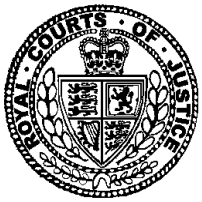

Neutral Citation Number: [2021] EWHC 2784 (Admin)

Case No: CO/1035/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2021

Before:

THE HONOURABLE MR JUSTICE LINDEN

- -

Between:

THE QUEEN **(on the application of D9)**	**Claimant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr Stephen Cragg QC and **Mr Anthony Vaughan** (instructed by **Duncan Lewis**) for the Claimant
Mr Martin Goudie QC and **Mr David Lemer** (instructed by the Special Advocates Support Office) as Special Advocates

Mr David Blundell QC and **Ms Natasha Barnes** (instructed by the Government Legal Department) for the Defendant

Hearing date: 22 September 2021

- -

OPEN JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII, if appropriate, and/or publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 2.00pm on Monday 18 October 2021

MR JUSTICE LINDEN:

Introduction.

1. This hearing was listed pursuant to directions made on 21 May 2021 to consider:

   i) The Defendant's application, dated 27 May 2021, for a declaration under section 6 of the Justice and Security Act 2013 that these are proceedings in which a closed material application may be made to the court ("the section 6 application");

   ii) If the section 6 application is refused, permission; and

   iii) Directions as to the future conduct of these proceedings.

2. In the Claimant's skeleton argument Mr Cragg QC and Mr Vaughan drew attention to the fact that the Claimant's legal representatives had had difficulties in establishing contact with, and taking instructions from, him. However, they assured me that they have sufficient instructions to consider themselves properly instructed in these proceedings which seek to increase the prospects of the Claimant's lawful return to the United Kingdom as soon as possible.

3. This is my OPEN judgment. For obvious reasons, it seeks to explain as fully as possible the reasons for my decisions. There is a shorter CLOSED judgment which sets out matters which it is not appropriate to set out in the OPEN judgment.

The Claim

4. The Claimant is a national of Afghanistan who entered the United Kingdom on 20 May 2001. On 2 February 2006, he was granted Indefinite Leave to Remain ("ILR").

5. On 31 December 2019, the Claimant travelled to Afghanistan. He remained there until the events which are the subject of these proceedings, he says for reasons related to the Covid-19 pandemic, and it is believed that he is still there.

6. On 18 December 2020, the Defendant made two decisions in relation to the Claimant, namely:

   i) to exclude him from the United Kingdom on grounds of national security pursuant to paragraph 321A (4) of the Immigration Rules on the basis that his presence in the United Kingdom is not deemed conducive to the public good ("the Exclusion Direction");

   ii) to cancel his ILR pursuant to Article 13(7)(b) Immigration (Leave to Enter) Order 2000 ("the Cancellation Decision").

7. These decisions were notified to the Claimant in a letter served on him on 29 December 2020.

8. On 26 January 2021, the Claimant applied to the Special Immigrations Appeals Commission ("SIAC") for a review of the Exclusion Direction. The hearing of that review was listed for 26 and 27 January 2022 but it was taken out of the list, by order

of the SIAC dated 10 September 2021, because of the difficulties with taking instructions from the Claimant to which I have referred. The Claimant's solicitors are required to update the SIAC as to the Claimant's position by 8 November 2021.

9. On 10 February 2021, Jay J handed down judgment in **C1 v Secretary of State for the Home Department** [2021] EWHC 242 (Admin), holding that Article 13(7) of the 2000 Order does not confer a power on the Defendant to cancel or revoke ILR. It was on the basis of this decision that the Claimant made arrangements to travel back to the United Kingdom despite the fact that he was also the subject of the Exclusion Direction.

