SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/63/2007
Hearing Dates: 1st – 3rd July 2014
Date of Judgment: 8th August 2014

BEFORE:

THE HONOURABLE MR JUSTICE IRWIN
UPPER TRIBUNAL JUDGE PERKINS
MR STEPHEN PARKER

BETWEEN:

ZZ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

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MR HUGH SOUTHEY QC and MR N ARMSTRONG (instructed by Public Law Project) appeared on behalf of the Appellant.

MR T EICKE QC and MR DAVID CRAIG (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State.

MR A UNDERWOOD QC and MR M GOUDIE (Instructed by Special Advocates' Support Office) appeared as Special Advocates

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JUDGMENT

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1. This case concerns rights to information derived from European Union law and the consequent obligations on a Member State to release information even where, in the view of the Member State, that information impinges on national security. In this case those rights are said to spring from the French citizenship of this Appellant.

2. The facts are familiar. It is not necessary for us to set them out in full. They are analysed fully in the judgment of SIAC of 30 July 2008. In short summary, ZZ has dual nationality, Algerian and French. On 25 August 2005 the Secretary of State cancelled his indefinite leave to remain in the United Kingdom and excluded him from the United Kingdom. The Home Office had been notified on 19 August 2005 - that is to say six days before those decisions - that ZZ had left the UK. His application for naturalisation was refused on 30 August 2005. A little over a year later, on 18 September 2006, the Appellant arrived at Heathrow from Algeria, presenting his French passport. He was refused admission to the country and removed to Algeria. His challenge is to the refusal to admit him to the UK on that date.

3. The matter turns on Regulation 19(1) of the Immigration (European Economic Area) Regulations 2006. The refusal to permit his entry was justified within those Regulations on grounds of public security. The matter came to SIAC following certification by the Secretary of State on 15 March 2007.

The SIAC Decision of 2008

4. In considering the case, SIAC had in mind and considered the provisions of the 2006 Regulations just mentioned, which transpose into English law the Directive 2004/38/EC of the European Parliament and of the Council of 2004, those provisions conferring on every citizen of the Union "a primary and individual right to move and reside freely within the territory of the Member States", words forming part of Recital 1 of the preamble to the Directive.

5. Recital 22 identifies the restrictions placed upon the right, which include "public security". Recital 23 imports the "principle of proportionality", where expulsion of Union citizens is in question. SIAC in its original decision went on to consider and recite various of the safeguards set out in the Directive, including Recitals 24 to 26, inclusive, of the Directive, as follows:

> "(22) The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of public policy, public security or public health. In order to ensure a tighter definition of the circumstances and procedural safeguards subject to which Union citizens and their family members may be denied leave to enter or may be expelled, this Directive should replace Council Directive 64/221/EEC of 25th February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals, which are

> justified on grounds of public policy, public security or public health.
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> (23) Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host member state. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host member state, their age, their state of health, family and economic situation and the links with their country of origin.
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> (24) Accordingly, the greater the degree of integration of Union citizens and their family members in the host member state, the greater the degree of protection against expulsion should be. Only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host member state, in particular when they were born and have resided there throughout their life…
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> (25) Procedural safeguards should also be specified in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another member state, as well as to uphold the principle that any action taken by the authorities must be properly justified. (26) In all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another member state. "

6. The Commission also considered Article 27.2, which provides:

> "2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.
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> The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on consideration of general prevention shall not be accepted"

7. The Commission also considered, *inter alia*, Article 30.2 of the Directive, which reads:

> "The persons concerned shall be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security."

8. SIAC went on to analyse the extent to which the 2006 Regulations embodied the procedures in the Directive, at paragraphs 6 and 7 of its judgment:

> "6. Part 6 of the Regulations deals with appeals and procedure, but does not contain provisions equivalent to Articles 30.2 or 31.4. In proceedings before this Commission when national security is in issue, the United Kingdom's procedural obligations under Article 30 are contained in the Special Immigration Appeals Commission (Procedure) Rules 2003. Mr Southey accepts that this appeal concerns a denial of entry to the territory of the United Kingdom, so that the obligation to permit the Appellant to submit his defence in person under Article 31.4 does not arise.
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> 7. Articles 27.2 and 28 create a hierarchy of protection, with "imperative grounds of public security" (or "*motifs graves de securite publique*", in the (possibly erroneous) French text), as does Regulation 21(3) to (6): *LG (Italy) v Secretary of State for the Home Department* [2008] EWCA Civ 190. The relevant periods of residence necessary to achieve the higher degrees of protection are periods of residence which are, objectively, enjoyed by Treaty and Directive right, not only under domestic law:[2008] EWCA Civ 641. It would be possible *McCarthy v Secretary of State for the Home Department* to engage in a complex debate about the precise category into which ZZ now falls. The transitional provisions in paragraphs 2(5) and (6) of Schedule 4 to the regulations may add an additional level of complexity. Mr Eicke submits that, by reason of his absence in Algeria between August 2005 and 18th September 2006, ZZ has ceased to be entitled to either of the two higher levels of protection based on long residence. Mr Southey submits that such an approach would not properly apply the principle of proportionality as expounded in recitals 23 and 24 of the preamble to the Directive. It is unnecessary for us to resolve these arguments. For the reasons explained below, the family circumstances of ZZ his wife and children are such that the principle of proportionality requires that they could only be outweighed by imperative grounds (or *motifs graves*) of public security, even if the only test being applied was that contained in Article 27.2 and Regulation 21(5) and (6)."

