SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/182/2024
Hearing Date: 6th & 7th November 2024
Date of Judgment: 22 November 2024

Before:

THE HONOURABLE MR JUSTICE JAY
UPPER TRIBUNAL JUDGE O'CALLAGHAN
MRS JILL BATTLEY

Between:

T7

Applicant/Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Amanda Weston KC and Julianne Kerr Morrison (instructed by **Birnberg Peirce Ltd**) appeared on behalf of the Appellant T7

David Blundell KC and Andrew Byass (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Ashley Underwood KC and David Lemer (assisted by **Special Advocates' Support Office**) appeared as Special Advocate

MR JUSTICE JAY:

INTRODUCTION

1. T7 was born and brought up in the UK. In August 2014 she travelled to Syria with her husband. SSHD says that once there she aligned with ISIL. Sometime thereafter – we are being deliberately vague so as to respect his anonymity – a son, CD, was born in Syria. He is and remains a British citizen. T7's husband is presumed dead. On 18 April 2017 SSHD decided to deprive T7 of her British citizenship and an Order formally doing so was made on 8 May 2017. Much later, T7 filed a notice of appeal in SIAC under s. 2B of the SIAC Act 2003. In April 2021, following a hearing the previous month, SIAC decided to extend T7's time for appealing the deprivation decision under s. 2B of the SIAC Act 2003. At T7's request, those proceedings have been stayed and the issues underlying them are not for present consideration.

2. The consequence of T7's decision not to prosecute her s. 2B appeal at this stage is that the national security case advanced by the Security Service in 2017 for SSHD's personal consideration remains unchallenged. Much of that case is in CLOSED. In very broad outline, SSHD was advised that not merely did T7 travel to Syria to align with ISIL, she was "an active and willing participant in that decision". Ms Amanda Weston KC, for T7, drew our attention to some exculpatory material which might suggest otherwise, but not merely was it lacking in independence and objectivity, we think that it cannot be our role in these proceedings to address matters which only fall for consideration within the ambit of the s. 2B appeal. We emphasise, however, that whether T7 *still* constitutes a threat to national security is a highly relevant issue in these proceedings.

3. In early 2019 T7 was severely injured in an airstrike. The exact extent of her injuries is not altogether clear and we will turn to the available evidence in a moment. Shortly thereafter T7 and CD were transferred to the Al Roj camp in North-East Syria which is under the control of the Syrian Defence Forces, an autonomous grouping of Kurdish ethnicity. Conditions in this camp are appalling and have been described in more detail in other SIAC judgments as well as in at least one Divisional Court judgment to which Jay J was a party. T7 and CD have remained in the camp ever since.

4. On 20 October 2021 Reprieve on behalf of T7 and CD wrote to the FCDO to request immediate action by the latter to bring about their return to the UK so that "[T7] may receive life-saving treatment for her urgent medical needs and [CD's] safety and well-being can be assured". On 27 July 2022, after an unacceptable delay, the FCDO replied to Reprieve's letter pointing out that T7 needed to make an application for leave to enter the UK before a repatriation request could be made.

5. After an unexplained delay, on 7 July 2023 T7 applied for entry clearance outside the Immigration Rules and on human rights grounds. After a further unacceptable delay,

this application was refused by SSHD acting personally on 28 February 2024. T7's representatives were notified of the decision the following day. They were informed of T7's right of appeal against the refusal of the human rights claim under s. 2 of the SIAC Act 1997 as well as of her right to apply for a review under s. 2F of the same Act. T7 has availed herself of both these rights.

LEAVE TO ENTER OUTSIDE THE IMMIGRATION RULES

6. T7, having been deprived of her British citizenship, requires leave to enter the UK as an alien. Putting to one side for the moment her claims on human rights grounds, T7 has no right to enter the UK under the Immigration Rules. CD, on the other hand, does not require leave to enter at all. He has the right of abode in the UK although ordinarily would be expected to prove that status by providing a passport to an immigration officer: see s. 3(8) of the Immigration Act 1971.

7. It is not disputed that SSHD has power to grant leave to enter outside the Immigration Rules: see *R (Munir) v SSHD* [2012] UKSC 32; [2012] 1 WLR 2192.

8. SSHD has published Guidance entitled "Leave outside the Immigration Rules" (the LOTR Guidance"), the relevant sections of which provide as follows:

> "Compelling compassionate factors are, broadly speaking, exceptional circumstances which mean that a refusal of entry clearance or leave to remain would result in unjustifiably harsh consequences for the applicant or their family, but which do not render refusal a breach of [the ECHR, Refugee Convention or other similar obligations]
> …
> Where the Immigration Rules are not met, and where there are no exceptional circumstances that warrant a grant of leave under Article 8 [etc.], there may be other factors that when taken into account along with the compelling compassionate grounds raised in an individual case, warrant a grant of LOTR. Factors, in the UK or overseas, can be raised in a LOTR application. The decision maker must consider whether the application raises compelling compassionate factors which mean that the Home Office should grant LOTR. Such factors may include:
> - emergency or unexpected events.
> - a crisis, disaster or accident that could not have been anticipated."

9. The LOTR Guidance makes it clear that reasons must be given for an adverse decision.

10. The LOTR Guidance does not mention national security and how it should be brought into the equation. As the Chairman indicated at the start of the hearing and in light of

no demur from the parties, we consider that the correct approach to the LOTR Guidance in a case such as the present is as follows. First, SSHD must consider whether there are sufficiently compelling compassionate grounds raised in the applicant's case such as to justify the grant of LOTR. If not, SSHD's enquiry stops there: LOTR should be refused. If so, at the second stage of SSHD's consideration he[1] must balance the compassionate factors pertinent to the applicant's case against the strength of the national security case, to the extent that it is possible to do so, and then decide whether the grant of LOTR is appropriate on an exceptional basis.

11. It is to be emphasised that the threshold of "compelling compassionate circumstances" is very high. If, for example, T7 did not have a son, the harsh reality of this case is that SSHD would be highly likely to conclude that the threshold was not met, regardless of any risk to national security.

