the challenge to the national security assessment would be largely conducted by the Special Advocates is, again, nothing to the point.

19. It follows that I decline the Appellants' invitation to return to what I said in my first ruling. I adhere to my second ruling. Given that the Appellants have made it explicit that they must challenge the national security case to avoid the "expensive waste of time" I have previously sought to eschew, it must follow that, if this issue were to be decided on the parties' submissions alone, the SSHD would have persuaded me to reverse my decision that certain grounds may proceed in advance of others.

20. Although the outcome will, as it turns out, be the same, I do not think that it is satisfactory to decide the issue solely on the basis of the parties' submissions. At this juncture, I should explain my more nuanced thinking: see para 14 above.

21. Imagine a public law ground that is less complex than the *Tameside* grounds that have been discussed thus far. Imagine a contention that the decision-maker was biased. The Supreme Court in *Begum* made it clear that an Appellant before SIAC could advance such a case. Such a ground would not, in my view, involve a direct challenge to the national security case. It would be saying that, owing to the absence of an open mind, there is a sufficient risk that the wrong assessments were made in the context of the national security case, but it would be unnecessary to go any further than that. The onus would then shift to the decision-maker to satisfy the Commission that the evidence was so strong that the result would inevitably have been the same. In bias cases that argument is very rarely attempted, but the principle I have stated holds good.

22. The point I am making is that, if a bias or predetermination ground were considered by SIAC in advance of any other (bringing my hypothetical example slightly closer to the facts of the present case), the SSHD could not say in answer to that ground that because the national security case must be taken at its highest, this ground must inevitably fail. To the extent that the predetermination ground involves an indirect challenge to the national security case, without any requirement to be specific, that could not be objectionable.

23. In permitting three *Tameside* grounds to proceed in advance of the merits challenge to the national security case, I was treating these grounds as amounting to what I have been calling an indirect challenge and no more. The contention would have to be that, because X, Y and/or Z were not properly investigated or taken into account, there is a

material risk that the wrong assessments were made in the context of the national security case, without going any further. I am formulating the contention in these terms because the Appellants have not said that this might be a fruitful way of proceeding. They see the issues rather differently.

24. Although this more nuanced approach has the attraction of appearing to steer a course between Scylla and Charybdis, the conclusion I have reached is that this was too ambitious. There is no such middle course. My reasons are as follows.

25. First, in contrast to the hypothetical predetermination ground that I have been examining, it is difficult in practice to separate the *Tameside* challenge from the stayed grounds. Without using the SSHD's metaphorical language, the Appellants have to say that it was irrational not to carry out a certain investigation or to take a particular matter into consideration. This is not a case where an examination of the statutory scheme alone would enable the Commission to hold that X, Y and/or Z should have been investigated or taken into account. But, in order to assess the force of that specific and narrow irrationality argument, some examination of the national security case as it was put to the SSHD in the ministerial submission and supporting material would be required. Only then would it be possible to conclude that a rational Secretary of State would have been required to do *ex hypothesi* what he did not.

26. In my second ruling I was careful not to express a view of the strength of this narrow irrationality argument, although it would not be right to infer that I was oblivious to the difficulties. I was proposing it as the only possible way forward for the Appellants. Frankly, I now think that I underestimated the problem. It *may* be possible to discern from an examination of the material before the decision-maker and taking it at its highest whether a rational Secretary of State should have undertaken further investigation. Without having seen the CLOSED material, I am speaking somewhat hypothetically. However, I now have to accept that this is unlikely. Without permitting a challenge to (as opposed to an examination of) the national security case, even one limited to the terms in which it was put to the decision-maker, it is improbable that what I am calling the narrow irrationality argument could succeed. Moreover, once some sort of merits challenge is permitted, it seems to me that in order to be fair to both parties no clear limits could be placed on it. The door, having been left ajar, would be burst open.