9. Paragraph 7, therefore, embodies the Commission's conclusions as to where in the "hierarchy of protection" the Appellant's case rested.

10. The Commission went on to consider arguments on the standard of proof, the requirement of procedural fairness derived from the European Convention of Human

Rights and Strasbourg authority, and claims concerning equality or discrimination. It is not necessary for us to recite those arguments or to consider them further.

11. SIAC then turned to the facts. Their findings were, of course, reached following the usual procedures in SIAC, including the admission of evidence in closed material proceedings, tested by Special Advocates and considered by the Commission.

12. In the course of paragraphs 16 to 18 of their decision, the Commission stated:

> "16. Little of the case against ZZ is contained in the first and second open statements. They assert that he was involved in the GIA and 'terrorist activities'. The only specific incident of any weight relied upon is the discovery in May 1995 of a set of British registration plates for a white Toyota which ZZ admits he owned for a short time, together with a grey Peugeot 309 which he admits owning, in a garage in Brussels rented by El-Majda, a known extremist, in which was also found a quantity of arms, ammunition and medical supplies. ZZ denies that he was ever a member of or associated with the GIA or knew anybody who was a member. In paragraphs 42 -58 of his second witness statement, he has given a long and detailed explanation of his movements in Italy and Belgium and of his ownership of the two cars."

13. In paragraph 18, the Commission observed:

> "As will be apparent from the brief analysis of the open case against ZZ and of his response to it, neither really engages with the critical issues, which we have determined principally by reference to the closed material. If *MB* requirements apply to these proceedings and they require that the gist of the case against ZZ is disclosed to him, they have not been fulfilled."

14. In paragraph 19 of the judgment, the Commission considered the linked questions of proportionality and the impact of the decisions taken upon ZZ's family life. Part of their conclusions in paragraph 19 read as follows:

> "We accept, without reservation, her conclusion [a reference to the expert reporting on the family] that the enforced separation of ZZ from his family is having a profound and damaging impact upon it and, given the nature of these proceedings, that the situation is necessarily incomprehensible to them. We share her concern that this situation may have a serious long-term impact upon intelligent children who might be made bitter and antagonistic to the British society in which they have been raised. On any view, the enforced separation is a tragedy for ZZ's wife and his children. Further, public security considerations apart, we would regard it as unreasonable for ZZ's wife and children to resettle in Algeria. The weight to be given to the family life of this family in the balancing exercise required by the principle of proportionality is very heavy."

15. Paragraphs 20 and 21 of the Judgment read:

> "20. Nevertheless, for reasons which are explained only in the closed Judgment, we are satisfied that the personal conduct of ZZ represents a genuine present and sufficiently serious threat which affects a fundamental interest of society namely its public security and that it outweighs his and their right to enjoy family life in the UK. We have considered, pursuant to the principle of proportionality, whether those interests could be adequately protected by the imposition of a control order upon ZZ. There are two problems with that course: first, the Secretary of State would, in imposing a control order and seeking to uphold it in the High Court, have to rely upon the closed material which we have considered. The requirements of procedural fairness identified in *MB* would demand that which the Secretary of State is unwilling to do for good reasons: to disclose the gist of the essential elements of the case to ZZ. Her inability to do so, would almost certainly prevent the imposition of a control order. Secondly, and more important, as we demonstrate in the closed Judgment, the imposition of a control order is not an appropriate method of controlling the risk to public security created by the personal conduct of ZZ.
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> 21. For reasons which are given in the open and closed Judgments, read together, we are satisfied that the imperative grounds of public security which we have identified in the closed Judgment outweigh the compelling family circumstances of ZZ's family so as to justify the Secretary of State's decision to exclude him from the United Kingdom. For those reasons, this appeal is dismissed."

16. It follows from the above quotations from the judgment of SIAC that ZZ knew little of the detail of the case which persuaded SIAC to uphold the decisions of the Secretary of State.

