Appeal No: SC/131/2016

Hearing Date: 22nd June 2023

Further written submissions on

22 June, 3, 5 and 6 July 2023

Date of Judgment: 11th August 2023

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE LANE
UPPER TRIBUNAL JUDGE KEBEDE
MR R GOLLAND

W2

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

JUDGMENT

Representation:

For the appellant: Mr Anthony Vaughan instructed by Birnberg Peirce Solicitors

For the respondent: Mr Rory Dunlop KC instructed by the Government Legal Department

Introduction

1. The respondent applies, under Rule 11B of the Special Immigration Appeals Commission (Procedure) Rules 2003 ("the SIAC Rules"), to strike out W2's notice of appeal in relation to the respondent's decision to deprive him of his British citizenship.

Background

2. W2 is an Algerian national born in August 1977. He travelled to the UK in February 2000 and claimed asylum. His claim was refused in March 2000, but he was subsequently granted indefinite leave to remain in August 2005 under a family legacy policy. He was granted British citizenship on 10 February 2006 as the spouse of a British citizen, IA, a naturalised British citizen of Somali origin who had previously been granted refugee status, whom he met shortly after his arrival in the UK. W2 and IA went on to have six children together. W2 also married KVA, a Dutch national, on 15 May 2012 in an Islamic marriage, and had a child with her. In 2013/2014 W2 and IA separated and he moved in with KVA, but he subsequently divorced KVA and reunited with IA and had a sixth child with her in 2022. KVA currently lives in Holland with their child.

3. In August 2014 W2 travelled to Syria via Turkey. In June 2015 he visited the British Consulate General in Istanbul, claiming that he had been kidnapped by ISIL after travelling to the Syrian border to see the refugee camps there and that his passport had been taken from him. He was questioned during three or four visits to the Embassy and was provided with an emergency travel document to enable him to return to the UK. IA travelled to Istanbul to meet W2 in May 2015 and returned to the UK after a few days, and W2 returned to the UK separately, on 11 June 2015.

4. On his arrival in the UK at the airport, on 11 June 2015, W2 was arrested and was taken to a police station. He instructed Birnberg Peirce & Partners ("BP") who prepared a witness statement for him, dated 11 June 2015, in which he claimed to have travelled to the border area without any contacts or prior planning and where he was tricked and subjected to extreme ill-treatment and the threat of more, and was unable to escape for a considerable period of time. He claimed not to have been involved in terrorist activity and that he had spent several months in terrifying circumstances from which he eventually managed to escape.

5. The police searched W2's home and confiscated items they found there including a Samsung tablet containing a memory card with bomb-making instructions. W2 was arrested for terrorism related offences on 3 September 2015, but no charges were pursued

against him. When he was arrested he made a statement, dated 3 September 2015, in which he said that he had never before seen the documents found on the tablet and that he was not, and had not, been involved in terrorist activity.

6. On 22 September 2016 W2 travelled to Algeria to visit his sick mother.

Deprivation decision

7. On 13 October 2016 the respondent sent W2 a notice of an intention to make an order depriving him of his British citizenship under section 40(2) of the British Nationality Act 1981. The reason given for the decision was that

> "…you are a British/Algerian dual national who is known to have travelled to Syria and is assessed to have been located with ISIL. On your return to the UK you were arrested. Seized media recovered from your home address contained extensive instructions on the production of improvised explosive devices. You are assessed to maintain an Islamist extremist mindset."

8. The notice letter was sent to W2's home address in the UK. The letter was opened and read by IA who telephoned W2 on 14 October 2016. On 15 October 2016 the Home Secretary signed an Order depriving W2 of his British citizenship.

9. On 17 October 2016 W2 sought to re-enter the UK but was prevented by British Airways from boarding the flight in Algiers on the instruction of the respondent.

10. In a pre-action protocol letter dated 8 November 2016 W2's solicitors, BP, asked that the Secretary of State grant him leave to enter the UK so as to pursue an appeal against the deprivation decision. In a letter dated 18 November 2016 the respondent refused that request.

11. On 10 November 2016 W2 appealed to the Special Immigration Appeals Commission ("SIAC") against the deprivation decision, disputing the assessments made that he had been involved in terrorism related activity and that he presented a risk to national security of the UK and that the deprivation was conducive to the public good.

Judicial Review

12. On 3 January 2017 W2 brought a claim for judicial review challenging the decision to make an order to deprive him of his British citizenship whilst he was outside the UK and challenging the order itself. He relied upon the factual background as set out above and argued that the best interests of his children were for their father to be returned to the UK as soon as possible so that normal family life could be resumed and to prevent harm to the welfare of the children.

13. The specific grounds relied upon by W2 were:

- The Secretary of State's failure to give notice of the decision to deprive in accordance with the British Nationality (General) Regulations 2003
- The Secretary of State's failure to give notice of the deprivation order
- That the decision to make the deprivation order whilst he was outside the UK and prevent his return to the UK pending his appeal was unlawful, procedurally unfair, in breach of Article 3 of the ECHR and disproportionate
- That the deprivation order was in breach of his Article 8 ECHR rights and failed to have sufficient regard to the best interests of his children
- That the deprivation order was in breach of his rights under EU law.

14. W2's judicial review claim was supported by a statement from Gareth Peirce of BP, dated 21 December 2016, in which it was stated that W2 had cooperated fully and frankly with the UK authorities and/or agencies who had interviewed him at the British Consulate before his return to the UK, that the allegations about involvement in terrorist-related activities put W2 at risk in Algeria and that it would be impossible to obtain evidence and instructions from W2 whilst he was in Algeria.

15. BP also instructed a clinical psychologist, Dr Rachel Thomas, and an independent social worker, Diane Jackson, to provide reports in support of the judicial review claim, both reporting on the best interests of W2's children being to be reunited with their father within the family home in the UK.

16. By way of his judicial review claim, W2 also sought urgent interim relief in the form of a mandatory order requiring the respondent to facilitate his return to the UK for three main reasons: firstly, so that he could safely give instructions to his solicitors for the purposes of his appeal; secondly, to ensure his safety generally, given the risks to individuals in Algeria who were alleged to have an involvement with terrorism and ISIS; and thirdly, to continue

his family life with his British wife and five (at that time) British children and to safeguard their best interests.

17. W2 maintained, in his judicial review claim, that he could not travel safely outside of Algeria, it was unclear whether he would be permitted to do so by the Algerian authorities, he had no real prospect of being permitted to leave Algeria by plane or otherwise, and that he was not willing to try to leave Algeria for a third country and feared the consequences of doing so.

18. In an Order of 3 February 2017, Flaux LJ sitting in the Administrative Court directed that the hearing of the claim for permission to apply for judicial review be expedited to be heard on a "rolled up" basis in advance of the appeal to SIAC.

19. The matter then came before Elisabeth Laing J who, in an Order dated 26 April 2017 and accompanying judgment in W2 and IA, R (On the Application Of) v The Secretary of State for the Home Department [2017] EWHC 928, refused permission to apply for judicial review and dismissed W2's application for interim relief. She concluded that the grounds seeking permission were either unarguable or raised issues which should properly be dealt with by SIAC in the statutory appeal and that W2 therefore had an adequate alternative remedy to judicial review.

20. W2 sought permission to appeal to the Court of Appeal, relying again on the expert reports of Dr Thomas and Diane Jackson, maintaining the position that he could not relocate to another country, and stressing the risk of irremediable harm arising from documented human rights abuses by the Algerian security forces and the risk of permanent psychological/emotional damage to his five British children caused by their protracted separation. W2's grounds challenged Elisabeth Laing J's finding on the SIAC appeal being an adequate alternative remedy to judicial review, given the risk of harm to him in Algeria, the legal and practical disadvantage of pursuing the appeal from Algeria, and the interference with his family life and breach of Article 8 and s55 of the Borders, Citizenship and Immigration Act 2009.