27. In my judgment, to permit *Tameside* grounds to be run in advance of the primary challenge to the merits of the national security and proportionality assessment creates two real, unacceptable risks. The first is that it would soon become evident at the first appeal hearing, once the CLOSED material has been made available to the Commission and written submissions received, that these grounds cannot succeed on the basis on which they are being advanced. I would assess that risk as being quite high. The second risk, overlapping to some extent with the first, is that it becomes clear that any challenge to the national security case within the parameters of the material that was put before the decision-maker at the material time generates more questions than answers. The Commission could well conclude that it cannot fairly determine the narrow irrationality challenge on the existing material, and finds itself

wishing that the issue was being addressed after a full exculpatory review had been undertaken.

28. Secondly, there is a further problem which neither party has mentioned.

29. Imagine that the non-stayed public law grounds fail. The Appellants have previously accepted that this would mean that these grounds are *res judicata* and could not be revisited in the context of any later hearing of the stayed grounds. Is that what the Appellants really want, and is it practicable? I would have thought that in challenging the national security case head-on through the avenue of the currently stayed grounds the Appellants would want to be able to contend that SIAC should be considering what may be their best points, namely the substance of three *Tameside* grounds I have identified. When the currently stayed grounds are under consideration, it is likely that the taxonomy of *Tameside* would no longer be deployed by the Appellants, but what matters here is substance and not form. Distinctions between pure *Wednesbury*, failures to take into account relevant considerations (on Lord Greene's analysis, a sub-category), and failures to investigate (in the circumstances of this case, a further sub-category) are all without a difference. Here we confront another rock and hard place. The rock is the plea of *res judicata* in relation to the substance of the three *Tameside* grounds; the hard place is the re-litigation of what in reality are the same issues. So, either the Appellants would be precluded from advancing their best arguments by operation of law, or they would be acting abusively. True, the abuse would not be as egregious as the abuse that would be generated on the Appellants' preferred approach, which I have rejected, but here matters of degree are not relevant.

30. The answer to these difficulties is not to be found in any contention that they will largely disappear if the SSHD decides to advance a *Simplex* defence. She has said in the past that she intends to do so, but in my opinion these issues fall to be addressed as a matter of principle on a free-standing basis. *Simplex* only arises if one or more of the public law grounds succeed.

31. This brings me thirdly and finally on this topic to the Court of Appeal's decision in *P3*, and the SSHD's submission that:

> "*P3* demonstrates that the Appellants' attempt to divorce the national security case from their public law grounds of challenge is fundamentally misconceived. In reality, there is no room for the sort of free-standing public law challenges which the Appellants have attempted to mount. The focus of any public law challenge must be on the national security case; and, as such, resolution of these appeals requires resolution of the national security case."

32. Certainly in the context of the majority of the public law challenges that the Appellants are attempting to mount, the SSHD's submission is well-founded. This is because appeals under s. 2B of the 1997 Act cannot be envisaged as judicial review proceedings where the primary focus is on the decision-making process. They are appeals properly so called, where administrative law principles fall to be applied to the merits of the national security case but otherwise the facts and other evaluative assessments are for the Commission. Appeals under this section are determined on exculpatory material and other evidence (if adduced) which was not before the SSHD

when the relevant decision was made. It is the policy of Parliament, and the rule-maker, that as a general rule an appellant should raise all aspects of her challenge to the decision at the same time, in particular her challenge to the national security case. That challenge is the centre-piece of her appeal. Putting bias challenges possibly into a different category, it is not the policy of Parliament and the rule-maker that an appellant may proceed in a piecemeal fashion, as if it were a judicial review, with the sole objective that her case be put back to the decision-maker for reconsideration. Instead, either the appeal is dismissed, and that is the end of the case, or it is allowed, and an appellant's citizenship is restored. The SSHD is right in submitting that *P3* makes it clear, if it was not sufficiently clear following *Begum* in the Supreme Court, that as a general rule s. 2B appeals should be one-stop rather than – at least potentially - multiple-stop.

33. Looking back at para 4 of my amended note dated 23rd August, this is close to being the point I was trying to make.

34. Ultimately, I have to jump one way or the other. Either I accept the Appellants' argument and permit a challenge to important elements of the national security case through the prism of the unstayed grounds, or I accede to the SSHD's argument that it would be both wrong in principle and unfair to allow that.