Referral to the Court of Justice of the European Union

17. The decision of SIAC was appealed and the appeal was reported as *ZZ -v- The Secretary of State for the Home Department* [2011] EWCA Civ 440. In April 2011, at the conclusion of the hearing, the Court of Appeal referred the case to the Court of Justice of the European Union [CJEU]. As Maurice Kay LJ put it in his judgment, at paragraphs 3 and 4:

> "3. The question at the heart of this appeal is whether, by reason of his French nationality, the appellant enjoys procedural rights which, if he were only an Algerian citizen, would not arise. His position falls for consideration under three legal regimes...
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> 4. The third legal regime is that of the European Union. The case for the appellant is that it provides for procedural

> protection to the extent of entitling him to disclosure of at least the gist of the closed national security case against him so that the special advocates in SIAC, when seeking to protect his interest in the closed hearing, have his instructions on the closed allegations sufficiently to be able to refute them. In this way, his French nationality would provide him with a form of protection for which his Algerian nationality would not qualify him."

18. In fact, there was disagreement within the Court in relation to the submissions made on behalf of the Appellant. Maurice Kay LJ expressed his own view in paragraph 16 of the Judgment, in the following terms:

> "16. However, what the Charter does not and cannot do is to give birth to rights, freedoms and principles in areas in which the Treaties claim no rule-making competence but acknowledge the exclusive competence of Member States. This is spelt out in Article 51.2 of the Charter, as to which the Explanations state:
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> > '[Article 51.2] confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred on it …
> >
> > [It] also confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties … it goes without saying that the reference to the Charter in Article 6 of [TEU] cannot be understood as extending by itself the range of Member State action considered to be "implementation of Union law".'
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> In other words, a Member State is not to be taken to be acting 'in the implementation of Union law', if it is acting within an area which, under the Treaties, is not allocated for Union legislation.
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> 17. It follows that the potential of Article 47 as a legal peg upon which the Appellant might hang his claim to procedural fairness derived from EU law has to be assessed by reference to the allocation of competences by the Treaties. This leads back to Article 4.2 of the TEU, which requires the Union to "respect … State functions ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security". Mr Southey focuses on the word "respect", suggesting that it bears a less than forceful interpretation. However, it is immediately followed by these unequivocal words:

> 'In particular, national security remains the sole responsibility of each Member State.'
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> 18. This, coupled with the 'rule' set out in Article 346 of TFEU - 'no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security" - leads me to the conclusion that the appellant cannot rely on Article 47 of the Charter as giving rise to a right to the disclosure of the gist of the closed case against him. This conclusion is fortified by Article 51.1 of the Charter which makes it clear that the provisions of the Charter are addressed to Member States 'only when they are implementing Union law.' The SIAC procedure as it applies in the circumstances of this case is not an implementation of Union law. It is a procedure of domestic provenance in an area which is the 'sole responsibility' of a Member State."

19. Thus, Maurice Kay LJ rejected the arguments advanced by the Appellant, but Carnwath and Moses LJJ considered the issue of procedural fairness to be arguable. As a consequence, all of the Judges agreed on the referral to the Court of Justice of the European Union of a question which was subsequently modified in the course of the proceedings before the CJEU.

CJEU: The Advocate General

20. Following their conventional procedure, the Court of Justice of the European Union first received the opinion of Advocate General Bot. The matter was subsequently referred to the Grand Chamber, who delivered their Judgment on 4 June 2013. Both the opinion and the judgment are reported as *ZZ (France) -v- Home Secretary* [2013] QB 1136, [2013] EUE CJC 300/11.

21. By the time of the hearing in Luxembourg the question for the Court had been somewhat re-cast:

> "Does the principle of effective judicial protection, set out in Article 30(2) of Directive 2004/38, as interpreted in the light of Article 346(1)(a)[TFEU], require that a judicial body considering an appeal from a decision to exclude a European Union citizen from a Member State on grounds of public policy and public security under Chapter VI of Directive 2004/38 ensure that the European Union citizen concerned is informed of the essence of the grounds against him, notwithstanding the fact that the authorities of the Member State and the relevant domestic court, after consideration of the totality of the evidence against the European Union citizen relied upon by the authorities of the Member State, conclude that the disclosure of the essence of the grounds against him would be contrary to the interests of State security?"

22. It is helpful to begin with the opinion of the Advocate General, principally in order to show the context of the decision of the Court. The Advocate General began his

analysis in paragraphs 35 to 42 of the judgment, with some observations on the nature of terrorism, rather elegantly expressed, and giving emphasis to the remarks which follow, where the Advocate General said this:

> "43. In a democratic society, it is imperative to allow the very people who are fighting the safeguards provided by the rule of law to benefit from those same safeguards, in order to ensure the absolute primacy of democratic values, but this cannot result in a kind of suicide of democracy itself.
>
> 44. Consequently, according to the seriousness of the identified threat and depending on the degree of coercion in the preventive measure taken, it is necessary each time to 'balance' the degree to which the application of the rule of law is restricted against the seriousness of the danger represented by terrorism."