10. On 16 March 2021, the Claimant boarded a Turkish Airlines flight to Istanbul at Kabul airport with a view to taking a connecting flight from Istanbul to London Heathrow. However, he was asked to leave the aircraft on the grounds that the Defendant had refused the Airline authority to carry him pursuant her then Authority to Carry Scheme 2015 ("the ATC Scheme 2015"), which came into force pursuant to the Counter-Terrorism and Security Act 2015 (Authority to Carry Scheme) Regulations SI 2015/997.

11. On 17 March 2021, these proceedings were issued in the Administrative Court challenging the Cancellation Decision, the refusal of authority to carry the Claimant and the Defendant's communications with Turkish Airlines about the Claimant. The Statement of Facts and Grounds pleads four grounds:

    i) Ground 1 contends that the Defendant's cancellation of the Defendant's ILR on 18 December 2020 was ultra vires because Article 13(7) of the 2000 Order does not confer a power to cancel ILR. The remedy sought by the Claimant is a declaration that the Cancellation Decision was a nullity and of no effect. This Ground relies on the decision of Jay J in **C1** although I understand that that decision is currently before the Court of Appeal with a hearing date of 24 or 25 November 2021.

    ii) Ground 2 contends that the Defendant's refusal of authority to carry was unlawful and seeks declaratory relief to this effect. This argument assumes that the Claimant is right that the cancellation of his ILR was a nullity and argues that nothing in the 2015 ATC Scheme empowers the Defendant to refuse authority in respect of a person who has valid ILR. If the position were otherwise, it is said, the Scheme would infringe the principle that specific rights conferred by statute cannot be cut down by subordinate legislation made under the enabling powers of a different statute: see **R v Secretary of State for Social Security ex parte JCWI** [1997] 1 WLR 275 CA.

    iii) Grounds 3 and 4 challenge statements and disclosures made by the Defendant to Turkish Airlines on the basis that their effect was that the Claimant was seen as a security risk, or there were perceived to be security issues in relation to him. It is said that this was contrary to the Data Protection Act 2018 and/or Articles 2, 3 and 8 European Convention Human Rights ("ECHR") and that the Defendant's statements and disclosures gave rise to a risk to the Claimant's safety in that he would be likely to be believed by the then authorities in Afghanistan to be an Islamic extremist and a threat to national security. However, by email dated 15 September 2021, the Claimant's representatives

have confirmed that these grounds are not pursued, and his case is therefore limited to Grounds 1 and 2.

12. In addition to declaratory relief, at paragraph 82(e) of the Statement of Facts and Grounds the Claimant seeks: *"Any further, necessary or consequential relief as the Court thinks fit, including to the extent necessary to remove any obstacle to the Claimant's lawful return to the UK"*. This reflects the objective which he seeks to achieve through these proceedings albeit, as matters stand, he will face significant legal complications on his return.

13. A further significant feature of this case is that the Claimant seeks expedition of the proceedings on the basis that he is at risk when in Afghanistan. Originally his case was that the Defendant's refusal of authority to carry him, and his removal from the Turkish Airlines flight on 16 March 2021, will have led to him being suspected of being an extremist and a threat to national security by the Afghan authorities including the National Directorate of Security ("the NDS"). Given the methods of the NDS, he said, this would put him at risk of arrest, detention and ill treatment by them. He relied on the evidence and opinions of Mr Tim Foxley MBE, who is a political and military research analyst with expertise in relation to Afghanistan, as set out in a report from Mr Foxley dated 19 April 2019.

14. As is well known, the situation in Afghanistan has changed with the Taliban coming to power in August but Mr Foxley maintains, in supplementary material set out in an email dated 17 September 2021, that there are continuing risks to the Claimant. Mr Foxley accepts that there have been major changes in Afghanistan since his original report, the implications of which are not yet fully apparent. The Ghani government and the NDS have now dispersed and the direct threat from the NDS has therefore gone. However, the Taliban have taken over the apparatus of government including buildings previously used by the police, the military and the intelligence services and, he says, there is a very real risk that they will gain access to NDS intelligence files. It is also possible that they will be assisted by former NDS officials either voluntarily or through compulsion. If those files contain information about the Claimant, and if that information shows that he is connected to Islamic State in any way, he would be at real risk given the enmity between the Taliban and Islamic State. At least one Islamic State commander has been executed and there are media reports of a crackdown on supporters of Islamic State more generally.