21. Permission was granted in the Court of Appeal in an Order of 4 August 2017 "*so that the operation of the SIAC appeal regime in relation to a deprivation order under s40 of the British Nationality Act 1981, the operation of judicial review in respect of such an order/notice of an order and the operation of judicial review in relation to an application for leave to enter can be reviewed in the light of the recent Supreme Court decision in Kiarie and Byndloss v SSHD [2017] UKSC 42*."

22. Sales LJ directed that the hearing of the appeal be stayed until after the conclusion of the SIAC appeal. However, having been advised that the SIAC appeal was not ready to be heard in the near future, he revised the directions in that regard in a further Order of 16 August 2017 so that the appeal in the Court of Appeal was to be expedited.

23. W2's case was then heard in the Court of Appeal on 26 and 27 October 2017 and his appeal was dismissed in an Order of 19 December 2017 which accompanied the Court's judgment in R (W2 and IA) v Secretary of State for the Home Department [2017] EWCA Civ 2146. The main issue in the appeal was identified as whether a statutory appeal to the Special Immigration Appeals Commission ("SIAC") was, in the circumstances of this case, a practical, suitable and adequate alternative remedy to judicial review. The Court considered that the case turned on two main points, the scope of SIAC's jurisdiction and the procedure for determining whether W2 should be able to return to the UK pending his appeal in SIAC, with mention made of the perceived risk to W2 of treatment contrary to Article 3 in Algeria which necessitated that details of the case not be published.

24. At [48] the Court found it to be common ground that SIAC could consider (a) whether the Secretary of State had failed to give notice in accordance with the British Nationality (General) Regulations 2003 ("the 2003 Regulations"); (b) whether there was a failure to consider risks to W2 in his country of origin and nationality; (c) the substantive and procedural aspects of the family's rights under Article 8, and (d) the duty under section 55 of the 2009 Act. At [49] the Court set out the issues which W2 identified as being those which could not adequately be dealt with in an appeal in SIAC: firstly SIAC did not have jurisdiction to consider a challenge to the timing of the deprivation order in the sense that it could not consider whether the Order was unlawful because it was made while W2 was outside the United Kingdom; and secondly, the lack of availability of interim relief in a SIAC appeal meant that SIAC could not determine whether, in order for the SIAC appeal to be effective, W2 should be in the United Kingdom for that appeal.

25. The Court concluded at [89] that both issues could properly be dealt with by SIAC:

> "For the reasons given at [52] – [68] above, I do not consider that the judge erred in stating that framing a challenge as one to the deprivation order did not raise a jurisdictional bar to a SIAC appeal if that challenge is in truth a collateral attack on the decision to make the order as to which SIAC clearly has jurisdiction. For the reasons given at [53] – [88] above, I have concluded that there is no reason why SIAC, in the course of a section 2 appeal of a refusal of LTE, could not determine and give a practical and effective remedy to the question whether it is necessary for W2 to be in the country for his appeal to be effective and to do so before the hearing of the substantive appeal. This could be done by hearing the appeal against a decision to refuse W2 LTE if, as

seems likely to be the case, the Secretary of State will so decide, together with its consideration of this issue as a preliminary issue in the appeal. It is, of course, for SIAC to decide whether the case merits expedition. I observe only that Ms Giovanetti stated that the Secretary of State would make a decision on any application for LTE with expedition and, if the application is refused, facilitate a challenge to it being considered with expedition by SIAC."

Entry Clearance Application

26. In line with the Court's conclusion above, W2 then applied for leave to enter the UK on 9 February 2018, outside the immigration rules, on human rights grounds, in order that he may have a fair hearing of, and participate fully in, his appeal against deprivation of citizenship. It was asserted in his application that refusal of entry to the UK would be unlawful as it would be in breach of common law unfairness and would breach his human rights under Articles 3 and 8 of the ECHR, the former in relation to the risk posed by him in remaining in Algeria at the hands of the Algerian authorities, and the latter in relation to his family life with his British wife and children.

27. The respondent refused W2's application on 11 May 2018. With regard to the reliance upon Article 8, the respondent noted that W2 chose to leave his family between 2012 and 2014 when he married another woman with whom he had a child, and in August 2014 when he travelled to Syria, and considered that it was proportionate to prevent him from travelling to the UK prior to any outcome of the SIAC hearing given the risk he posed to national security. With regard to the Article 3 claim and the assertion as to risk from the Algerian authorities, the respondent considered that that was belied by W2's actual travel to Algeria on 22 September 2016 and noted further that there was no assertion or evidence of any adverse interest from the Algerian authorities since that time. The respondent noted further, with regard to the issue of preparation for his appeal from outside the UK, that W2 had managed to provide his solicitors with full instructions for his judicial review claim. The respondent considered that W2 could give oral evidence via a communications platform such as WhatsApp.

Appeal to SIAC

28. W2 appealed against that decision on 15 May 2018. On the same day he applied to amend his grounds of appeal against the deprivation decision to include six grounds of appeal flowing from the decision to deprive him of his citizenship whilst he remained outside the UK:

(a) Breach of Article 2/3 arising from risk of serious harm at the hands of the Algerian authorities and breach of Secretary of State's practice of not exposing those he has deprived of British citizenship to Article 2/3 harm;

(b) Procedural requirements of Articles 3 and 8, based on his inability to participate meaningfully in his deprivation appeal from Algeria by communicating with his solicitors without placing himself at risk of harm;

(c) Clear and compelling evidence that W2 could play no meaningful part in his appeal from Algeria;

(d) Requiring him to appeal from abroad was contrary to Article 8 and Section 55 of the Borders, Citizenship and Immigration Act 2009;

(e) Abuse of power in depriving him of a suspensive in-country appeal and thus obtaining a litigation advantage and breaching the human rights guarantee of protection against ill-treatment in Algeria by requiring him to appeal from outside the UK;

(f) Breach of s40(5) of the 1981 Act and the British Nationality (General) Regulations 2013 by not giving him the deprivation notice before the Order was served on him and by serving the deprivation notice at his last known address rather than making reasonable endeavours to ascertain his location in Algeria.

29. The application to amend the grounds was granted on 15 June 2018.

30. The same day W2's deprivation appeal was listed by SIAC for a preliminary hearing and the leave to enter appeal was listed for a substantive hearing, on 29 to 30 October 2018, to determine the preliminary issue of whether W2 could "*have a fair and effective appeal from outside the UK and in Algeria consistently with the procedural requirements of the common law, Article 3 and Article 8, having regard inter alia to Kiarie and Byndloss v SSHD [2017] UKSC 42*.", as set out in directions from Elisabeth Laing J.

31. The preliminary hearing was vacated in August 2018 as a result of W2 claiming to have difficulties in obtaining expert evidence.

32. On 10 January 2019, W2 informed BP that he had left Algeria and had travelled to Turkey on a visa obtained a few days before he left. A case management hearing was listed for 26 July 2019 to determine if the preliminary issue still fell for consideration.

33. On 8 February 2019, W2's expert, Professor Peter Sommer, provided a report on W2's ability to communicate safely with his advisers from Algeria. A further expert report from Dr Claire Spencer dated 19 February 2019 was also produced, providing expert opinion on

the activities of Islamists extremists in Algeria and the concerns of the Algerian authorities in that regard, the extent of the Algerian security services' willingness and ability to monitor the communications of people in the country and between such people and those in the UK or other countries, the likely adverse interest the Algerian authorities would have in W2 and the risks he would face from them.