23. He then conducted a review of European Union case law and then in two passages commencing at paragraph 73, and then 78, gave the nub of his opinion:

> "73. First of all, it is clear reliance by member state on interests of state security does not rule out the application of European Union law and, in particular, the fundamental rights protected by the Charter. It is also not sufficient in itself to justify the decision not to inform the Union citizen, precisely and in full, of the grounds for an expulsion or exclusion decision taken against him by a Member State.
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> …
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> Where a member state wishes to invoke interests of state security to prevent the grounds of public security justifying the expulsion of a Union citizen being disclosed to him, it must prove to the national court hearing an appeal against an expulsion decision that it is necessary to have recourse to the derogation provided for in article 30(2) of Directive 2004/38. That state must thus provide proof that legitimate security concerns about the nature and sources of intelligence information taken into account in the adoption of the decision concerned militate in favour of a restriction or non-disclosure of the grounds. In the absence of such proof, the national court must always uphold the principle that the Union citizen must be informed, precisely and in full, of the grounds justifying his expulsion."

24. The Advocate General went on to say:

> "78. In my view, it is essential to maintain the possibility of non-disclosure of the grounds of public security on which a decision to expel a Union citizen is based where even the mere disclosure of the main allegations against that Union citizen

> would be likely to prejudice state security, and in particular the member states' legitimate security concerns about the nature and sources of intelligence information taken into account in the adoption of the decision concerned.
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> 79. Even if this possibility is reserved for exceptional cases, it must be maintained in the context of the interpretation of article 30(2) of the Directive 2004/38 if article 346(1)(a)FEU is not to be deprived of much its effectiveness.
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> 80. It should also be stated that, whilst the member states may not unduly restrict the exercise of the right of free movement of Union citizens, conversely the constraints on those states in terms of respect for the rights of the defence and effective judicial protection must not be such that they discourage those states from taking measures to guarantee public security. It should be borne in mind in this regard that whilst, as is stated in article 3(2) EU, the Union is to offer its citizens an area in which the free movement of persons is ensured, it must also guarantee an area of security in which the prevention and combating of crime are ensured. Consequently, it is not acceptable to claim, as some have done in the present proceedings, that where a member state considers that the disclosure of the essence of the grounds is contrary to state security, it would only have the choice of making the expulsion and disclosing the grounds of public security justifying that decision or simply foregoing the expulsion of the person concerned. In other words, I do not accept the existence of a general and systematic obligation to disclose grounds which could, in certain circumstances, lead the member states to forego measures which they consider necessary, subject to judicial review, for the maintenance of public security.
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> 81. In the light of these factors, I take the view that article 30(2) of Directive 2004/38, read in the light of article 47 of the Charter and article 346(1)(a)FEU, should be interpreted as permitting a member state, in exceptional cases duly justified by the need to guarantee state security and subject to review by the national court, to prevent a Union citizen being informed of the grounds of public security for a decision to expel him, whether in detail or in summary form."

25. In our view, these passages are important because they set the context for the later decision of the Grand Chamber. There can be no doubt that the Court must have had in contemplation the likely effect of enforcing the obligations of disclosure, namely that the obligation might well leave the Member State with exactly the choice formulated by the Advocate General; to make the expulsion and disclose the grounds, or forego the expulsion. The Advocate General regarded it as unacceptable to force such a choice upon the Member State. It was "in the light of those factors" (see paragraph 81) that he advanced his interpretation of the relevant Article, Directive and passage from the Charter.

26. The Advocate General went on to give his view that the procedures of SIAC satisfied the requirements of the Convention and of the European Court of Human Rights, a point subsequently confirmed by that Court in the case of *IR and GT -v- The United Kingdom* [2014] 58 EHHR SE14. At paragraph 102, the Advocate General went on to propose that the Court should interpret the Directive, the Charter and Article as indicated. However, the Court declined to do so.

CJEU: The Grand Chamber

27. The judgment of the Grand Chamber recites the background, the facts and the substantive European law. They firstly addressed a submission by the Italian Government to the effect that the report for a preliminary ruling was inadmissible, an argument that the Court rejected. In paragraph 35, the Court noted that:

> "In the Italian Government's submission... [It is argued that it is] clear from Article 4(2) EU of the EU Treaty and Article 346(1)(a) FEU of the FEU Treaty that State security remains the responsibility of solely the member states. The question referred thus relates to an area governed by national law and, for that reason, does not fall within European Union competence."

28. At paragraph 38, the Court responded:

> "38. … although it is for Member States to take the appropriate measures to ensure their internal and external security, the mere fact that a decision concerns State security cannot result in European Union law being inapplicable: see *Commission of the European Communities v Italian Republic* (Case C-387/05) [2009] ECR I-11831, paragraph 45."