15. Mr Blundell QC also drew attention to an email from the Claimant's solicitor, which was written in the context of the SIAC proceedings and dated 3 September 2021. This states that they have not been able to speak to him since a telephone conversation on 19 August 2021 which lasted 20 minutes before it was suddenly disconnected. The email says that, on 13 August 2021, the Claimant had been sent materials in respect of the SIAC proceedings but that it had not been possible to contact him until 19 August. On the call, the Claimant indicated that he had not had time to read the documents, given the situation in Kabul. The solicitor was unable to take meaningful instructions in relation to them. The Claimant was therefore unable to comply with the SIAC's directions in relation to preparation for the hearing in January 2022. I am told that the Claimant's representatives have not been have not been able to make contact with him since then, despite various attempts.

The application under section 6 of the Justice and Security Act 2013

Legal framework

16. As is well known, section 6 applications require an in-principle decision by the court as to whether a closed material procedure should be available in the particular circumstances of the case. The application itself may be dealt with by way of a closed material procedure, with special advocates appointed, a closed hearing and consideration of a selection or all of the sensitive material which may be the subject of an application in due course. If the section 6 application is allowed it provides a gateway for the making of an application, pursuant to section 8, not to disclose sensitive materials other than to the court and the special advocate. Any declaration pursuant to section 6 is kept under review pursuant to section 7 and may be revoked if it ceases to be justified or appropriate.

17. As to the court's powers, section 6 of the 2013 Act provides that the court may make such a declaration if it considers that two conditions are met. Section 6(4) provides that:

> *"The first condition is that—*
> *(a) a party to the proceedings would be required to disclose sensitive material in the course of the proceedings to another person (whether or not another party to the proceedings), or*
>
> *(b) a party to the proceedings would be required to make such a disclosure were it not for one or more of the following—*
>
> *(i) the possibility of a claim for public interest immunity in relation to the material,*
>
> *(ii) the fact that there would be no requirement to disclose if the party chose not to rely on the material,*
>
> *(iii) section 56(1) of the Investigatory Powers Act 2016 (exclusion for intercept material),*
>
> *(iv) any other enactment that would prevent the party from disclosing the material but would not do so if the proceedings were proceedings in relation to which there was a declaration under this section."*

18. Section 6(5) provides that:

> *"The second condition is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration."*

19. Section 6(6) provides that:

> *"The two conditions are met if the court considers that they are met in relation to any material that would be required to be disclosed in the course of the proceedings (and an application under subsection (2)(a) need not be based on all of the material that might meet the conditions or on material that the applicant would be required to disclose)."*

20. Under section 6(7):

> *"The court must not consider an application by the Secretary of State under subsection (2)(a) unless it is satisfied that the Secretary of State has, before making the application, considered whether to make, or advise another person to make, a claim for public interest immunity in relation to the material on which the application is based."*

21. *"Sensitive information"* is defined by section 6(11) as *"material the disclosure of which would be damaging to the interests of national security"*.

22. Mr Blundell and Mr Cragg have also reminded me of the guidance in **McGartland v Secretary of State for the Home Department** [2015] EWCA Civ 686 and, in particular, of what Richards LJ said at [35] as to the exceptional nature of the closed material procedure and the likely rarity of its use given the importance of the principle of open justice. However, Richards LJ also said that the relevant statutory provisions build in safeguards and it is therefore unnecessary to give them a narrow or restrictive reading save for any reading down which may be required by article 6 ECHR. Subject to that point, the words of the section should be given their natural meaning.