35. For the reasons I have set out, I am driven to accede to the SSHD's submission that it would not be appropriate in the overall interests of justice for the Appellants to be permitted to pursue certain grounds in advance of others.

36. Although I invited submissions from the parties on *P3*, it is unnecessary to say much more about it. Plainly, the Court of Appeal have assisted the Commission in interpreting and applying the decision of the Supreme Court in *Begum*, and any differences in emphasis between the three judgments may be addressed on another occasion.

37. I limit myself to one further observation on *P3*.

38. *P3* has clarified the potential value of an appellant's evidence even though it was not before the SSHD at the material time. Para 13 of Birnberg Peirce's letter dated 17th November is correct. The Court of Appeal did not explain how convincing evidence from an appellant might impinge on the SSHD's national security assessment, but the answer is that it would depend.

39. This brings me to the SSHD's first alternative submission, that the Appellants should be put to their election. The SSHD's primary contention is that these appeals should be stayed (see the first two sentences of para 9 of their letter dated 9th November), but if that is wrong she says in the alternative that the only logical and fair conclusion is that these appeals must be all or nothing, with the Appellants being permitted to choose which.

40. There is nothing in *P3* in the Court of Appeal which touches directly on this question. The Supreme Court in *Begum* were clearly assuming that SB would not wish to prosecute her appeal without giving evidence to the Commission, but they were not holding that evidence from her was a precondition to her pursuing her appeal. The

issue for me is whether the Appellants may be given the opportunity to pursue these appeals without giving confidential instructions to their lawyers, and on the basis of either bare or deemed denials to the proposition that they each constitute a threat to national security.

41. In October I was addressing the SSHD's objection to SB being permitted to lift the stay in the context of the possibility that she might seek to re-open any adverse finding by SIAC in the event that at some point in the future she were able to give full instructions. I will be returning to this topic, but in general terms I see no reason why the Appellants should not be allowed to advance their cases on all grounds in the knowledge that any adverse holding by SIAC would be *res judicata*. There could be evidentiary problems in connection with the cases they advance, but the gravamen of the SSHD's contention that each would pose a threat to national security on their return could in my view be properly tested. Granted, it would have to be tested largely in CLOSED, but that would be the case even if evidence from them were given. The Special Advocates in CLOSED are duty-bound to probe the national security case whether or not they have confidential instructions from an appellant obtained before they went into CLOSED. That duty arises even if an appellant files no evidence. Rule 10A(1) of the SIAC Procedure Rules permits, but does not require, the filing of evidence by an Appellant, indicating that its absence cannot be dispositive of the appeal.

42. Thus, the real question becomes this: does *P3* alter the possibility that an unsuccessful Appellant could later successfully apply to set aside SIAC's adverse decision on the basis that she now has something valuable to contribute evidentially?

43. In my second ruling I downplayed the potential importance of an appellant's evidence in SIAC proceedings. The October transcript will show a rather revealing exchange between Sir James and me on this issue. Even so, I was not holding that such evidence would be inadmissible. Of course, by pursuing these appeals on all issues without their clients being in a position to give evidence the Appellants would be deemed to accept the logical consequence of the litigation strategy of their lawyers, viz. that a *res judicata* would be generated. However, save in SB's case where she has given express instructions to proceed in this manner, *P3* alters the dynamic somewhat, at least to the following extent. Given that an Appellant could give potentially valuable evidence, would it really be in their best interests to proceed on all appeal grounds without SIAC receiving their evidence? Further, would the potential value of their evidence serve to increase their chances of a decision adverse to them being set aside? That would be the very point that would be pressed if a set aside application were ever made.