29. The Court proceeded to set out their reasonings and their conclusions for the "national court with jurisdiction", in this instance SIAC:

> "49 It is only by way of derogation that Article 30(2) of Directive 2004/38 permits the Member States to limit the information sent to the person concerned in the interests of State security. As a derogation from the rule set out in the preceding paragraph of the present judgment, this provision must be interpreted strictly, but without depriving it of its effectiveness.
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> 50. It is in that context that it must be determined whether and to what extent Articles 30(2) and 31 of Directive 2004/38, the provisions of which must be interpreted in a manner which complies with the requirements flowing from Article 47 of the Charter, permit the grounds of a decision taken under Article 27 of the directive not to be disclosed precisely and in full.
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> 51. It is to be borne in mind that interpretation in compliance with those requirements must take account of the significance,

as resulting from the system applied by the Charter as a whole, of the fundamental right guaranteed by Article 47 thereof. In particular, it should be taken into account that, whilst Article 52(1) of the Charter admittedly allows limitations on the exercise of the rights enshrined by the Charter, it nevertheless lays down that any limitation must in particular respect the essence of the fundamental right in question and requires, in addition, that, subject to the principle of proportionality, the limitation must be necessary and genuinely meet objectives of general interest recognised by the European Union.

52. Therefore, the interpretation of Articles 30(2) and 31 of Directive 2004/38, read in the light of Article 47 of the Charter, cannot have the effect of failing to meet the level of protection that is guaranteed in the manner described in the preceding paragraph of the present judgment."

30. At paragraph 57 the Court observed:

"57. However, if, in exceptional cases, a national authority opposes precise and full disclosure to the person concerned of the grounds which constitute the basis of a decision taken under Article 27 of Directive 2004/38, by invoking reasons of State security, the court with jurisdiction in the Member State concerned must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle: see, by analogy, the *Kadi* case, paragraph 344."

31. In paragraphs 64 and 65 the Court said this:

"64. On the other hand, if it turns out that State security does stand in the way of disclosure of the grounds to the person concerned, judicial review, as provided for in Article 31(1) of Directive 2004/38, of the legality of a decision taken under Article 27 thereof must, having regard to what has been stated in paragraphs 51, 52 and 57 above, be carried out in a procedure which strikes an appropriate balance between the requirements flowing from State security and the requirements of the right to effective judicial protection whilst limiting any interference with the exercise of that right to that which is strictly necessary.

65. In this connection, first, in the light of the need to comply with Article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to

> contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that directive ineffective.
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> ...
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> 67. In that context, the national court with jurisdiction has the task of assessing whether and to what extent the restrictions on the rights of the defence arising in particular from a failure to disclose the evidence and the precise and full grounds on which the decision taken under Article 27 of Directive 2004/38 is based are such as to affect the evidential value of the confidential evidence.
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> 68. Accordingly, it is incumbent upon the national court with jurisdiction, first, to ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence and, second, to draw, pursuant to national law, the appropriate conclusions from any failure to comply with that obligation to inform him.
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> 69. In the light of the foregoing considerations, the answer to the question referred is that Articles 30(2) and 31 of Directive 2004/38, read in the light of Article 47 of the Charter, must be interpreted as requiring the national court with jurisdiction to ensure that failure by the competent national authority to disclose to the person concerned, precisely and in full, the grounds on which a decision taken under Article 27 of that directive is based and to disclose the related evidence to him is limited to that which is strictly necessary, and that he is informed, in any event, of the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence."

32. Before considering the arguments as to the effect of that decision, we will complete the procedural history.

Return to the Court of Appeal

33. Following the decision of the CJEU, the matter returned to the Court of Appeal and they considered the case. This decision is reported as *ZZ France v The Secretary of*

State for the Home Department (No. 2) [2014] 2 WLR 791, [2014] EWCA Civ 7. The holding reads:

> "Held, allowing the appeal, that, in accordance with a straightforward reading of the judgment of the Court of Justice as a whole, the essence of the grounds on which a decision to exclude a person from a member state had always to be disclosed to that person, and such a course was a minimum requirement which could not yield to the demands of national security; that a distinction was drawn between the grounds and the related evidence on the basis of which a decision to exclude was taken, so that, where a national security stood in the way of full disclosure, in order to strike an appropriate balance between the requirements flowing from national security and the requirements of the right to effective judicial protection, the manner in which the essence of the grounds was disclosed had to take due account of the necessary confidentiality of the evidence, and the evidence itself might be withheld from disclosure for reasons of national security; that the procedure had to ensure to the greatest possible extent that the adversarial principle was complied with so as to enable the person to put forward an effective defence; that the applicant had not therefore been given the minimum level of disclosure required under European Union law in the Commission proceedings; and that, accordingly, the case would be remitted for a fresh determination by the Commission applying the principles set out in the judgment of the Court of Justice (post, paragraphs 18 to 27, 33, 35, 37-38, 41, 42).
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> *Per curiam*. The Advocate General's key reasoning finds no reflection in the judgment of the Court of Justice and cannot be relied on as illuminating that Court's conclusion (post, paragraphs 28, 41, 42)."