THE DECISION UNDER CHALLENGE

12. On 19 February 2024 a Ministerial Submission was provided to SSHD. This included six annexes: (1) information from FCDO about T7's requests for consular assistance and other information about her and CD's circumstances in Syria; (2) the submissions made on behalf of T7 in support of her entry clearance application, together with a mass of accompanying documentation; (3) T7's leave to enter application form; (4) a national security assessment from MI5; (5) a "Full SCU Assessment"; and (6) the ISIL Generic Assessment. Only summaries of the Ministerial Submission, and of items (4)-(6), are available in OPEN.

13. Ms Weston took us to some of the medical evidence although we have considered its entirety.

14. By way of summary of the position in or about September 2022:

> "[T7] sustained serious head and neck shrapnel injuries from an airstrike, eventually collapsing and waking up from a coma two weeks later unable to talk and paralysed down her right side. She is now only able to talk with considerable difficulty which clearly exhausts her and sometimes struggles with breathing due to the shrapnel which is still present in her throat, Similarly, [T7] walks only with difficulty with crutches and the support of others so relies on her son to wash, cook and dress her. Therefore, although we discussed repatriating [CD], she said that he was her carer and that she'd be unable to cope without

[1] At the time the deprivation decision was made in 2017, SSHD was the Rt Hon Amber Rudd MP. In February 2024, and until 5 July 2024, SSHD was the Rt Hon James Cleverly MP. Since then, she has been the Rt Hon Yvette Cooper MP. SIAC's use of personal pronouns will reflect the gender of SSHD at the material time.

him. Ultimately, she has a significantly brain injury and displays all the symptoms of a stroke victim."

15. According to the gist of an internal MI5 email:

> "[T7], having been injured, suffers paralysis, struggles to communicate as her speech has been impacted and she has difficulties with her memory.
> [T7] struggles to care for her son and herself and relies on support from third parties.
> Concerns have been raised in relation to her safety and that of her son (including risk to life) due to the perception of her disability amongst the other camp residents, including that there is a lack of specialist medical care to deal with medical problems such as [T7's]."

16. Dr Clive Kelly FRCP, a consultant physician, reported on T7 on 22 April 2021. For obvious reasons, he was not able to examine T7 and agrees that the validity of his opinions must depend on the accuracy of the material provided to him. In Dr Kelly's opinion, the nature of T7's symptoms are suggestive of brain damage. Dr Kelly believed that T7's condition was deteriorating. She was completely paralysed on her right side, could speak only slowly and haltingly, and had profound memory loss. X-rays confirm the presence of shrapnel in her neck and possibly in her skull. The prognosis was to some extent uncertain, for this reason:

> "Once the extent and position of the shrapnel is established, this could then be surgically removed allowing more detailed imaging with MRI of the brain and spinal cord. This would clarify the exact diagnosis and required intervention."

17. Dr David Nicholl FRCP, a consultant neurologist, reported on T7 on 18 November 2021. In his opinion, although he had not had the benefit of examining her, T7's presentation was consistent with a significant brain injury, a right hemiparesis from a dominant hemisphere brain injury resulting in speech problems, reading problems and cognitive problems, and epileptic seizures secondary to scarring from her traumatic brain injury. T7 required urgent medical evaluation and treatment.

18. Dr Nicholl gave an updated report on 2 November 2022. In it he addressed T7's cognitive problems in more detail. T7 completed TYM and ACE tests. On the TYM test, she scored only 27/50, well below the expectation of 43/50 for someone with a university education. She struggled with both numeracy and literacy although could remember the name of the then Prime Minister. On the ACE test her score was 82/100 overall which is borderline abnormal. T7 had no idea of the current year or of the year in which she had been injured.

19. We interject to observe that it is always possible for someone to fake these tests although the fact that T7 could remember the Prime Minister's name is a contra-indication. Further, Dr Nicholl was not of that view and neither was SSHD.

20. In Dr Nicholl's opinion, there was very limited if any likelihood of physical improvement. Dr Nicholl did not opine on the possibility of cognitive or mental improvement, although we note his opinion that part of the reason for T7's low scores on the fluency and language component of the ACE tests was that she was likely suffering from anxiety and PTSD consequent on her brain injury. SIAC from its own considerable experience of brain injury cases is aware that these conditions are treatable and that some improvement is possible. We need put it no higher than that.

21. In an email sent on 22 March 2024, admittedly post-decision but it was not suggested that we could not take it into account and Mr David Blundell expressly relied on it, the FCDO stated that it was aware that T7 had recently undergone surgery to remove shrapnel from her neck. A later email indicates that it was not possible to remove the shrapnel from the back of her neck, surgeons feeling that it would be too risky. According to the March email:

> "[T7] is feeling better, her speech has improved, and she is able to move her leg a little."

We interpret this as being the extent of her improvement at that stage.

22. In the materials before SSHD was also a report from Professor Nimisha Patel FRSM, a chartered consultant clinical psychologist. In her opinion:

> "It is my professional opinion that it is in the best interest of the mother and her son to be allowed to remain together, and for [T7] to receive the medical treatment she needs. Her safety and health are fundamental to her son's emotional, physical health and development. Any forced separation will undoubtedly lead to intense and likely prolonged distress deleterious to their mental health, for both mother and child, and likely to further life-threatening seizures for [T7], and possibly death."

We consider that Professor Patel went beyond the scope of her expertise when commenting on the prognosis in relation to T7's epilepsy.

23. Turning now to the advice given to SSHD, we have already mentioned the gist of MI5's national security assessment, which – contrary to one of T7's grounds of review - was an updated assessment. According to the summary of SCU's assessment of T7's case, T7 has not responded to FCDO's offer to repatriate CD without his mother. SCU has

inferred that T7 would not agree to that. SCU pointed out that the 2017 ISIL generic assessment concludes that were subjects of interest to return from ISIL-controlled territory, they would present a national security threat to the UK. However, "the 2017 ISIL generic statement should be considered in light of MI5's assessment of [T7's] case in their letter". There is nothing in OPEN that sheds light on how MI5 assessed T7's case as at the date of SSHD's decision.