The arguments of the parties

23. Mr Blundell submits that:

i) The material, which is sought to be protected, referred to as "the section 6 material", consists of documents which relate to, or impact upon, the decision to refuse Turkish Airlines authority to carry the Claimant. There is also material which relates to and impacts upon the Exclusion Decision.

ii) The section 6 material is sensitive material within the meaning of section 6(11) of the 2013 Act.

iii) The Defendant has considered whether a claim for public interest immunity would be appropriate, as required by section 6(7), but has concluded that it would not. This is essentially because the effect of a PII certificate would be to exclude the section 6 material from the proceedings altogether whereas the Defendant considers that she should disclose this material in order to comply with her duty of candour. Failure to do so would potentially mean that the court did not have the full factual picture when making decisions in these proceedings and would risk unfairness to the parties.

iv) The first condition under section 6(4) of the 2013 Act is satisfied in that the Defendant would be required to disclose material such as the section 6 material were it not for one or more of the matters set out in section 6(4)(i)-(iv). She accepts that the sensitive material in question is not relevant to the determination of the questions of construction which arise in relation to Grounds 1 and 2. However, she points out that these are not the only issues in the case. There is the question of the management of the case given the appeal to the Court of Appeal in **C1** and the Claimant's application for expedition. There is also the question of relief in the event that the Claim succeeds on Grounds 1 and/or 2.

v) The second section 6 condition is satisfied is that it is in the interests of the fair and effective administration of justice that a declaration should be made in the

circumstances of this case. Whilst the principle of open justice is the starting point, section 6 reflects the fact that there may be cases in which the interest of national security will require its application to be modified. This is such a case.

vi) I should therefore make a section 6 declaration.

24. The section 6 application is opposed by the Claimant. His essential basis for doing so is that the section 6 material cannot be relevant to the issues on Grounds 1 and 2 given that these are pure issues of statutory construction. The first condition, under section 6(4), is therefore not satisfied and nor can the second one be. He is not able to comment on the other aspects of the Defendant's argument given that he has not seen the section 6 material, save that Mr Cragg accepted in oral argument that the scope of section 6 is not limited to sensitive material which goes to the substantive legal issues on which a claim is based: it may in principle apply to any materials which are relevant to the fair and effective administration of justice in the relevant proceedings. I agree.

25. Mr Goudie QC's position in his helpful written response to the section 6 application, dated 8 June 2021, was that he:

i) Did not dispute that the section 6 material is sensitive material as defined by section 6(11) of the 2013 Act;

ii) Did not take any point on section 6(7);

iii) Did not oppose the Defendant's application given Grounds 3 and 4, albeit he made clear that he would not have accepted that a section 6 declaration was appropriate in relation to Grounds 1 and 2 alone given that they raise issues of pure statutory construction;

iv) Reserved his position in relation to any subsequent closed material applications made pursuant to section 8 of the 2013 Act.

26. Consistently with his position in writing, given that Grounds 3 and 4 were no longer pursued, Mr Goudie's position before me was that he disputed the Defendant's application. I deal with the basis on which he did so in more detail in my CLOSED judgment but, in outline, his position was that:

i) There is a distinction between the duty of a party to disclose information and documents, and the decision of the party to whom the information is disclosed as to whether to rely on the disclosed materials for the purposes of the proceedings. Although the Defendant considered that the duty of candour required disclosure of some of the section 6 materials, Mr Goudie did not seek to rely on any of those materials on behalf of the Claimant. They therefore need not be put before the court.

ii) Insofar as the Defendant wished to rely on the fact that she considers the Defendant to be a risk to national security, that this is her view is not disputed by the Claimant in these proceedings and he is not able to challenge her view as part of this Claim. There is therefore no need for further disclosure in relation to this point.

iii) There was therefore no need for a section 6 declaration for the purposes of case management issues.

iv) As far as the suggestion that the section 6 materials were relevant to remedy was concerned, this was speculative and wrong given that the Claimant seeks declaratory relief in relation to issues of statutory construction. The court could not refuse declaratory relief on the basis of the section 6 materials.

v) Whether or not the first condition under section 6 was satisfied, then, it was not in the interests of the fair and effective administration of justice to make a section 6 declaration in these proceedings. The second condition under section 6 therefore was not met.