We draw attention to the remarks made *per curiam.*

34. An important passage is contained in the judgment of Richards LJ at paragraph 27, where he said:

> "My reading of the judgment is reinforced by consideration of the wording of the question referred for a preliminary ruling. That question asked whether the national court must ensure that the person concerned is informed of the essence of the grounds against him:
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> > 'notwithstanding the fact that the authorities of the member state and the relevant domestic court... conclude that disclosure of the essence of the grounds against him would be contrary to the interests of national security': see paragraph 9 above.'

> The Court of Justice's 'in any event' language looks strongly like an affirmative answer to the substance of that question; and against the background of a question formulated in those terms I would have expected the court to use very different language if it had intended to rule that even the essence of the grounds need not be disclosed where such disclosure would be contrary to the interests of national security."

35. In paragraph 28 of his judgment, Richards LJ makes the observation that the reasoning of the Advocate General, whose opinion was presented to the CJEU, was rejected and that observation finds its echo in the remarks cited below the headnote. However, in our view, it is legitimate to pay attention to the remarks of Advocate General Bot, not to rely upon his opinion, but to look on that opinion as fairly laying before the CJEU the implications of their decision. In our view, it makes it impossible to conceive that the CJEU did not have in contemplation the outcome identified by the advocates in this case, and spelled out by Advocate General Bot in his opinion.

The Application of the CJEU Decision

36. We turn to the application of the decision of the CJEU. The Appellant says that the obligation is straightforward, although what the essence of the grounds means may be subject to debate, particularly in the context of specific facts. The Secretary of State attacks that straightforward application of the decision saying, firstly, that the CJEU would be acting outside its competence in presenting a National Government and Member State with what for shorthand we will call the "invidious choice". Mr Eicke, in elegant submissions both in writing and orally, relies, for example, upon the case of *Dory* (Case C-186/01 of 2003) to the effect that the jurisprudence of the European Union recognises that competence can be divided in a given field and on a given subject, in that instance between the Court of Justice of the European Union and the German courts. In that case the CJEU returned the case to the German jurisdiction, having considered the limits of their own competence. Mr Eicke says that the competence of the CJEU is confined to EU matters through many formulae enshrined in Union law.

37. He also says that the reservation of national security to the Member State is as clear as it could be. Thus, Article 6(1) of the TEU provides that:

> "the provisions of the Charter shall not extend in any way the competencies of the Union as defined in the Treaties."

Further; Articles 5(1) and (2) TEU provide, so far as material:

> "1. The limits of union competencies are governed by the principle of conferral. The use of Union competencies is governed by the principles of subsidiarity and proportionality.
>
> 2. Under the principle of conferral, the Union shall act only within the limits of the competencies conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competencies not conferred upon the Union in the Treaties remain with the Member States."

Article 4(2) of the TEU provides, so far as material:

> "The Union shall respect ... [Member States'] essential functions, including ... safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

Article 346 TFEU provides, so far as material:

> "1. The provisions of the Treaties shall not preclude the application of the following rules:
>
> (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security."

38. Mr Eicke submits that:

> "the question therefore arises as to whether more can be disclosed to the Appellant than has already been disclosed to him in respect of the grounds, and the evidence underlying those grounds, having regard to the UK's national security concerns and/or without, thereby, putting the Secretary of State to the, wholly invidious, choice as to whether: (a) to disclose confidential evidence to the Appellant contrary to the UK's national security interests (as confirmed by SIAC), or (b) to accept that the Appellant would (subject to a material change of circumstances) have to be permitted to enter the UK even though the Commission has concluded (and, it is submitted, should conclude again) that an exclusion was justified on national security grounds (especially where that risk to national security might not be capable of being addressed by other measures such as TPIMs). If the answer to that question is 'No', then it is respectfully submitted that it is outside the competence of EU law to require the Secretary of State to make that 'invidious choice' because, whichever decision the Secretary of State makes, it would require her to act contrary to the interests of national security, an area of competence expressly reserved by the TEU 'solely' to the Member States (and, therefore, to the Secretary of State and this Commission)."