24. SCU's evaluation of the "compelling compassionate circumstances" issue was as follows:

> "… the specific circumstances of [T7] and [CD] as set out in Annex B [viz. the material that we have summarised, albeit not comprehensively] are exceptional meaning that a refusal of T7's application may result in unjustifiably harsh consequences for [T7] and [CD]. Accordingly, despite recognising in the guidance that a grant of LOTR should be rare, [T7's] application is assessed to fall within the LOTR guidance given the exceptional circumstances of the case."

25. SCU's conclusion, recognising that falling within the scope of the "compelling compassionate circumstances" test in the LOTR Guidance was not the end of the inquiry, was as follows:

> "**Taking the above into account, the plight of her son as the sole carer for [T7] and the medical evidence submitted in [T7's] application her situation means SCU assess on balance that there are compelling compassionate factors which means [sic] that a refusal of entry clearance would result in unjustifiably harsh circumstances for both [CD] and [T7] if they were to remain outside the UK.** [CD's] welfare, being the sole carer of his ill mother T7 should he remain in a camp in Syria with his mother or should he become an orphan, have been our primary consideration in making this recommendation." [emphasis in original]

26. The Ministerial Submission advised SSHD that this was "a complex and finely balanced case in light of the exceptional circumstances." Mr Blundell submitted, and we agree, that SSHD was being advised that these exceptional circumstances had to be weighed against national security. There were a number of factors militating in favour of granting T7 entry clearance including the obvious plight of CD who is a vulnerable British child and "should be our primary consideration". CD was T7's sole carer and could not be properly cared for and supported by her. He was affected by his mother's medical conditions in the camp "where conditions are widely recognised as inhuman and degrading, below the threshold of Article 3 of the ECHR". As for the position of

T7, the Ministerial Submission sought to summarise the medical evidence without seeking to contradict it, in the following terms:

> "Reprieve have provided detailed reports on [T7's] medical condition which outline a number of significant injuries, including seizures, loss of consciousness, infections, shrapnel in the neck, broken ribs, burns, anaemia, and pain of varying levels. They state that [T7] is at risk of (avoidable) deterioration and death if specialist treatment is not obtained. They also state that [T7] is at risk of stroke which means she needs to be properly and fully evaluated, which is not possible in Syria. If [T7] remains in Al-Roj there is a risk of significant permanent injuries, which could put [CD] at further risk."

27. The factors enumerated in the Ministerial Submission as militating against granting entry clearance included T7's deprivation of British citizenship on national security grounds in 2017, the generic ISIL assessment and, "although not necessarily a factor against granting entry clearance", the likelihood that T7 would apply for asylum on arrival here.

28. The Ministerial Submission asked whether SSHD agreed with SCU's recommendation to grant T7 entry clearance for one year and to waive the biometric requirement in relation to T7.

29. Ministers were sent the Ministerial Submission on 21 February 2024. Some documents were provided by alternative secure means, others by OPEN email. Mr Blundell confirmed to us that, one way or another, SSHD was sent all relevant documents. Ministers were advised of the 29 February deadline.

30. There was a case discussion on 22 February. No evidence has been filed by SSHD dealing with the decision-making process. Mr Blundell informed us, and this much we are able to accept, that SSHD was not present at the meeting. According to the email referring to that discussion, at least one Special Adviser (SPAD) may have been present, and Mr Blundell confirmed that to be so. Although Ms Weston did not make a submission about it, SIAC cannot begin to understand how that was appropriate. Assuming that the SPAD was develop-vetted to the right level, she or he could have no possible role to play in a case of this sensitivity before SSHD had given his decision. We consider that this practice should cease forthwith.

31. SIAC asked Mr Blundell whether a note or minute of the case discussion exists. Our follow-up question would have been: did SSHD see it? We were told that no note or minute exists. We were surprised to learn that, although we are not doubting the integrity of Mr Blundell's instructions. If the decision were to be taken by SSHD acting personally, what was the point of the meeting if nothing was to be put up to SSHD for

consideration? One possibility is that SSHD's PS attended the meeting and told his or her boss something about what was said. We are reaching no conclusion to that effect; we are merely delineating some of our concerns. None of these was set out by Ms Weston at any stage.

32. On 23 February SSHD's decision was communicated to various civil servants and Special Advisers by internal email in these terms:

> "The Home Secretary has decided not to grant the LOTR application on the grounds that there's nothing in the paperwork that leads him to believe that the national security risk has been reduced. He would like FCDO to engage in the way outlined in the submission."

33. By this final sentence SSHD meant that FCDO should explore the possibility of repatriating the son without the mother.

34. Although, as we have said, the decision was made personally by SSHD, the letter sent to Birnberg Peirce on 28 February was in the name of the "Entry Clearance Officer, UK Decision Making Centre". Further, that part of the decision that was made under the Immigration Rules – that T7's presence in the UK was not conducive to the public good on national security grounds – appears to have been made by the ECO rather than SSHD. However, our reading of the critical part of the letter – dealing with the decision outside the Immigration Rules – is that the ECO was intending to set out the thinking of SSHD:

> "In support of your claim, you state that you were injured in an airstrike and as a result you were paralysed on one side of your body. You have submitted a witness statement from Maya Foa with exhibits, including reports from various doctors. You have also provided details of your son, [CD], who is a British national and the situation he finds himself in is understandably no fault of his own. This has all been carefully considered, but your application does not fall for a grant of leave outside the rules because your presence in the UK has been assessed as a risk to national security and that risk outweighs the consideration of the compelling compassionate grounds you have provided in your application."

35. The use of the passive voice – "this has all been carefully considered" – coupled with the evidence demonstrating that SSHD made the decision personally leads to the clear inference that the ECO was told what to say.

36. What is crystal-clear, despite Ms Weston's submissions to the contrary, is that the decision refusing exceptional leave was made on 28 February 2024 and not on 23

February. Insofar as we have any insight into SSHD's thinking, we find it in the 23 February email and not elsewhere. But the letter explains in terms that it contains the refusal decision and the reasons for it.

37. It is unnecessary to set out the reasons for refusing the human rights claim. These turn on points of law which we address below.