34. W2's solicitor, Ronald Graham, of BP, filed a statement dated 29 May 2019 for the preliminary hearing, explaining the difficulties he had experienced in taking instructions from W2 whilst he was in Algeria due to poor connection and safety concerns. He also provided evidence of his conversations with W2 whereby W2 advised him in October 2017 and subsequently that he was being monitored and watched and that he was having suicidal thoughts, and his conversation on 10 January 2019 where W2 told him he had left Algeria that day as he had been warned by a family member who worked for the intelligence services in Algeria that his life was in danger and that that family member had helped him obtain a new Algerian passport in a different first name and a visa entitling him to reside for one year in a third country. Mr Graham did not wish to disclose the third country to which W2 had travelled as that would give rise to a significant risk of W2 being detained by the authorities of that country and returned to Algeria, having fled there clandestinely, entered the third state clandestinely and continued to reside there on that basis.

35. In a letter dated 29 May 2019 from BP to the GLD, BP advised that their position was that the preliminary issue hearing could proceed. They referred to W2 being in a highly precarious position in the third country as he was at risk of refoulement to Algeria and stated that it would be perverse to expect W2 to appeal from the relevant third country whose authorities he had had to mislead in order to enter that country. W2 therefore continued to argue that he could not have a fair and effective appeal against the deprivation decision from Algeria.

36. On 18 July 2019, W2, by way of a letter from BP, withdrew his appeal against the refusal of leave to enter the UK and his claim that he could not have a fair and effective appeal against the deprivation decision from where he was presently situated. As a result, the directions hearing scheduled for 26 July 2019 was vacated.

37. On 24 July 2019, the respondent invited BP to provide written proposals to progress W2's appeal.

38. In August 2019, BP travelled to Turkey to attend on W2. W2 told BP that he had changed his name lawfully and was present in Turkey lawfully.

39. On 11 September 2019, BP applied, on W2's behalf, for the continuation of the anonymity order previously granted for W2 and for his family members. On 10 November 2019 BP wrote to SIAC and the Secretary of State confirming that an application for funding to appeal to the Supreme Court remained outstanding and seeking further disclosure of the memory card from West Midlands Police. The respondent replied on 28 November 2019 explaining that GLD would liaise with the West Midlands Police and, on 24 January 2020, they confirmed to BP that access to the memory card could be provided so long as their expert signed a confidentiality order. After being chased several times, BP stated, on 21 February 2020, that their expert could undertake the work in March 2020. BP were provided with contact details for West Midlands Police on 5 June 2020 but did not contact them. On 7 May 2021 BP was asked for an update on the appeal and on 12 May 2021 SIAC asked BP for a response by 21 May 2021 failing which a Rule 40 notice would be served. On 21 May 2021 BP advised SIAC that an expert had been instructed to examine the memory card and required two months to do so. On 29 July 2021 BP requested SIAC to seal an agreed confidentiality order and the order was sealed on 4 August 2021. The memory card was delivered to the expert on 19 August 2021. On 28 January 2022 BP advised SIAC and the GLD that the expert report was close to completion and that they hoped to provide proposed draft directions by the end of March 2022. BP sought further time on 1 April 2022. On 29 April 2022 BP provided proposed directions.

40. On 14 June 2022, SIAC issued directions for any proposed variation of W2's grounds of appeal to be filed and served by 1 July 2022, together with an application to vary the grounds. However W2 did not apply to serve his amended grounds by 1 July 2022. The respondent wrote to W2's representatives on 5 July 2022 stating that, in the absence of any response by 7 July 2022, it would be assumed that W2 no longer wished to vary his grounds. There was no further communication from W2's representatives.

41. The GLD then applied to SIAC, on 25 August 2022, for a notice pursuant to rule 40(1) of the SIAC Rules to be served on W2 notifying him that his appeal may be struck out if he failed, by 8 September 2022, to file and serve any proposed variation of his grounds of appeal and an application for leave to vary his grounds, and serve on the respondent his proposals for further directions. The application was granted and W2 was served with the Rule 40 notice.

42. On 8 September 2022, W2 sought permission to vary his grounds of appeal in line with developments that had occurred since the previous amendment on 15 May 2018, namely to challenge the respondent's conclusions arising from the forensic copy of the memory card and to rely on the expert report which was still awaited. W2 was given leave to vary his grounds of appeal in that respect. Directions were then issued for W2 to file and serve any evidence upon which he relied by 8 November 2022.

43. On 17 November 2022, the GLD applied to SIAC, once again, for a notice pursuant to rule 40(1) of the SIAC Rules to be served on W2 giving him 7 days to comply with the direction to file and serve his evidence. BP responded on 21 November 2022 providing a detailed explanation for the delays which involved the particular circumstances of the lawyer with conduct of W2's case, from whom a statement was produced, and explaining that steps had now been taken to progress the case, with conduct having been taken over by Mr Daniel Furner. BP proposed a deadline of 27 January 2023 for W2's evidence to be filed and served. On 8 December 2022 the GLD requested further clarification of the explanation for the delay. The GLD agreed not to pursue the Rule 40 notice.

44. On 16 January 2023, Mr Furner applied for a further stay of the proceedings for two months, advising SIAC and the GLD that W2 had been arrested by the Turkish authorities just before Christmas and that there were criminal and immigration proceedings against him, that BP had secured legal representation for him in Turkey and that legal challenges had been made against his detention and a decision to deport him which remained outstanding, that W2 remained in detention in Turkey and that they had not therefore been able to attend on him. The GLD agreed a stay, but only for three weeks, and SIAC then granted a stay for 28 days expiring on 21 February 2023.

45. In a witness statement of 21 February 2023, Mr Furner stated that BP's understanding was that, with respect to the criminal proceedings in Turkey, W2 was being investigated for fraud by use of electronic devices, for which the maximum penalty was five years' imprisonment or a fine. With respect to the immigration proceedings, decisions were taken in December 2022 to deport him and to hold him in detention until that time and applications for his release had been refused. Mr Furner stated further that it had never been BP's understanding that W2 was in Turkey unlawfully, but it had always been understood that he had a residence permit allowing him to reside there for a renewable period of two years.

46. In a letter dated 28 March 2023 and emailed to SIAC, Daniel Furner apologised for the delay and advised that he had now attended in person on W2 in Turkey and was submitting W2's witness statement of the same date. He confirmed that there was no further evidence and proposed that directions were set for a Rule 10A exculpatory review. Mr Furner advised further that W2 had just been released from detention. He also clarified the matter in regard to W2's immigration status in Turkey, accepting that BP's earlier letter of 29 May 2019 had indicated that W2's entry into Turkey and residence up to that point had been unlawful, but explaining that that was the position as they understood it at the time and that there had been some misunderstanding as a result of the difficulties in communicating with W2, as explained by Mr Graham in his witness statement. It was only when they first attended on W2 in person in Turkey in August 2019 that they were instructed that he had changed his name lawfully and was present in Turkey lawfully.

47. In their letter of response dated 19 April 2023 the GLD requested a further explanation as to how Mr Graham could have made such an error in regard to W2's status in Turkey and why BP did not provide any update to the GLD and SIAC when it became apparent in August 2019 that he had in fact travelled to, and been living in, Turkey lawfully.

48. Mr Furner replied on 19 April 2023 stating that it would be difficult to provide any further clarity on his explanation and proposing again that the appeal proceed to a rule 10A exculpatory review and then to a final determination of the appeal.

W2's witness statement of 23 March 2023

49. In his witness statement of 28 March 2023, W2 explained his understanding that his legal representatives had challenged two parts of the decision to make the deprivation order against him: Firstly, the decision to make the order whilst he remained outside the UK and in Algeria; and secondly, the decision in principle to make him the subject of a deprivation of citizenship order. W2 stated that he had had to take steps to leave Algeria after his judicial review claim was refused in relation to the challenge to the first part and he maintained that it was wrong and abusive of the Secretary of State to deprive him of his citizenship whilst he was in Algeria. He stated that if SIAC agreed with that, and ruled that the deprivation decision was unlawful, then the deprivation order should be made again taking account of his current circumstances. Accordingly he was instructing his legal representatives to pursue his SIAC appeal only against the decision to deprive him of his citizenship whilst he was in Algeria and not, at this stage, the national security case against him. However he made it clear that he denied the national security case in its entirety.