27. Mr Goudie also indicated in the alternative that if a section 6 declaration was granted, having seen the materials in these proceedings and in the SIAC proceedings, he did not envisage that the timetable for any closed material application under section 8 would be lengthy.

Decision on the section 6 application

28. I agree that the section 6 material is sensitive material as defined.

29. For reasons which I explain further in my CLOSED Judgment, I am satisfied that there is sensitive material which the Defendant is under a duty to disclose and/or ought to be put before the court in these proceedings. The first condition under section 6(4) is therefore satisfied. I did not understand Mr Goudie to question the Defendant's judgment that the duty of candour required the disclosure of the Category 1 material. If he did, I disagree. The materials contain information on which the Defendant is right to consider the Claimant might wish to rely. But, equally importantly, the duty of candour is owed to the court. It requires the Defendant to act in the public interest and to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide: see **R (Citizens UK) v Secretary of State for the Home Department** [2018] 4 WLR 123 at [106(3) and (5)] in particular.

30. This is also the answer to Mr Goudie's argument that the second condition is not satisfied because he would not rely on the section 6 materials if they were disclosed pursuant to a successful closed material application, and the materials therefore need not be put before the court. For reasons which I explain further in my CLOSED judgment I am satisfied that *"it is in the interests of the fair and effective administration of justice in these proceedings to make a section 6 declaration"*. Essentially, this is because I accept that the court should consider at least some of the section 6 materials for the purposes and for the reasons identified by Mr Blundell, and that the Defendant should be in a position to make a closed material application in respect of this material given its sensitivity.

31. I also agree that this is not a case in which a claim for PII is appropriate for this reason.

32. I will therefore declare that these proceedings are proceedings in which a closed material application may be made to the Court in accordance with section 6 of the Justice and Security Act 2013.

Permission

33. The position taken in the directions of 21 May 2021 was that permission would be determined in the event that a section 6 declaration was refused. However, that was when all four Grounds of challenge were "live". In her Summary Grounds of Defence, the Defendant argued that permission should be refused on Grounds 1 and 2 on the basis that the Claimant's points of statutory construction were wrong. She did not suggest that there were any other considerations which might lead to the refusal of permission and Mr Blundell very fairly confirmed that he was not submitting that there were. Nor would his proposed closed material application affect the question of permission given the nature of the substantive issues in relation to these Grounds.

34. Given the abandonment of Grounds 3 and 4, Mr Cragg invited me to decide the question of permission and to grant it. Given that I have read into the case and given that, whilst not conceding the point, Mr Blundell had indicated that he did not wish to make any further submissions on permission, I did not see any reason why I should not deal with this question.

35. I agree with Mr Cragg that Ground 1 is clearly arguable. I accept that as matters stand, I should proceed on the basis that the decision of Jay J in the **C1** case is correct, albeit the Court of Appeal may in due course hold that it is not. Mr Blundell's arguments based on the principle that a decision of a public body is valid and has legal consequences unless and until a court holds otherwise and quashes it (see eg **Smith v East Elloe Rural District Council** [1956] AC 736, 769) seem to me to be nothing to the point given that the relief sought by the Claimant is a declaration that the Cancellation Decision was a nullity. Granted the current position, pending a decision of the court on the Claim, is that the decision had legal consequences but the argument in the case, which will be determined in due course, is that it did not.

36. With greater hesitation, Ground 2 seems to me to be arguable, again as matters stand and again on the basis that that may change shortly. Mr Cragg's arguments may prove to have unattractive consequences but it cannot be said at this stage that they are bound to fail even if the Claimant succeeds on Ground 1.