38. Mr Blundell informed us that the author of the SCU assessment/advice document wrote the key section of the ECO refusal letter. He also told us that the author was not present at the 22 February meeting. Nothing in the end turns on it, although we should make it clear that we cannot properly take into account information fed to us in this way.

39. Our approach to the absence of a witness statement from an official within SSHD's department dealing with the decision-making process is as follows. We express the matter in that way because, although SSHD made the determinative decision, we would not require a witness statement from him.

40. There is no witness statement before us dealing with (1) national security, and (2) the decision-making process. The absence of the former is not particularly surprising given that T7 does not seek to challenge the national security assessment in these proceedings. Point (2) requires careful examination. We understand that Birnberg Peirce, owing to oversight, were not sent the relevant emails until 24 September. However, there was sufficient time in our view for those advising T7, if they considered it to be in her best interests, to make it clear in correspondence that they wished at this hearing to interrogate the decision-making process more critically, perhaps along the lines SIAC itself has outlined, and that would have led GLD to take steps to find an appropriate witness. Had such a witness statement not been adduced in these circumstances, it would have been open to SIAC to draw an adverse inference. Further or alternatively, had a witness statement been filed which was unclear, SIAC may then have decided to order cross-examination on the same basis as the Administrative Court would in rare circumstances in judicial review proceedings.

41. Birnberg Peirce's correspondence with GLD over SSHD's alleged disclosure failings was shared with the Chairman at the time it was sent. SIAC has reviewed that correspondence for the purposes of preparing its judgments. The matters SIAC has raised of its own motion do not appear in this correspondence.

42. In the absence of T7 putting in issue the matters to which we have referred, or perhaps others, it follows in our judgment that it was not incumbent on SSHD to file a witness statement in order to avoid an adverse inference being drawn in the absence of such a statement. Ms Weston mentioned SSHD's duty of candour. In the context of this statutory review jurisdiction, that is catered for by an express disclosure duty which

goes further than the duty in judicial review proceedings, including a duty to provide exculpatory material. We do not think that it includes a duty to put up a witness to be cross-examined on topics which have not been put in issue.

43. Be that as it may, insofar as Mr Blundell may be inviting us to draw a more favourable inference in his client's favour on the basis of either the instructions he communicated to us during the hearing, or on the footing that SSHD should be given the benefit of the doubt, we would reject that invitation. The only inferences we are prepared to draw are those that we consider to be fair and reasonable in all the circumstances having regard to all the available material, putting guesswork or speculation entirely to one side.

44. As a separate matter, there is some force in Ms Weston's submission that there is a mismatch or disconnect between the email of 23 February and the letter of 28 February. We agree with her that at first blush at least it is not crystal-clear that the two are mutually consistent. To be clear: if there were a mismatch or disconnect between the 23 February email and the 28 February letter, we would quash SSHD's decision and invite her to reconsider. We will return to this important point when we come to address T7's first and second review grounds.

GROUNDS OF APPEAL

45. These relate to the human rights appeal under s. 2 of the SIAC Act 1997. We may take these first in order to clear the decks. Were these judicial review proceedings in the Administrative Court, permission would have been refused on all the human rights grounds because none of the points raised is arguable.

46. T7 relies on breaches of Articles 6, 8 and 2/3 of the ECHR.

47. The case under Article 6 is advanced on the basis that T7's Article 6 rights have been violated because her deprivation appeal cannot proceed compatibly with Article 6 until she is allowed to enter the UK. Further, it is contended that SSHD, through GLD, has failed to comply with her disclosure obligations.

48. The case under Article 8 is advanced on the basis that SSHD has failed to explain or identify with adequate specificity the legitimate aim served in refusing exceptional leave to enter in the particular circumstances of this case, and the decision is in any event an arbitrary interference with T7's rights.

49. The case under Articles 2 and 3 is advanced on the basis that conditions in the camp are such as to engage these provisions and, as a separate matter, SSHD's willingness to countenance the return to the UK of CD without his mother amounts to an act of cruelty and inhumanity.

50. Our point of departure must be that, as matters currently stand, T7 is not seeking to challenge the deprivation decision. Accordingly, we must proceed on the premise that SSHD made a valid decision to deprive T7 of her British citizenship on national security grounds. T7 is, therefore, someone who requires entry clearance to come to the UK, and may only seek such permission on the basis of an exceptional policy. In our judgment, decisions regarding the entry of aliens do not engage Article 6: see the judgment of the Grand Chamber in *Maaouia v France* [2001] 33 EHRR 42. Further, T7's entry clearance application was not put forward on the basis (contrast Shamima Begum's case) that her presence in this country was essential to ensure justice in her deprivation appeal. Even if it were, the decision of the Supreme Court in *Begum v SSHD* [2021] UKSC 7; [2021] AC 765 is authority for the proposition that in any case where national security is in issue, SIAC should not determine that issue for itself and, in effect, permit a situation where an individual is allowed to travel to this country, be (as a matter of practical reality) irremovable after arrival, and constitutes a national security threat at all material times until (at best) SIAC decides to allow her appeal and determine that she is not a threat. The correct course in a case such as the present, however apparently compelling its facts, is to stay the deprivation appeal until the appellant is able to play an effective part in it without the safety of the public being compromised: see the judgment of Lord Reed PSC, at para 135.

51. T7's separate submission that SSHD is in breach of Article 6 in failing to provide proper disclosure in these proceedings is met by the fact that SIAC has sufficient means at its disposal to ensure that SSHD's disclosure obligations are fulfilled.

52. As for the Article 8 case, T7 was not within the jurisdiction of the ECHR for the purposes of Article 1 when the relevant decision was made: see the long line of cases cited at para 88 of SSHD's skeleton argument. Further, as SIAC recorded at para 403 of its judgment in *Shamima Begum* (unreported, SC/163/2019), Article 8 has only a limited sphere of application even in deprivation cases. In short, the scope of the inquiry is confined to whether the deprivation was in accordance with the law, whether the authorities acted diligently and swiftly, and whether the person deprived of her status was afforded the procedural safeguards afforded by Article 8: see also *Begum* in the Supreme Court (para 64), and *K2 v UK* [2017] 64 EHRR SE 18 (paras 49-50; 54-61). In our view, this analysis should be limited to deprivation of citizenship cases where the revocation of the right in question is of great importance to the subject, and should not extend to entry clearance cases, where the alien has no relevant right. But even if that were wrong, T7 cannot show that SSHD has made an arbitrary decision which is immune from challenge in a judicial forum. T7 has a right to seek a review under s. 2F.