50. W2 went on, in his statement, to set out his background and explain his travel to Turkey and then Syria. He said that he was not going to address the specific national security case around his travels because he was no longer pursuing that part of his appeal at this stage, but he went on to correct what he had previously said to the UK security services and others in that regard. He confirmed that he had voluntarily travelled to Syria in August 2014 knowing that he was entering an ISIS controlled area, wanting to see what life was like in the caliphate, but had realised that he had made an error once he crossed the border and was unable to change his mind as he was not free to leave Syria. He stated that he had never fought for ISIS or trained to fight for them and that the most he ever did was to teach the Koran to children and on one occasion was forced to appear masked in an ISIS propaganda video. He married a German woman of Moroccan origin on 4 January 2015 whilst in Syria, but neither had any choice in the matter as it was organised by the local ISIS leadership. W2 stated further that he tried to escape on two occasions but failed on the first, in January 2015, and he was detained and tortured for several weeks. He succeeded on the second

attempt in April 2015 and was able to travel to Turkey where he called IA who flew out to Istanbul to meet him on 15 May 2015. They spent a week together and she flew back to the UK on 23 May 2015. He then visited the British Consulate in Istanbul in early June 2015. He was interviewed about his experiences in Syria and gave them names of some ISIS people he had come across. He was given money to buy a ticket back to the UK. Although he was willing to provide information of his own experiences he never agreed to act as a spy. He then flew back to the UK on 11 June 2015 and was arrested at the airport.

51. W2 stated that he had lied about having been kidnapped on arrival in Syria because he was terrified that telling the truth would be the end of his life and he would not be able to resume his life with IA and their children. W2 stated that a week and a half or so after being released from the police station he was contacted by the man who had interviewed him in the British Consulate in Turkey and was asked to come into Solihull police station where he was seen by that man and another who he believed was MI5 and was asked to work for them. W2 said that he went into treatment for his mental health problems after arriving back in the UK because his experiences in Syria had left him with disabling episodes of anxiety and fear and traumatic flashbacks. He had been referred to a psychiatric unit in hospital and had seen a psychologist a couple of times. He told the MI5 agent about his mental health problems and he told him that he did not want to work for them and that he was terrified of ISIS. At some point a police officer came to his house and told him that they were taking no further action against him and he was eventually given back his passport in March 2016. W2 said that MI5 gave him money on three occasions, in cash. He believed that part of the reason he was being deprived of his citizenship was that he had led them to believe that he would be prepared to become a spy for them but had backed out once he returned to the UK and that they were punishing him for that, whereas he had never agreed to become a spy. He believed that the security services were still watching him. W2 referred to being arrested with IA and questioned about documents recovered on a memory card on a tablet taken from their home but he stated that he had no knowledge of the memory card or the documents on it and he did not know how they ended up in his house. W2 stated that he rejected the suggestion that he had an extremist mindset and he rejected all forms of terrorism.

52. W2 went on to explain how he had gone to Algeria to visit his sick mother on 22 September 2016 and had been told by IA, whilst he was in Algeria, about the deprivation decision, and how he had tried to return to the UK a week earlier than originally planned but was not allowed to board the plane. He explained how he found it difficult living in Algeria and how terrified he was of communicating with anyone from there, including his lawyers. He believed that his communications were being monitored by the Algerian authorities and he therefore kept his instructions to his lawyer, Ronnie Graham, very brief, which led to misunderstandings. He stated that he kept changing his phone number to make it more difficult to monitor him but he was aware of being followed and knew that he was under surveillance by the Algerian authorities. In 2017 he changed his first name formally by the

Algerian equivalent of deed poll but retained his surname. He then obtained a new Algerian passport in that name. All was done lawfully but he understood how Ronnie Graham may have misunderstood. On several occasions he was approached by people and asked questions and was also told by friends that they had been approached by people and asked questions about him. Then a family member who worked for the intelligence services in Algeria warned him that his life was in danger and that he needed to leave the country, with a final warning given in mid-December 2018. He realised that he had to leave Algeria without delay and he travelled to Istanbul on 10 January 2019 using the new Algerian passport in his new name, having obtained an electronic visa from the Turkish authorities a few days earlier. He learned from his sister in Algeria that people had come to the house asking about him.

53. W2 stated that it was completely fanciful to believe that he could have pursued his appeal from Algeria as his life was at risk there and his communications were not secure. He could not have given video evidence to SIAC using a secure government laptop as was suggested, as he did not believe that that would have been secure from monitoring by the Algerian authorities and the whole process would have exposed him to suspicion and risk from the Algerian authorities. W2 said that he had had no problems entering Turkey and no problems since being in Turkey, but he had been contacted by the Algerian security services. He had not wished to reveal his location to the UK authorities and had therefore instructed his solicitors not to disclose that, but it was pointless to continue withholding that information after being arrested in December 2022 and threatened with deportation. He was arrested on 11 December 2022 by the Turkish authorities and taken to a police station and questioned about some kind of fraud involving the misuse of sim cards for processing payments. It was clear that someone had simply stolen his identity and it was nothing to do with him. He was told that he would be deported from Turkey on public order and public security grounds, but he did not know to what that related. He was released on 16 March 2023 and on 20 March 2023 he was able to meet his solicitor Daniel Furner face to face.

Rule 11B Application

54. On 5 May 2023, the respondent applied to strike out W2's notice of appeal pursuant to rule 11B of the SIAC Rules on the basis that it disclosed no reasonable grounds for bringing the appeal and/or that it was an abuse of process. With regard to the former, the respondent noted that W2 now accepted that he had lied about the reasons he travelled to Syria and that he accepted that he had travelled to align with ISIL, that W2 now resided lawfully in Turkey and had been able to pursue his appeal safely from that location, and that W2 no longer challenged the national security case against him, and considered that in the circumstances his appeal as it now stood, based on the remaining grounds, was bound to fail. With regard to the latter, the respondent considered that W2's dishonesty had resulted in an abuse of process. It was noted that whilst W2's appeal was still (seven years on) at

an early stage of the proceedings, he had pursued two related challenges, a judicial review in the High Court and Court of Appeal, and an entry clearance refusal appeal which he later abandoned, each founded upon his denial of the national security case against him including the basis of his travel to Syria and his assertion that he could not appeal safely from Algeria. Both challenges had consumed a vast quantity of public resources and as a result of that conduct W2 had forfeited his right to have his appeal determined by SIAC.

55. Having identified that, in light of his statement, W2 no longer pursued the second part of his grounds challenging the decision in principle to deprive him of his British citizenship, the respondent then addressed each of the remaining grounds which challenged the decision to deprive W2 of his citizenship whilst he was in Algeria, providing reasons why each was bound to fail. Those grounds were as follows:

    (a) Ground 5(i): Article 3/serious harm

    "*the decision that the order be made whilst W2 remained abroad in Algeria was contrary to s.6 of the Human Rights Act 1998 because, were W2 to have participated fully in his deprivation appeal, including by giving instructions to his solicitors on the national security case against him, he would have been at real risk of serious harm at the hands of the Algerian authorities contrary to: (a) Article 3 ECHR; and/or (b) the SSHD's practice of not exposing those he has deprived of British citizenship to Article 2/3 harm, eg as set out in the Home Office Supplementary Memorandum to the Immigration Bill dated January 2014, para 16*".