37. I therefore grant permission.

Directions/Expedition

The arguments of the parties

38. Mr Cragg submits that this case is urgent. If the Claimant succeeds on Grounds 1 and/or 2 he will be able to travel to this country notwithstanding that his ILR will then be cancelled, and he will be refused leave to enter, given the Exclusion Decision. The Claimant will then be able to contest any immigration decisions in relation to him from within the jurisdiction and he will no longer be at immediate risk of harm as he is in Afghanistan.

39. I have noted that the basis for the contention that the Claimant is at risk of harm was originally the fear of ill treatment by the Afghan authorities in power at the time that proceedings were issued and, in particular, the NDS. The position, Mr Cragg accepts,

has changed but he argues that the Claimant remains at risk as stated in the email from Mr Foxley dated 17 September 2021.

40. Mr Cragg also submits that the fact that there has been no contact between the Claimant and his representatives since the telephone call of 19 August 2021 is an extremely worrying development which is consistent with a number of possibilities including detention, or worse, by the Taliban authorities. He points out that whereas there was a need to take detailed instructions in the SIAC proceedings, albeit in the context of a review, the issues in the present proceedings are ones of statutory construction and the position is therefore different. There is no reason why they cannot be determined by the Court without detailed input from the Claimant.

41. Mr Blundell argues that the materials which were submitted with the Claim Form do not make out a case, or at least a compelling case, that there is a significant risk to the Claimant in Afghanistan from the NDS suspecting him of being a threat to national security. The situation in Afghanistan has in any event changed since then, as Mr Cragg acknowledges, and Mr Foxley's email of 17 September 2021 is essentially conjecture. The current situation of the Claimant is also unclear given the lack of contact between him and his legal representatives in this country. Mr Blundell suggests that the better course may be to stay the Claim pending the determination of the appeal in the **C1** case.

My view.

42. As I put to Mr Cragg in relation to my provisional view as to the appropriate way to proceed, all things being equal, there are compelling reasons to stay this Claim until the outcome of the appeal in the **C1** case given that if the Defendant's case as to her powers is correct, Grounds 1 and 2 will fail. In addition to this, the reality of the case may also prove to be that unless and until the Exclusion Decision is set aside the Claimant will have difficulties in persuading the court that these proceedings should be conducted in such a way as to maximise the chances that he will be permitted to return to this country. The SIAC hearing in relation to the Exclusion Decision has been postponed, as I have noted, and it is not clear whether, and if so when, those proceedings will be resumed.

43. Although the situation of the Claimant is a matter of concern, on the materials which I have seen, I am not persuaded that there is a sufficient degree of risk in his case for it to be in accordance with the overriding objective to order that the proceedings be expedited as a general matter at this stage. Nor is it clear that the Claimant would benefit from such an approach given that his situation is unknown, and he has lost contact with his legal representatives. I also consider that the Defendant should be given an opportunity to respond to Mr Foxley's email of 17 September 2021 and that the question of the future conduct of the proceedings should be considered once the Defendant has made her closed material application and the evidential picture is clearer. This approach also contemplates the possibility of further evidence from the Claimant being taken into account if he is in contact with his solicitor, as well as the taking into account of any developments in the SIAC proceedings and/or the **C1** appeal.

44. Accordingly, I consider that a step by step approach to the timetable is appropriate. I accept that there should be a degree of expedition in the timetable for the preparation of the closed material application and therefore directed the parties, at the hearing, to agree a timetable or alternatively file and serve written submissions on this topic by 4pm on Friday 1 October 2021. I also indicated that I would need to be persuaded that

a period of 4 weeks to prepare that application was needed and that, in the event of a dispute, I would take into account the fact that the Defendant has known of the broad issues for some time and is able to set the ball rolling immediately.

45. Thereafter, there will be a hearing to consider the closed material application and further directions.