53. T7's contention that the decision does not pursue a legitimate aim is somewhat question-begging. It depends for its success on T7's public law grounds being correct,

and in our view that is the proper framework for their consideration. If T7 cannot assail SSHD's conclusion directed to national security, it must follow that the decision pursued the legitimate aim of safeguarding that important public interest.

54. As for the Article 2/3 case, T7 faces the same jurisdictional hurdles as she encounters in the context of Article 8. In any event, there is force in SSHD's argument that it was not the February 2024 decision which has brought about T7 current difficulties or the dilemma she faces. It was her decision to travel to Syria in the first place. Further, if SSHD were entitled to take the view that national security outweighs the compelling compassionate circumstances of this case, it would follow that he is also entitled to adopt the position that T7's entry clearance application should be refused but steps should be taken to facilitate CD's return unaccompanied. That decision does not amount to a breach of Article 3 in relation to either or both of T7 and CD even if the jurisdictional difficulties were surmountable. SSHD is not compelling T7 to split the family, and were CD brought to the UK without his mother Professor Patel's evidence does not in our judgment go so far as to suggest that the psychological harm to him would surpass the Article 3 threshold. Overall, the Article 3 considerations, even were they justiciable, are not such that SSHD is effectively compelled to grant an entry clearance to T7 however strong the national security case against her.

GROUNDS OF REVIEW

55. T7 has advanced seven grounds of review which may be summarised as follows:

56. GROUND 1: the decision is irrational and lacks proper reasoning. Here, the focus is on what is attributed to SSHD in the 23 February 2024 email.

57. GROUND 2: SSHD has asked himself the wrong question. The right question is whether the instant case possesses particular features such that a refusal of entry clearance may result in unjustifiably harsh consequences. Under this rubric it is also contended that the compelling compassionate circumstances test has been treated as a threshold that, once exceeded, no longer requires any particular regard to the individual facts.

58. GROUND 3: SSHD, as opposed to SCU, failed to treat CD's interests as a British child as a primary consideration.

59. GROUND 4: there is no evidence in OPEN that any updated national security assessment was either undertaken at all or properly undertaken.

60. GROUND 5: SSHD failed to consider a range of relevant considerations, including the fact that the DAANES (the Kurdish autonomous entity in control of the camp) are seeking actively to have T7 and CD returned to the UK with the support of other

international actors, and the Crown's protective duty of *parens patriae* to British children abroad at risk of harm.

61. GROUND 6: SSHD failed to make proper enquiries of FCDO.

62. GROUND 7: SSHD failed to consider whether the refusal of entry clearance would likely mean that T7 would never be able, through ill-health or death, to prosecute her deprivation appeal.

LEGAL FRAMEWORK

63. The parties advanced quite wide-ranging submissions on the law not all of which we need address. We do not think that we need cover ground that is not in issue or is so well-established in SIAC that further iteration is not required.

64. This is, of course, a review under s. 2F of the SIAC Act 1997. The constraints imposed by *Begum* in the Supreme Court apply *a fortiori*. However, Ms Weston ultimately abandoned any *Wednesbury* challenge to SSHD's decision (predicated on the premise that all her public law grounds failed), and in our view none of the issues discussed in *Begum* is applicable to the present challenge. It stands or falls on traditional public law principles which, subject to Ms Weston's submission on "anxious scrutiny", do not depend on the intensity or otherwise of SIAC's examination of the underlying material.

65. Ms Weston did submit that this was an "anxious scrutiny" case in the sense that fundamental rights are in play and SIAC must therefore be satisfied that a substantial objective justification for the interference with or the curtailment of the right at issue exists. We were taken to the familiar line of authority on this point. We think, with respect, that the clearest explanation of the principle is to be found in the judgment of Lord Woolf MR in *R v Lord Saville of Newgate, ex parte A* [2000] 1 WLR 1855, at 1867 para 37:

> "What is important to note is that when a fundamental right such as the right to life is engaged, the options available to the reasonable decision-maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently compelling countervailing considerations. In other words it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of interference with the human right involved and then apply

the test accepted by Sir Thomas Bingham MR in *R v Ministry of Defence, ex p Smith* [1996] QB 517 which is not in issue."

66. We have already rejected all of Ms Weston's human rights arguments. When making submissions on *ex parte A*, she mentioned the right to life, but that submission was misplaced. T7 is outside the territorial scope of the Convention, and Article 2 has no application. However, the principles outlined by Lord Woolf apply equally to fundamental rights vouchsafed by the common law. In all situations, however, there must be an interference with or curtailment of the right in question.

67. Ms Weston advanced her case in various ways but, however put, we cannot agree with her that either T7 or CD possesses a fundamental right at common law which has been interfered with or curtailed by SSHD. On the facts of this case, harsh though it may seem, SSHD did nothing to cause T7 to travel to Syria and enter a war-zone. SSHD is not responsible for the birth of CD. Ms Weston submitted that T7's life was at stake. That may be so, but T7 has no right at common law giving rise to a correlative duty in SSHD to bring her to the UK to save her life. She is now an alien without the right of abode and, therefore, someone who requires exceptional leave under a policy issued outside the Immigration Rules.

68. As for the position of CD, he as a British citizen does enjoy a right of abode. SSHD has done nothing to frustrate the exercise of that right. Indeed, SSHD wishes to take active steps to bring CD to this country provided that T7 consents. She does not. In any event, the right of abode is not enough for CD's (or T7's) purposes. What is really being said is that the best interests of CD and T7 are so inextricably intertwined that it would be unconscionable to bring CD to the UK without T7. We do not disagree with the proposition that the best interests of CD militate in favour of him being brought to the UK with his mother. But best interests, or welfare, are not to be equated with a right. The former must be considered by SSHD within the decision-making process. Arguably, they must be SSHD's primary consideration. If, however, these interests are to be elevated to some sort of right, whether as being part and parcel of his right of abode or otherwise, the correlative duty in SSHD not to frustrate those rights would mean that it would be very difficult if not impossible for him to reach a lawful decision under the LOTR without repatriating both son and mother, whatever the risk posed by the mother to the national security of this country.