    (b) Ground 5(ii): Procedural requirements of Articles 3 & 8 ECHR

    "*the decision that the order be made while W2 remained in Algeria was contrary to s.6 of the Human Rights Act 1998 on the further basis that, owing to W2's reasonable fear that he could not communicate with his solicitors in the UK concerning the national security case against him without placing himself at a risk of Article 3 harm, W2 was unable to do so without facing harm contrary to Articles 3 and 8 ECHR, and could not therefore participate meaningfully in his deprivation appeal whilst he remained in Algeria. This is contrary to the procedural requirements of Articles 3 and 8 ECHR.*"

    (c) Ground 5(iii):

    "*could play no meaningful part in his appeal against deprivation of citizenship from Algeria, such that an out of country appeal is precluded by common law.*"

    (d) Ground 5(iv): Section 55

"*requiring W2 to appeal from abroad was contrary to section 55 and/or the Secretary of State's policy commitment to take into account the welfare of children affected by such measures who are outside the UK. The interference with the interests of W2's wife and their 5 British children, involving an immediate, unjustified and unassessed adverse impact on the right to family life, and upon the children's best interests and welfare, is grave. There was no lawful enquiry to ascertain the facts relevant to the said adverse impact before the decision was taken.*"

(e) Ground 5(v) (re-numbered as ground (ivA) in the respondent's skeleton argument):

"*to the extent that the Secretary of State assessed that W2 could play a meaningful part in his appeal from Algeria, notwithstanding her awareness of the ruling of W & others v SSHD (SC/39/2005) dated 18 April 2016 and the practicalities of the Algerian security services, the Secretary of State's decision to deprive W2 of his citizenship while in Algeria was irrational, failed to take into account relevant factors and was vitiated by a failure to make due enquiry*."

(f) Ground 5(vi) (re-numbered as ground (v) in the respondent's skeleton argument): Abuse of power/improper purpose

"*it was an abuse of the Secretary of State's powers under s40(2) of the 1981 Act, and was otherwise unlawful, to deprive W2 of his British citizenship while he was in Algeria knowing and/or taking into account that this would deprive him of, or prevent his access to, (i) an in-country suspensive appeal, thereby obtaining a litigation advantage, and/or (ii) the human rights guarantee of protection against ill-treatment in Algeria under Article 3 ECHR; and/or without considering whether to defer her decision to deprive him of his British citizenship until he had returned to the UK.*"

(g) Ground 5(vi): Breach of s.40(5) of the 1981 Act/the Regulations; procedural unfairness

" *was not given the deprivation notice in accordance with s.40(5) and the British Nationality (General) Regulations 2003 before the deprivation order was served on him, which rendered the deprivation action under s.40(2) unlawful. Instead of serving the deprivation notice at W2's last known address, the Secretary of State should have made reasonable endeavours to ascertain W2's location in Algeria, eg by making enquiries of HM Passport Office to obtain W2's telephone number, or to effect personal service on W2 under Reg.10(1)(a) of the 2003 Regulations. That was plainly a reasonable step that was required of the Secretary of State: Anufrijeva v SSHD [2004] 1 AC 604 at [43].*"

56. With regard to (a), the Secretary of State's response was firstly that Article 2 and 3 did not apply extra-territorially, as per S1, T1, U1 and V1 v Secretary of State for the Home Department [2016] EWCA Civ 560. Secondly that the SSHD's practice of not exposing those deprived to Article 2/3 harm was limited to risks of harm which were the direct and foreseeable consequences of the deprivation, as per Begum v SSHD [2021] AC 765, whereas the harms on which W2 relied were neither direct nor foreseeable consequences of that decision, and further that he was able to participate fully and safely in his appeal by travelling to another country, as he had done.

57. With regard to (b), the Secretary of State's response was that Article 3 did not apply extra-territorially, as above, and similarly that W2's Article 8 rights were not engaged from outside the UK, as per R3 v Secretary of State for the Home Department [2023] EWCA Civ 169.

58. With regard to (c), the Secretary of State's response was that it was at all material times open to W2 to travel to a third country to conduct his appeal from there if he so wished, as he had now done. He had met with his solicitors in the third country on several occasions and had provided a lengthy witness statement. Further, the common law did not require the Secretary of State to facilitate, for the purposes of conducting an appeal, an appellant who was outside the UK and whose presence in the UK was harmful to national security.

59. With regard to (d), the Secretary of State's response was that the welfare of W2's children had been specifically considered and the s55 duty had therefore been complied with. In any event, given that W2 was no longer challenging the national security case, and had admitted to lying about his motivation in travelling to Syria, the public interest in depriving him of his citizenship clearly outweighed the interests of his children.

60. With regard to (e), the Secretary of State's response was that it was always open to W2 to travel to a third country to conduct his appeal. With regard to (f), the Secretary of State noted that that repeated earlier grounds and that the Secretary of State was in any event entitled to make the deprivation order while W2 was outside the UK on the basis that that diminished the threat he posed to national security, as per L1 v SSHD [2015] EWCA Civ 1410. With regard to (g), the Secretary of State's response was that the service of written notice on W2 at his last known address was sufficient to comply with the 2003 Regulations, and in any event section 10(6) of the Nationality and Borders Act 2022, which came into force on 28 April 2022, was a complete answer to that.

61. As for the application to strike out on the basis of abuse of process, the respondent set out the various occasions upon which W2 had lied about his reasons for travelling to Syria and the people and institutions to which he had maintained that lie, and noted that his dishonest account had formed the basis of the litigation to date. The respondent also relied upon W2's lies about his willingness and ability to travel to Turkey and remain there and considered that his allegation that he could/ would not travel to Turkey was a dishonest device to try to obtain re-entry to the UK. Whilst the device had not succeeded, significant amounts of court time and public money were wasted in the meantime. The respondent, referring to Mr Furner's suggestion that Mr Graham had merely misunderstood W2 when claiming that he was living in Turkey clandestinely, considered it to be implausible that Mr Graham had misunderstood the instructions received from W2 and considered that Mr Graham had been acting upon W2's instructions. The respondent also relied on the late stage in the proceedings at which W2 withdrew his appeal against the refusal of leave to enter and the ground which was to be considered at a preliminary hearing, which wasted yet further public funds. Reliance was also placed on the failure to update SIAC and the Secretary of State about W2 living lawfully in Turkey.

Hearing in SIAC

62. The hearing of the respondent's rule 11B application took place on 22 June 2023. We are grateful to Mr Vaughan and Mr Dunlop KC for their oral and written submissions.

63. Following the hearing, on 26 June the special advocates filed an (OPEN) position statement. This elicited a post-hearing note of 3 July from the appellant, a post-hearing note dated 5 July from the respondent and a reply from the appellant dated 6 July.

Discussion

The approach to a strike out application

64. It is important to identify the general principles underlying rule 11B of the SIAC Rules. The power in Rule 11B(a) to strike out where it appears to SIAC that (in this case) the notice of appeal discloses no reasonable grounds for bringing the appeal closely aligns with the language in CPR 3.4(2)(c). This provides that the court "may strike out a statement of case if it appears to the court (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim". Categories of claim which fall to be struck out under CPR 3.4 (2)(c) include those where the claim is bound to fail or which raise an unwinnable case, where continuance of the proceedings is without any possible benefit and would waste resources on both sides: Harris v Bolt Burden [2000] C.P. Rep. 70; Hughes v Colin

Richards & Co [2004] EWCA Civ 266. In Pham v Secretary of State for the Home Department [2019] 1 WLR 2070, the Court of Appeal held that the function of SIAC under rule 11B(a) is not limited to considering whether on the face of the notice of appeal, a recognisable point of law is pleaded: [70].