39. In the course of the argument, the Commission requested Mr Eicke to formulate in writing his proposition as to why the CJEU should not be taken to have presented the Member State with the "invidious choice". His formulation is as follows:

> "The CJEU did not address the situation of the decision of the Commission requiring the SSHD to make disclosure of the essence of the grounds, disclosure of which SIAC agrees (a) cannot be achieved without disclosing the underlying evidence which (b), in turn, is contrary to national security, where that decision leaves the SSHD with no choice other than to withdraw that part of her case to which that evidence relates,

> thereby compelling the Commission to reach a substantive conclusion on the appeal, which it agrees is contrary to national security."

40. The difficulty that we see with that proposition is that the "invidious choice" was, in our view, precisely formulated by Advocate General Bot. He did not say in the course of his opinion that it was beyond the competence of the Grand Chamber to rule in such a fashion. He did propose that the law should be interpreted specifically to avoid the imposition of that choice. He put it as strongly as to say that the law must avoid imposing "a kind of suicide of democracy" (see paragraph 43). The CJEU have rejected that. It is, in our view, inconceivable that they did not have in mind the consequences so forcefully put before them. The Court themselves cannot have thought they were acting beyond their competence.

41. No doubt, it was open to Her Majesty's Government to argue in this way before the CJEU, as Mr Eicke has before us, and so also it was open to the Secretary of State to argue thus before the Court of Appeal, following the return of the Strasbourg decision to them. It appears that that did not happen. Mr Eicke in the course of argument, with grace conceded that the "invidious choice" may well be the natural consequence of the CJEU's ruling. In his skeleton argument, he acknowledged that the Court of Appeal remitted this case to SIAC "to apply the principles of the Court of Justice's judgment." That is the formulation in the order of the Court of Appeal. He also agrees that the Court of Appeal concluded that the effect of the CJEU judgment was "the essence of the grounds must still be disclosed." That concession in the skeleton argument follows consideration of the judgment of Richards LJ and of the shorter, but not unimportant, judgment of Christopher Clarke LJ. Our conclusion is clear. We are bound to follow the CJEU decision and to order the disclosure of the "essence of the grounds", even if such disclosure has the consequences for national security identified.

42. We consider briefly the mechanism by which we must do so. It is agreed that rule 4(1) of the SIAC Procedure Rules prohibits the release of information which threatens national security or might represent a breach of national security. The wording is familiar. It is as follows:

> "4(1) When exercising its functions, the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."

43. It is agreed in helpful submissions from both sides that such an outcome means the Rule must be read down. Section 2(1) of the European Communities Act 1972 provides:

> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect

> or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies."

44. The case of *Lister v Forth Dry Dock Co Ltd* [1991] AC 547 HL confirmed that an ambiguous statute is not a requirement for such reading down. Even where provisions are clear, European Union Law may require words to be added, deleted or held to be ineffective. In the case of C-106/39 *Marleasing SA contre La Comercial Internacional de Alimentacion SA* [1990] ECR I-4153 at 4159, the European Court of Justice, as it then was, held that:

> "In applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter."

45. In *Biggs v Somerset County Council* [1995] ICR 811, Mummery J, as he then was, provided a helpful summary of the interpretative obligation in the context of statutory tribunals at page 826C to 827C. We take his observation to be applicable here.

46. The Appellant's counsel have helpfully suggested a way in which Rule 4(1) might suitably be read down. It has the quality of simplicity. The submission is that the Rule 4(1) should be read as follows:

> "When exercising its functions, *and save where to do so would be incompatible with EU law*, the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."

We agree.

47. We pause to observe that it is a remarkable consequence of the decision of the Luxembourg Court that the rights of an EU citizen in relation to the UK are so enhanced. The procedures of SIAC, as we have already observed, have been approved by the European Court of Human Rights. The prohibition on the release of national security sensitive material is accepted within the jurisprudence of the European Court of Human Rights, provided the relevant conditions are fulfilled and safeguards present. This incremental or additional right would not apply to a UK citizen unable to invoke intra-Community law; it would not apply to a foreign national, who holds no EU nationality; it would not apply to ZZ, were he an Algerian alone. It is a direct effect of European Union law which enhances the rights of disclosure in circumstances that impinge on national security.

Interpretation of the Test

48. What is the meaning of "the essence of the grounds"? The Appellant has advanced two authorities as analogy. Firstly, the decision of the Strasbourg Court in *A and the UK* (2009) 49 EHRR 29 incorporated into English law by *AF (No. 3*) [2009] UKHL 28. Secondly, Mr Southey relies upon the decision of the CJEU in *Kadi (No. 2*) (2013) Case C-58410P 18 July 2013. In our view, *AF (No. 3)* is an analogy only. It is no authority on the effect of the language or the meaning of the relevant words. Whilst it is established that rights derived from the European Convention of Human Rights may properly be regarded as a floor not a ceiling (see, for example, the case of *McB -v- E* [2011] Fam 364) and, while it is correct that article 52(3) of the Charter makes it clear that European Union law can go farther and provide additional safeguards to ECHR law, in our view, neither of those take us farther in interpreting the obligations now placed upon SIAC.