69. That is not the law. We were taken to no authority which treats the interests of a child outside the UK as equivalent to a right properly so called. After the hearing, Ms Weston drew our attention to the recent decision of the Supreme Court in *CAO v Secretary of State for the Home Department* [2024] UKSC 32. It was a decision on s. 55 of the Borders, Citizenship and Immigration Act 2009 as well as various provisions of the Children Act 1989. These provisions do not have extra-territorial effect. The welfare duty under s. 55(1)(a) applies only to children in the UK. We have found

nothing in the Children Act 1989 to suggest that it applies to children outside the UK. The presumption against extra-territorial effect applies.

70. For all these reasons, we cannot accept that the "anxious scrutiny" principle applies to this case in the sense explained by Lord Woolf in *ex parte A*. However, Mr Blundell accepted, and we agree, that it is inevitable in a case such as the present that SIAC's "powerful microscope" should be applied with full force. We are not saying that "powerful microscope" and "anxious scrutiny" are equivalent concepts because we recognise that the *ex parte A* approach does not inform the setting on the microscope. Even so, the two concepts are not poles apart.

71. The next legal issue which arises is the extent to which SSHD's reasons – as set out in the 23 February email rather than the letter written five days later – may be supplemented by what appears in the Ministerial Submission or other materials placed before him. The answer to that question is: it depends. SIAC received many submissions on this topic but in our view most were irrelevant. If SSHD should be interpreted as *accepting* the advice he was given as to the factors relevant to the national security case on the one hand and those relevant to compelling compassionate circumstances on the other, it may be appropriate to supplement the ground or reason given in SSHD's email by further reasoning in the surrounding material. On that hypothesis, all that SSHD did in this finely balanced case was come to a different conclusion from his advisers as to where the ultimate balance should fall. Further, on that hypothesis it may be possible to infer that to the extent that the case against the grant of exceptional leave is set out in the surrounding material, SSHD must have accepted it.

72. Conversely, if SSHD is to be interpreted as *disagreeing with* or *contradicting* the advice given in the Ministerial Submission or otherwise to a material way, then the inferential drawing of his reasons by reference to that underlying body of documentation cannot take place.

73. Mr Blundell relied on the decision of the Court of Appeal in *R (Oakley) v South Cambridgeshire DC* [2017] EWCA Civ 71; [2017] 1 WLR 3765 in support of his submission that this is a situation where the decision-maker's reasons may be inferred. We have detected a slight tension between the judgments of Elias LJ (with whom Patten LJ agreed) and Sales LJ. In that case the Court of Appeal was dealing with a situation where the members of a planning committee did not accept a recommendation made in the officer's report, and gave no reasons for their decision. This was in the context of a decision-making structure where the relevant regulations did not require the giving of reasons. Our case is different, inasmuch as the LOTR Guidance does require the giving of reasons. One of the issues which the Court of Appeal had to address was whether members' reasons could be inferred from the officer's report inasmuch as the latter had set out reasons favouring or disfavouring a

particular course of action. When dealing with the issue at a high level of generality, Sales LJ suggested (at para 71) that in such a situation "the fair and proper inference is that [members have] simply adopted the contrary reasoning set out in the report".

74. We do not read Sales LJ as setting out a principle of universal application, not least because (1) he rejected the notion that a planning committee was under a general duty to give reasons, and (2) he concurred in the result of the appeal, namely that the decision should be quashed on the basis that adequate reasons had not been given. In any event, we think that Elias LJ's arguably slightly less prescriptive approach represents the law:

> "Nor is it a case where the officer set out the relevant competing considerations, perhaps expressed the view that it was a marginal decision, and came down on one side or the other. It may be easy to infer in such a case that the committee did merely balance the interests differently. Here there was a complex assessment of numerous factors in play and there is no indication at all how they were assessed." (at para 65)

75. Exactly how SSHD's email should be interpreted in light of (1) what is said in the underlying material, and (2) the 28 February 2024 letter is a matter which we will need to consider with care and precision in the context of the OPEN and CLOSED grounds of review.

76. Further, SIAC drew the parties' attention to the recent decision of the Court of Appeal in *Secretary of State for Justice v Sneddon* [2024] EWCA Civ 1258. When considering the advice of the Parole Board as to whether a prisoner should be transferred to open conditions, SSJ may only reject a favourable recommendation "if it is considered that there is not a wholly persuasive case" for transfer. Thus, the policy places some constraint on SSJ's decision-making. The Court of Appeal held that the personal decision of SSJ was reviewable only on unreasonableness grounds and that there was no additional requirement for SSJ to provide good or very good reasons for disagreeing with the Parole Board's recommendation.

77. Ms Weston relied on para 35 of the judgment of the Lady Chief Justice:

> "The reasonableness of the SoS's decision must be assessed in context, for rationality is not determined in the abstract. The central context is the legislative scheme identified above. The assessment of reasonableness will of course involve scrutiny of the SoS's approach to the Board's advice, and whether that advice was given due consideration and weight. But it is important not to be prescriptive as to the precise approach that will be reasonable in every case."

78. In our case, the legislative scheme is different in that there are no constraints on SSHD's personal decision-making. He did not have to be satisfied that MI5, the SCU or whoever, had failed to present a wholly persuasive case. Further, SSJ in a Parole Board context does not act personally but through her officials in the *Carltona* sense. Here, SSHD chooses to act personally, although the statute does not require it, because national security is in issue. The reasons given on behalf of SSJ in *Sneddon* were more detailed than those appearing in the email or the letter. We repeat what we have already said. If SSHD is to be interpreted in the instant case as *disagreeing with* or *contradicting* the advice he was given on a material issue, then we think that a public law flaw could be made out. The same may apply if what SSHD has expressly said is not sufficiently clear. This is not least because on such a hypothesis, it may well be difficult to say that SSHD has given the contrary advice "due consideration and weight".