65. In determining an application under rule 11B(a), Mr Vaughan accepts that SIAC may be able to look at the underlying evidence, as well as consider whether the pleaded grounds are meritorious, taken at their highest.

66. Rule 11B(b) enables SIAC to exercise the power of strike out if it appears that (here) the notice of appeal is an abuse of SIAC's process. Again, it is instructive to consider the CPR. CPR 3.4(2) enables a strike out to take place where the court is "satisfied that the party's abuse of process was such that he had forfeited the right to have his claim determined": Summers v Fairclough Homes [2012] 1 WLR 2004 [43].

67. In B v SSHD (SC/09/2005), Flaux J recognised that SIAC "like any other court, should be assiduous to protect the authority of the court and the integrity of its process and to demonstrate to litigants that they cannot defy the court with impunity or manipulate the process to achieve their own ends ...The deterrent effect of striking out claims by those who defy the authority of the courts and abuse the process is an important aspect of the power to strike out": [60].

68. At [61], Flaux J recognised that striking out for abuse of process "is not inevitable where a party is in contempt or abusing the process. There is a balancing exercise between what justice requires in terms of protection of the process and discouragement of abuse and what justice requires in terms of a just and fair result of the litigation". He considered that where the court comes down in the balancing exercise "will depend upon the seriousness of the contempt or abuse, particularly the extent to which it would lead to the party in contempt or abuse manipulating the results of the litigation".

69. We would venture to add the following observations. In the case of rule 11B(a), the Commission should not lightly reach a conclusion that no reasonable grounds exist for bringing the appeal. In particular and notwithstanding Mr Vaughan's acceptance that evidence may fall to be examined in a rule 11B application, the Commission needs to bear in mind the limitations of the exercise being conducted, especially where (as here) it has not received and tested any oral evidence.

70. Where the Commission does conclude that there are no reasonable grounds, it is unlikely that it will decline to exercise its power of strike out. This is because to allow an appeal to

proceed in these circumstances would necessarily be highly likely to be wasteful of time and resources, besides subjecting other (arguably meritorious) cases in the system to unwarranted delay.

71. In the case of rule 11B(b), the Commission must be careful to distinguish between on the one hand, behaviour of a party that rightly falls for criticism and, on the other, behaviour that is so gross as to be abusive. Even where abuse is found, the power of strike out under rule 11B(b) should be exercised only where, in all the circumstances, it is proportionate to do so in the interests of the overriding objective. Those circumstances may include having regard to the substantive merits of the appeal. Even if there is, for the purposes of rule 11B(a), a reasonable ground for appealing, the strength of that ground and the likely consequences, if it succeeds, will be relevant in deciding whether it is appropriate to strike out under rule 11B(b).

72. With all of these matters firmly in mind, the Commission turns to consider first, whether there are reasonable grounds for bringing the appeal.

Ground 5(i): Article 3/serious harm

73. The appellant's case under ground 5(i) cannot succeed, in so far as it seeks directly to engage Article 3 of the ECHR. In S1, the Court of Appeal held that neither Article 2 nor Article 3 of the ECHR applies extra-territorially. Mr Vaughan told the Commission that W2 reserves the right to challenge, in due course, the correctness of the judgment in S1. That judgment, however, binds the Commission. Any current disagreement with it on the part of W2 is immaterial for the purposes of rule 11B(a).

74. Understandably, therefore, Mr Vaughan concentrated upon W2's assertion that the deprivation decision in his case was unlawful because it was contrary to the respondent's practice or policy of not exposing those whom she has deprived of British citizenship to harm under Article 2 or 3 of the ECHR. In this regard, Mr Vaughan drew attention to the fact that the deprivation decision of 13 October 2016 was made only a few months after the Commission had handed down judgment in W (Algeria), otherwise known as BB, PP, W, U and others v SSHD. That judgment followed BB, PP, W, U and others v SSHD [2015] EWCA Civ 9, which remitted the appellants' appeals to the Commission for rehearing and determination. As Sir Maurice Kay, giving judgment of the Court of Appeal, stated at [4], "The issues of the heart of this appeal relate to the conditions in which the appellants would or would be reasonably likely to be held for up to twelve days on arrival in Algeria. The controversial period is known as garde à vue detention. It is now the subject of more

specific evidence than was available at the previous SIAC hearings". All of the appellants had been subject to attempts by the respondent to deport them to Algeria.

75. It was common ground that, if placed in *garde à vue* detention in Antar Barracks, a person would be at real risk of Article 3 harm. The respondent had, accordingly, sought to negate that risk by securing specific assurances from the Algerian government that the person concerned would not suffer such harm.

76. On the remitted appeals, the Commission found that the means of verification of adherence to the assurances, taken together, did not amount to a robust system of verification: [116]. The appeals were accordingly allowed.

77. W2's case is that, in the light of these findings, it cannot be said that there are no reasonable grounds for bringing the appeal under this ground. It was a direct and foreseeable consequence of deprivation that W2 would be told by IA about the deprivation notice; that monitoring would bring that fact to the attention of the Algerian authorities who, in any event, had given W2 the notice at the airport in Algeria, preventing him from boarding an aircraft bound for the United Kingdom; that W2 was as a result compelled to stay in Algeria for an indefinite period, raising questions about his ongoing presence; that W2 would be in contact with his solicitors; that he would seek to return to the United Kingdom to participate in the deprivation appeal; and that he would seek to leave Algeria in order to pursue an effective legal challenge from a third country, were he not able to do so as a result of action taken through the courts in this jurisdiction.

78. The interests and capabilities of the Algerian authorities, in this regard, are said by W2 to be amply demonstrated in the evidence of Dr Spencer and Professor Sommer. Their evidence supported what is said to be the subjective fears of W2 about risks to him in Algeria at that time.

79. In Begum, the Supreme Court emphasised the difference between the respondent's duty under section 6 of the Human Rights Act 1998 not to act contrary to the ECHR and the principles relevant to the respondent's application of her policy concerning the position of those deprived of citizenship and outside the United Kingdom: see [117] to [124]. Accordingly, as Lord Reed explained at [129], the issue was whether the respondent, exercising discretion under section 40 of the British Nationality Act 1981 to make a deprivation decision, had acted in accordance with the policy. That issue was to be determined as at the date of the decision. Lord Reed continued:-

> "… In order to comply with his policy, the Secretary of State therefore had to make a judgment as to the degree of risk of such treatment to which Ms Begum would be exposed, on the basis of a body of material which enabled him to make such an assessment, and to decide whether he was satisfied that Ms Begum would be exposed to a real risk of such treatment.
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> 130. That is what the Secretary of State did. He had before him detailed assessments by his officials and by the Security Service, which concluded that there were no substantial grounds to believe that a real risk of mistreatment contrary to articles 2 or 3 would arise as a result of Ms Begum being deprived of her British citizenship while in Syria, and that any potential risks in countries outside Syria were not a foreseeable consequence of the deprivation decision: see paras 22-24 above. Having considered that material, the Secretary of State was not satisfied that depriving Ms Begum of British citizenship would expose her to a real risk of such mistreatment. His conclusion in relation to that issue was OPEN to challenge on the ground of unreasonableness, but SIAC considered the issue on that basis, and rejected the challenge. I can see no defect in its reasoning in relation to that question."

80. In the present case, the Commission has before it the OPEN (redacted) written submissions of 10 October 2016, provided to the respondent by officials, upon which the deprivation decision was made. It is plain from the document that Annex B contained a "consideration of risks" with regard to W2, in the event of being deprived of citizenship whilst he was in Algeria. Mr Dunlop informed us that the special advocates had been made aware of the respondent's rule 11B application and provided with the parties' skeleton arguments. The special advocates had not sought to raise any issue, whether in OPEN or CLOSED. This stands in contrast with the actions taken by these special advocates in the Court of Appeal in R(W2) v the Secretary State for Home Department [2017] EWCA Civ 2146.