49. The European Convention would not require such disclosure as is in contemplation here. We are not in the territory impinging on the liberty of the person so as to invoke the *A v the UK* or *AF (No. 3)* jurisdiction. The argument on behalf of the Appellant here is somewhat circular. If liberty was in question, *AF (No. 3)* would require disclosure to a given extent: even though liberty is not in question, EU law should require the same level of protection that Convention law would prescribe, if liberty was in question. That seems to us not to take the matter farther.

50. In relation to the *Kadi* case, the observations of the court in that case derive from a very different context of fact and law. In that case institutional action was sought. It was not a case of deprivation of any rights of this kind. It was not a case concerning the actions of an individual. There was no information before any court at the time when the case was brought. No procedural safeguards were present, as in SIAC. This case arose in such a wholly different legal and factual context that we do not find the remarks of the court helpful in terms of guidance.

51. Equally, the Secretary of State drew the Commission's attention to the well-known cases of *Tariq* [2012] 1 AC 452 and *Kennedy* [2010] 52 EHRR 207. However, those are cases where, by the application of Strasbourg jurisprudence and in the absence of a decision impinging on personal liberty, no disclosure at all was needed of the grounds on which a decision was based. Even if those cases represent one end of a spectrum in domestic and European Convention law, in our judgment, they do not really tell us how to apply the decision taken in this case in Luxembourg.

52. We consider that the observations of Richards LJ in the Court of Appeal *ZZ (No. 2)* case confirm this approach. In paragraphs 33 and 34, he said this:

> "33. Accordingly, although the approach laid down by the Court of Justice in the *ZZ* case is much the same as that laid down by the Strasbourg court in *A v United Kingdom*, the difference in context and the fact that the Court of Justice makes no mention of *A v United Kingdom* in its judgment lead me to the view that the Court of Justice's judgment should be interpreted independently of the decision in *A v United Kingdom*.

> 34. For much the same reasons I have gained no real assistance from the authorities cited to us by Mr Southey in relation to article 8 of the Convention or from the various domestic and Strasbourg authorities relied on by Mr Eicke, including the actual decisions in *Kennedy v United Kingdom* [2010] 52 EHRR 207 and in *Tariq v Home Office* [2012] 1 AC 452."

53. Richards LJ continued at paragraphs 39 and 40 to deal with *Kadi*:

> "39. For that purpose I do not think it necessary to elaborate on what is required by way of disclosure of 'the essence of the grounds. As I have said, the concept is one with which SIAC is familiar from other contexts. Its application is also highly fact specific. It is right to note, however, that Mr Southey drew support from the finding of the Court of Justice in *Kadi (No.2)* (see paragraph 29 above), at paragraph 141, that the General Court had been correct to endorse Mr Kadi's argument that the allegation that he had been the owner in Albania of several firms which funneled money to extremists or employed those extremists in positions where they controlled the funds of those firms is insufficiently detailed and specific given that it contains no indication of the identity of the firms concerned, of when the alleged conduct took place and of the identity of the 'extremists' who allegedly benefited from that conduct.
>
> 40. On rehearing the case in accordance with the principles laid down in the Court of Justice, SIAC will also be able to consider two secondary arguments advanced by Mr Southey before us. One is that SIAC is required to conduct a balancing exercise between the interests of national security and the interests of the individual when considering the question of disclosure and that this requires a more flexible approach towards the application of SIAC's procedural rules than has historically been the case. The other is that when considering the weight to be attached to withheld material SIAC is required to take account of the difficulties caused to the appellant by the non-disclosure of that material. These points did not form part of the grounds of appeal against SIAC's decision and were not the subject of the question referred by this court to the Court of Justice, and in my view it is not necessary or appropriate for us to engage with them."

54. Following that rejection of the attempts of both sides to provide authority which should guide us in the application of the phrase "the essence of the grounds", we are left with this: these are plain English words and we will apply them conscientiously to the facts.

55. We have not forgotten Mr Southey's argument that the question of balance must be addressed in any case, to decide whether there is justification within European Union jurisprudence to withhold the full and detailed reasons for any such decision as this. We acknowledge that that is the effect of the CJEU judgment. However, in this case

we are already well beyond such consideration, because of the history of the case and because SIAC has already decided that there are strong reasons, now arguably to be altered by the effect of the Luxembourg decision, for withholding information for national security reasons.

56. One final word: as we have already indicated, SIAC Procedure Rule 4(1) will have to be read down. The Rule still applies. The Commission's duty under 4(1) subsists and is only qualified so far as it is necessary to comply with EU law. We accept that it does apply in this case.