79. In addition, we need set out the refinement of the *Wednesbury* test proffered by the Divisional Court (Leggatt LJ and Carr J, both as they then were) in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649, at para 98:

> "… This legal basis for judicial review [sc. irrationality] has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is "so unreasonable that no reasonable authority could ever have come to it": see [the *Wednesbury* case itself] at page 233-4. Another, simpler formulation of the test which avoid tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1999] 2 AC 143, 175 per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it – for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error …"

80. Although Ground 1 could be described as raising a reasons challenge, and Ms Weston advanced a number of submissions which could be said to fall under that rubric, our attention was not drawn as it should have been to the *locus classicus* on this topic: the decision of the House of Lords in *South Bucks DC v Porter (No 2)* [2004] UKHL33; [2004] 1 WLR 1953, per Lord Brown at para 36. This was another planning case – and Ms Weston was keen in the context of *Oakley* to draw distinctions between planning

cases and immigration cases. In our view it sets out principles of general application in situations where there is a duty to give reasons:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn … A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

We should make it clear that Lord Brown should not be understood as holding that reasons need always be express. If that were indeed the position, the *Oakley* case would be wrongly decided as inconsistent with *South Bucks (No 2)*. In our judgment, these two authorities can be reconciled. In a case where reasons may be inferred from an officer's report, it is that report which must meet the *South Bucks (No 2)* standard. We would add that if there were substantial doubt as to whether the decision-maker had accepted the reasons contained in an advisory document, the Court would be slow to draw the relevant inference.

ANALYSIS OF THE REVIEW GROUNDS

81. It is convenient to take the first three grounds together. Ms Weston advanced the following submissions.

82. She submitted that the refusal to grant T7 leave to enter cries out for a rational explanation which has not been given. There is a want of proper reasoning in this exceptional and urgent case. In particular, SSHD has failed to demonstrate any or any adequate basis for rejecting SCU's comprehensive advice. As for the reason set out in the 23 February email, Ms Weston submitted that it represented a one-sided consideration of T7's case and failed to address her compelling compassionate circumstances at all. Ms Weston also submitted that the reason set out in the email was perverse, because it was entirely plain that the national security risk had reduced.

83. Ms Weston submitted that SSHD has asked himself the wrong question: namely, has the national security risk reduced? What he should have asked himself was the

different question of what were the particular circumstances of this case such that a refusal would or may result in unjustifiably harsh consequences. Ms Weston submitted that SSHD appears to have treated this as a threshold which once passed no longer requires any particular regard to the individual facts. She also submitted that SSHD failed to undertake the balancing exercise required by the LOTR Guidance either properly or at all.

84. Ms Weston submitted that SSHD failed to treat CD's interests as a primary consideration. As a related matter – advanced as a sub-category of her fifth ground – she submitted that SSHD failed properly to have regard to the Crown's protective duty of *parens patriae* to British citizens abroad at risk of harm.

85. Finally, Ms Weston submitted that no proper regard was paid to the medical evidence dealing with T7's cognitive difficulties. This evidence was as relevant to the issue of future risk to national security as the evidence bearing on her physical disabilities. Lest it be said that this submission does not appear in the clearest terms in Ms Weston's skeleton argument, it is our interpretation of Ms Weston's oral argument and Mr Blundell was able to address it.

86. Ms Weston developed these submissions in various ways in oral argument. We do not think that it is necessary to set everything out in this judgment, nor are we addressing those of her subordinate submissions which did not materially advance her case.

87. Given that these are in the nature of public law proceedings, we think that we should begin by examining the decision under challenge and the decision-making process, and then – as it were – work outwards from there. It must also be borne in mind that there is an important CLOSED element to these proceedings that constrains what can properly be said in this OPEN judgment. Having made that observation, we cannot begin to accept Mr Blundell's submission, assuming that we have correctly understood it, that allowance should be made for the fact that the 23 February 2023 email is an OPEN document. That places the cart before the horse. SSHD could have said things to his PS which would have made the email a CLOSED document. If he had, it would presumably have been communicated via alternative secure means within the department, and we would have been examining it only in CLOSED proceedings. It is only because the email does not contain or by necessary implication reveal CLOSED material that a decision could properly be made by those advising SSHD in these proceedings that it could be an OPEN document.

88. The case was put to SSHD on the basis that it was finely balanced. It was also put to him on the basis that here there *were* compelling compassionate circumstances within the meaning of the LOTR Guidance. There is absolutely no reason to suggest that SSHD disagreed with that second conclusion. He has not said that he disagrees with it and it would have been perverse to do so. It follows that the only reasonable inference is

that SSHD balanced the compelling compassionate circumstances of this case against national security, and concluded that the latter outweighed the former. He came to that conclusion because he did not think that the national security risk had been reduced.

89. It also follows, in our judgment, that the decision-letter dated 28 February 2024 is consistent with SSHD's thinking. All that the author of the letter has done is to draw the only reasonable inference by way of extrapolation from the email. What he or she has not spelt out is that the reason SSHD believed that the balance came out as it did was that the national security risk had not reduced, but we can add that reason to the mix in the light of the email. It is the platform for the extrapolation which we have mentioned. The point is that there is no mismatch or disconnect between the two documents. The absence of a witness statement from the Respondent does not affect this conclusion.

90. We cannot accept Ms Weston's submission that SSHD must be regarded as having treated "compelling compassionate circumstances" as a threshold criterion which, once surpassed, meant that the particular circumstances of this case required no further consideration. In substance, what she was submitting was that this case exemplifies extremely compelling compassionate circumstances. We think that the distinction Ms Weston seeks to draw is a semantic one. The threshold under the LOTR Guidance is already a very high one, and there is nothing to indicate that SSHD was unaware of all relevant features of this extremely concerning case. Moreover, it should be noted that Ms Weston's submissions under this rubric do tend to contradict her headline submission that SSHD did not weigh up compelling compassionate circumstances at all.