81. In his oral reply on 22 June, Mr Dunlop invited the Commission to examine the unredacted submissions, if confirmation were needed of the fact that this issue was covered. When asked by the Commission, Mr Vaughan said that he did not require us to do this.

82. It was in the light of these exchanges that the Commission received the post-hearing written communications mentioned above.

83. In their OPEN Position Statement, the special advocates informed us that they had approached the matter on the basis that the rule 11B application was made entirely in OPEN, "with reference to the evidence provided (self-evidently in OPEN) by W2". The statement said that the fact the special advocates had not sought to advance any CLOSED arguments on the rule 11B application should not be taken to indicate that they would no longer seek to support the OPEN case with reference to CLOSED material, insofar as they are properly able, in the event that the application was successfully resisted by W2.

84. In the light of the special advocates' position statement, Mr Vaughan submitted in his note of 3 July that the Commission cannot assume, one way or the other, that the CLOSED material either supports or undermines the respondent's strike out application. The respondent could not be heard to suggest that, if the special advocates had anything to add, they would have done so by way of CLOSED submissions. Had the respondent wished to show that the extra-territorial human rights policy had been lawfully considered, she should have served CLOSED submissions. It was axiomatic that procedural fairness should be secured so far as possible: Khaled v SSFCA [2017] EWHC 1422 (Admin). Mr Vaughan urged us not to view any of the CLOSED material. We are happy to confirm we have not done so.

85. In their note of 5 July, Mr Dunlop and Ms Thelen said that an appeal to the Commission must be pleaded. If an error of law is only apparent by looking at the CLOSED material, the special advocates can bring a CLOSED ground of appeal. They have not done so. There is no OPEN ground of appeal alleging that the respondent failed to consider the policy at all. This suggestion was first raised in oral submissions. That was why it was unnecessary, before the hearing, to confirm that the policy had been considered. If it had not, the special advocates could have been expected to bring a CLOSED ground of appeal.

86. Mr Vaughan's reply of 6 July submitted that, because the respondent chose to bring the strike out application by reference only to the OPEN material, the Commission cannot conclude, one way or the other, that the CLOSED material either supports or undermines the respondent's application. W2 can only ever speculate about what may be in CLOSED. It would, according to Mr Vaughan, be grossly unfair for SIAC now to engage with the submission that there is nothing in CLOSED which could make a difference to the pleaded grounds.

87. We have paid careful regard to these post-hearing exchanges. In the Commission's view, the matter is, in fact, straightforward, as long as one adheres to basic principles of procedure in appeals.

88. One starts with the position that a challenge to a decision on appeal is made by means of grounds of appeal. W2's belated suggestion that the respondent might not have had lawful regard to her policy, when making the deprivation decision, is not a pleaded ground of appeal. W2 may say, with some justification, that he could not raise this as an OPEN ground of appeal because he does not know what is in the redacted elements of the submissions sent to the respondent by officials. There are, however, no standalone CLOSED grounds of appeal. It can, therefore, be said with confidence in OPEN that there is no CLOSED ground which takes this point.

89. What this means is that W2's stance is based on the proposition that, because the strike out application is made entirely in OPEN, SIAC can proceed only on the assumption that somewhere in the CLOSED evidence there may be something which, although not pleaded or otherwise raised by the special advocates in the years that the appeal has been ongoing, might give rise to reasonable grounds for the appeal.

90. The Commission cannot accept this proposition. To do so would undermine the carefully constructed mechanism, which Parliament has created for appeals that may have both an OPEN and a CLOSED element and which has been heavily scrutinised by both the domestic courts and the ECtHR. The mere fact that there is CLOSED evidence does not mean we should so depart from the normal requirements of pleaded grounds etc as to abandon any attempt to maintain procedural coherence.

91. The pleaded ground 5(i) cannot succeed. The case law relied upon by W2 concerns persons whom the respondent considered should be deported. A deportee, or someone removed under the powers contained in section 10 of the Immigration and Asylum Act 1999, would necessarily come to the direct attention of the Algerian authorities at the point of return and, thus, risk garde à vue detention, with all that entails. That is very far removed from the facts of W2. He has never been the subject of deportation or other removal action. His presence in Algeria arose because he chose to go there to visit his mother.

92. In oral submissions, Mr Vaughan sought to draw support from the judgment of SIAC in ZZ v SSHD (SC/63/2007). At [57] of its judgment, SIAC noted that ZZ was, for a time, living in Algeria, where any lack of frankness about his earlier activities should not, SIAC found, be held against him, since ZZ might understandably have feared the reaction of the authorities, had he been frank.

93. As [2] of the judgment makes plain, however, ZZ had been excluded from the United Kingdom and refused admission upon arrival at Heathrow airport. He was then removed to Algeria. The facts thus stand in marked contrast to those of W2.

94. The Commission also agrees with the respondent that W2's case wrongly categorises, as the reasonably foreseeable consequences of the deprivation decision, matters that must, in the light of recent case law, be regarded as no more than speculation.

95. In R3 v Secretary of State for the Home Department [2023] EWCA Civ 169, Elizabeth Laing LJ said:-

81. In *Aziz v Secretary of State for the Home Department* [2018] EWCA Civ 1884; [2019] 1 WLR 266, the appellants were British citizens by naturalisation and Pakistani nationals. They were convicted of grooming and sexually exploiting girls who were in their early teens. The Secretary of State gave them notice of decisions to deprive them of their nationality on the grounds that deprivation was conducive to the public good. The appellants all had children. In each notice the Secretary of State referred to the appellant's children and said that the public interest in deprivation outweighed any effect on the children's article 8 rights.

82. The appellants appealed to the F-tT. The F-tT dismissed their appeals, as did the UT. On their appeal to this Court, the Secretary of State was represented, but the appellants were not. Sales LJ (as he then was), giving a judgment with which the other members of this Court agreed, held that on an appeal under section 40A of the BNA, a court was only required to assess the foreseeable consequences of deprivation to the extent necessary to see whether a deprivation order would be lawful and compatible with Convention rights. That would depend on the reasons for the Secretary of State's decision (paragraph 26). If the Secretary of State had decided that deprivation was conducive to the public good because the appellants should not be allowed to enjoy the benefits of citizenship, a court was not required to speculate about whether the appellant was likely to be deported later, as his rights would be fully protected at that stage by the procedures which the Secretary of State would then be obliged to follow. It would not be possible, at that later stage, for a deportation order to be made which breached the appellant's Convention rights. On the facts, the Secretary of State and the tribunals had been entitled to find that deprivation orders would not, of themselves, breach anyone's article 8 rights (paragraphs 27 and 28)".

96. In the present case, there is simply no arguable justification for attempting to shoehorn into an appeal against a deprivation decision matters which lay outside the proleptic exercise which the respondent had to undertake in connection with the deprivation

decision. The fact that there is no evidence of any difficulties arising from IA's telephone conversation with W2 about the deprivation decision, or from the involvement of Algerian officials in preventing W2 from boarding the plane, speaks for itself. Any risks that W2 considered might derive from engaging with his solicitors and generally informing himself, whilst in Algeria, about the respondent's decision and any appeal against it, were matters that could and should be addressed through an application by W2 for leave to enter, and any appeal to SIAC against a refusal of that application. As we have seen, W2 did indeed pursue such a course. However, he has withdrawn his appeal against the refusal of leave to enter.