44. I have not received further submissions on these questions. Given that matters are pressing, I have decided not to delay the hand-down of this ruling further. Birnberg Peirce will no doubt continue to address the best interests of their clients. It is quite true that the judgments Birnbergs Peirce have thus far made are predicated on their being able to challenge the national security case, and that predicate has disappeared. Best interests will need to be reconsidered. Even if I understated the potential importance of evidence from an Appellant in my second ruling, one does need to

continue to bear in mind that the granular detail of the national security case remains in CLOSED, and that is where the primary battle-ground exists. Plainly, it is difficult to make a prediction as to the prospects of any application to set aside an adverse ruling from SIAC without being aware of precisely what any individual Appellant might wish to say, but that is not the sole factor under consideration. There are strong public policy reasons favouring the finality of judicial decisions, and by seeking to pursue these appeals on all grounds Birnberg Peirce must be taken to have decided, if that be their decision, that such a strategy represents the best interests of their clients. In my judgment, it remains unlikely that an adverse ruling from this Commission following a full and detailed examination of the CLOSED material albeit without much if any input from an Appellant could be set aside. The probable riposte to an aggrieved Appellant's complaint that her appeal proceeded perhaps without her knowledge and certainly without her evidential contribution, and without any explanation of the ins and outs being provided to her, would be – likely following a waiver of privilege - that Birnberg Peirce carefully considered what was in the best interests of their client, had their client's authority to proceed in this way, and that the outcome is binding and cannot be disturbed.

45. In case there be any doubt about it, an assessment of a client's best interests in appeals such as these involves a number of factors. Birnberg Peirce can hardly ignore the difficulties their clients are currently facing and the absence of any realistic prospect that the geo-political situation might improve in the foreseeable future. If a decision were made to pursue these appeals on all grounds, the inference must be that Birnberg Peirce have given full and anxious consideration to all the competing considerations.

46. Should I permit the remaining Appellants to pursue their appeals on all grounds if that be their election? In my judgment, I should. There *is* a risk that an adverse decision might later be set aside, and that risk is slightly higher than I previously thought. I also factor into the balance as I did in my second ruling that, in the unlikely event that SIAC were to set aside its decision on the application of an Appellant, the wheel would not require re-invention. Any further exculpatory review would be limited and probably unnecessary. The issue for SIAC would be whether the Appellant's evidence alters the picture.

47. An acceptance of the SSHD's primary submission would be an acceptance that the Appellants must be denied access to the Commission for the foreseeable future in circumstances where the risk of injustice to the SSHD is capable, for the reasons I have given, of being managed.

48. It is unnecessary to consider the SSHD's further alternative submission that, if the cases are to proceed on some grounds and not others, the public law grounds should be determined in advance of the *Simplex* defence. I have concluded that these appeals cannot proceed on that basis.

49. Nor is it necessary to address C11's concerns relating to the provision of the CLOSED material to the Special Advocates. These issues had to be resolved first.

50. In conclusion:

(1) I accede to the SSHD's submission that the Appellants should not be permitted to pursue certain grounds but not others.

(2) I reject the SSHD's submission that all grounds must be stayed until the Appellants can give confidential instructions.

(3) I accede to the SSHD's alternative submission that the Appellants must be put to their election: they must decide as soon as possible whether to proceed on all grounds or on none of them.

51. SB's case remains listed for November 2022. Directions have not as yet been made in her appeal and I therefore invite the parties to agree them. I can see that in the event that the other Appellants elect not to proceed at this stage, there exists the possibility of an earlier hearing for SB. C11's case is currently listed for early March 2022. In the event that she decides to proceed on all grounds, I require brief written submissions from the parties as to whether her appeal could fairly be heard then. On my understanding, the SSHD has been carrying out a full exculpatory review in C11's case on the premise that a *Simplex* defence was being advanced. I am not sure that widening the scope of her appeal changes the nature of that review. Directions in her case were made in July 2021, but if they need to be varied I will no doubt be told. The rule 38 hearing currently listed for mid-December could be put back a month. Birnberg Peirce will also let the Commission know as soon as possible how they now wish their clients' appeals to proceed. If time is needed for the full and anxious consideration I have mentioned, I would welcome a broad indication of its likely duration.

52. This is my third and final ruling on these issues. The way forward for a party aggrieved by my decision is not to ask for a further reconsideration but to seek to challenge this ruling by way of judicial review.