91. The position of CD was regarded by the author of the Ministerial Submission as "our primary consideration". CD was seen as central to the application under the LOTR Guidance because, without him, there could not have been compelling compassionate circumstances. It was also front and centre of the Ministerial Submission that those representing T7 and CD were contending that their cases were inextricably intertwined. Finally, it was the existence of all these factors which led to the recommendation that LOTR be granted on an exceptional case. Frankly, it is simply inconceivable that SSHD was not well aware of all the salient features of this case and did not take the primacy of CD's best interests into account. Although this is a point which tends to cut both ways, SSHD was sufficiently concerned about CD to direct that his repatriation be explored. Accordingly, we consider that Ms Weston's argument under her third ground may be reduced to the contention that SSHD reached the wrong conclusion as to what weight should be given to CD's circumstances and how his best interests should be advanced. In other words, given that CD's circumstances were treated as a relevant consideration in public law terms, the only refuge for the submission is that SSHD reached a perverse conclusion. We note that the pure

Wednesbury challenge has been abandoned and in any case we cannot conclude that SSHD's assessment of weight was irrational.

92. We do not consider that the *parens patriae* argument adds to the foregoing. The highest it may properly be put is that CD's best interests were a relevant factor to be addressed in the decision-making process. They were addressed in that way and on that basis.

93. This leaves the two submissions which undoubtedly carry the greatest force and therefore form, or at least should form, the centre-piece of T7's argument. The first is that the ground or reason attributed to SSHD in the 23 February email is perverse and/or inconsistent with the advice he had been given and/or is unintelligible. The second is that SSHD has failed to address the medical evidence properly, in particular the evidence relating to T7's cognitive difficulties.

94. These are submissions we can address only in CLOSED, although there are two matters which we may properly address in OPEN. Mr Blundell drew our attention to various parts of the Generic ISIL statements. SIAC has considered these in other cases. MI5's assessment is that the longer a subject of interest remains in theatre, the greater the risk to national security. Further, para 54 of the first Generic Statement (2017) states:

> "We assess that there is a risk that individuals who return to the UK from ISIL-controlled territory will radicalise others or impart knowledge of terrorist methodology. They may inspire, encourage or provide support to those who have not travelled to ISIL-controlled territory to carry out attacks."

95. What may be drawn from this is the obvious point that T7 was assessed as being a threat to national security in 2017, based in part on the ISIL Generic report. Given that T7's deprivation appeal is currently stayed, we need to be careful as to what we say about the strength of the national security case back in 2017. Mr Blundell submitted, and we accept, that the starting point for any fair consideration of this case is the risk T7 constituted to national security several years ago. What is also clear is that those representing T7 were submitting to SSHD in February 2024 that whatever the risk to national security was in 2017, that risk had reduced. Although, once again, this is a point that tends to cut both ways, it is hardly surprising in such circumstances that SSHD focused on the issue of reduction of risk. It is his conclusion on that issue which may be questioned in light of the advice he was given.

96. The second point that we are able to make in OPEN returns to the key email from SSHD's private office. Mr Blundell came close to submitting that this was a private email, that SSHD would have had no expectation or understanding that it might ever see the light of day in a forensic setting, that the email was written in haste, that SSHD

may well have had other reasons for refusing the application, and that it was open to SSHD to give no reasons whatsoever for his decision. We do not consider that these arguments, assuming that we are not mispresenting them in any way, are well-founded. The LOTR Guidance made it clear that reasons were required. SSHD knew, or at least ought to have been told, that a decision made by him personally needed to be a reasoned decision and that the reasons needed to be his reasons rather than ones contrived by others after the event. There is no evidence that the email was written in haste; and, even if it were, that would not help. Those advising SSHD must have been aware that the email chain would have to be disclosed in some shape or form if litigation commenced. We reject these submissions.

97. A more compelling argument, and one we think was made by Mr Blundell during his oral submissions, is that a degree of latitude is required when interpreting the email. A pernickety, textual approach to it would not be appropriate. For example, a literal reading of the email would run along the lines that SSHD considered that no evidence at all had been put before him showing that the risk had reduced. Such a literal reading would be unfair to SSHD. What he was saying was that in his opinion the national security risk had not been reduced. Whether that opinion stacks up in light of the advice given to SSHD is addressed in CLOSED.

98. Our conclusions on the two points that in our judgment carry far the greatest weight, insofar as they may be expressed in OPEN, are as follows. First, we are persuaded that SSHD did address the medical evidence properly. Secondly, we are not persuaded that SSHD's assertion that the national security risk has not reduced is supportable in public law terms.

99. We are able to address Ms Weston's remaining grounds very briefly. They have no merit. As for ground 4, it is not correct to say that MI5 have provided no updated national security assessment (we do not criticise Ms Weston for at least raising this ground because the way in which MI5's national security assessment was gisted might lead the reader to believe that there was nothing new, although she ought to have withdrawn it). As for ground 5, it was not a relevant consideration properly so-called (see *Begum*, SC/163/2019 paras 50 and 257) that DAANES are actively seeking to have T7, CD and it might be added all British and ex-British nationals in Al-Hoj returned to the UK. Furthermore, SSHD well knew that. As for ground 6, there is no evidence that SSHD failed in his *Tameside* duty – a duty which is reviewable only on *Wednesbury* principles – to obtain further information from the FCDO. The fact remains that SSHD had received an impressive and comprehensive array of material from those representing T7. Finally, as for ground 7, the fact that T7 may never be able to prosecute her deprivation appeal is not a sound basis for distinguishing para 135 of *Begum* in the Supreme Court. The same logic applies to Ms Begum herself, although she decided to proceed without giving evidence. Ms Begum's stay in this camp is indefinite. The real point is that a person who is said to be a threat to the national

security of the UK cannot be brought to this country until SIAC has determined that she is not a threat. Whether the s. 2B appeal can ever be pursued is not the point.

CONCLUSION

100. We declare that SSHD's decision is unlawful on the narrow ground that his reason for refusing T7's application for exceptional leave under the LOTR Guidance is unsupportable in public law terms. This is explained in more detail in our companion CLOSED judgment.

101. We therefore set aside SSHD's decision in the exercise of our powers under s. 2F(4) of the SIAC Act 1997. It is unnecessary to make a formal quashing order. SSHD must reconsider T7's application for exceptional leave outside the Rules, and we direct that she do so as soon as possible.