97. Mr Vaughan sought to derive support from [85] and [86] of the judgment of Beatson LJ in W2. Beatson LJ said this:-

> "85.As Mr Fordham recognised, the question for this court is whether an appeal under section 2 or section 2B of the SIAC Act 1997 will be a practical and effective remedy for determining whether an out of country appeal against the decision to make the deprivation order would be "effective". I do not consider that the circumstances of this case are analogous to the scenario considered by Lord Wilson at [65] (see [77] above) of *Kiarie* and *Byndloss*. This is because in this case there is no question of W2 seeking first an unenforceable direction and then to judicially review that. He would be pursuing an appeal against a decision by the Secretary of State. If he is successful in that and SIAC considers that his presence in the United Kingdom is necessary in order for his appeal to be effective it will allow the appeal. And (see *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787 at [52]) that decision will bind the Secretary of State.
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> 86. Accordingly, the matter before SIAC in an appeal is one where an effective remedy is available. SIAC will thus be able to consider the application of *Kiarie* and *Byndloss* and *Ahsan's* case to the circumstances of W2 and the matters which he wishes to raise in his appeal. It will have available the evidence submitted by him and others in support of his submission that an out of country appeal will not be effective in his circumstances, and it will have any evidence the Secretary of State files in support of the submission that such an appeal will be effective. This will mean that SIAC, the relevant specialist tribunal, can "look in detail at what is required to ensure an effective appeal in cases such as this": see Lord Carnwath in *Kiarie* and *Byndloss* at [104]. Lord Carnwath also stated (see [41] above) that there are practical and principled reasons for appeal courts not considering factual issues which are best considered by the relevant specialist court or tribunal.

87. SIAC, with the participation of its lay members with relevant expertise, will be able to assess the difficulties claimed by W2 in instructing lawyers and the extent to which oral evidence by him is necessary (for example in relation to the impact of the separation on his family) and to decide whether, in the light of *Kiarie* and *Byndloss,* the refusal of entry in his circumstances is unlawful. It will be able to consider whether there is a Convention-compliant system for the conduct of a SIAC appeal from abroad. In doing so, it will be able to take into account the matters relied on before this court by Ms Giovanetti in distinguishing the circumstances of this case from those of the appellants in *Kiarie* and *Byndloss.* They include the fact that SIAC has video conferencing facilities which have been frequently used in the past by appellants who are abroad, what SIAC will do to facilitate steps to enable **W2** to give evidence orally to it, the extent of the legal advice available to **W2** and his ability to give his lawyers instructions, and the position in relation to experts.

88. SIAC will also be able to consider whether the burden of showing that an out of country appeal will be effective lies on the Secretary of State in this case, as *Kiarie* and *Byndloss* held that it did in that case. Ms Giovanetti submitted that that case was considering a materially different factual and legal context because the decisions under challenge were decisions to remove individuals who were in the United Kingdom where forcible removal would have led to a dramatic alteration in their circumstances, whereas W2 left the United Kingdom voluntarily. She submitted that it was that forcible removal which the Secretary of State was called on to justify but that W2 position is in principle no different to a person who has never entered the United Kingdom. She relied on the ECtHR's admissibility decision in *GI's* case: *K2 v United Kingdom*. She also submitted that the legal context in *Kiarie* and *Byndloss* was different. This, she argued, is because sections 78 and 94B(2) of the Nationality, Immigration and Asylum Act 2002 provided that anyone in the United Kingdom with an arguable human rights appeal against removal should be permitted to stay until their appeal was concluded unless and until the Secretary of State certified that earlier removal would not breach their rights under the ECHR. That certification was a departure from the general rule which the Secretary of State had to justify. She argued that, by contrast, there is no statutory presumption that out of country appellants should be permitted to travel to the United Kingdom to conduct their appeals here and that article 8 does not create such a presumption. I express no views on these matters because, in this appeal, the role of this court is to consider whether SIAC is able to decide these matters and give a practical and effective remedy in respect of them."

98. As is apparent, Beatson LJ was assuming that SIAC would, in due course, hear an appeal under section 2 against the refusal of leave to enter. The law is now plain that the question of whether W2 would be able effectively to pursue an appeal from outside the United Kingdom falls to be addressed in the context of an appeal under section 2. We see nothing in the judgment which begins to suggest that, in the very different circumstances that now pertain, the Court of Appeal would expect matters which properly fall to be considered in a section 2 appeal to be nevertheless determined through the prism of a section 2B appeal.

99. Mr Vaughan cited E5 v SSHD (SC/184/2021) for the proposition that (at least sufficiently for the purposes of rule 11B), the respondent might have had a moral obligation to inform the Algerian authorities that W2 had been deprived of his British citizenship. If so, this was a factor that should have been considered by the respondent, before she made her deprivation decision.

100. There is, however, no evidence at all that the respondent, at the relevant time, considered herself to be under such an obligation; let alone that she acted upon it. The "moral obligation" argument appears to derive from SIAC's decision in J1 v SSHD (SC/98/2010). But J1 was a deportation case; a fact highlighted by SIAC in E5 Indeed, SIAC found it was "a very important part of the context in which the 'moral obligation' identified arose.": [48]. The same is undoubtedly true in the present case.

101. We find that W2 can derive no relevant assistance from the expert reports of Professor Sommer and Dr Spencer. Both reports significantly post-date the impugned decision. Given that, as Begum makes clear, it is the position at that date with which we are concerned, the respondent cannot be criticised for not having regard to matters contained in their reports.

102. Mr Vaughan characterised the reports as lending substance to what are said to have been W2's subjective fears in Algeria at the relevant time. As can be seen from the above analysis, however, the fate of this ground is not dependant in whole or part on the asserted state of W2's mind at that point.

103. For these reasons, there is no realistic prospect of ground 5(i) succeeding.

Ground 5(ii)

104. Ground 5(ii) contends that the challenged decision was contrary to section 6 of the Human Rights Act 1998 Act because W2 had a reasonably held fear that he could not communicate with his solicitors in the United Kingdom, concerning the national security case against him, without placing himself at risk of serious harm. As a result he could not meaningfully participate in an appeal whilst he remained in Algeria. This is said to be contrary to the procedural requirements of ECHR Articles 3 and 8.

105. S1 and R3 mean that there is no prospect of this ground succeeding on any appeal.

Ground 5(iii)

106. This ground contends that W2 could play no meaningful part in his appeal against deprivation of citizenship whilst in Algeria; and that accordingly an out of country appeal was precluded by common law.

107. W2 argues that at the date of the deprivation decision in October 2016, the respondent had no proposal as to how W2 could give remote evidence from Algeria; that she was likely to be of the view that W2 could communicate with his solicitors using WhatsApp or another mobile phone based messaging application but such a mechanism was wholly insecure (as Professor Sommer states); and the respondent had no proposal as to how W2 could safely view documents in his appeal from Algeria.

108. It will readily be apparent that this ground has now to be framed as a public law challenge to the decision, based on the situation as in October 2016. As has already been explained, W2 has for some years been in Turkey, living there in possession of a valid visa. There is no question, as matters currently stand, of W2 being unable to participate meaningfully in an appeal from Turkey: hence the withdrawal of his appeal against the respondent's refusal of leave to enter the United Kingdom.

109. The Commission is in no doubt that this ground has no prospect of success. The focus of the respondent's attention in making the deprivation decision was the national

security interest in keeping W2 out of the United Kingdom. That important assessment is no longer challenged by W2. Notwithstanding what the respondent is assumed to have appreciated about the general situation in Algeria in 2016, the precise nature of any difficulties faced by W2 in mounting an appeal would be known only if W2 (a) had decided to appeal; and (b) had put forward a reasoned case, through his solicitors, for being able to participate effectively in the appeal, only if he were able safely, to leave Algeria, whether for the United Kingdom or a safe third country. That is precisely the course of action that W2 adopted: see W2 in SIAC and in the Court of Appeal. To reiterate, the correct means of ventilating these concerns was by seeking leave to enter and appealing under section 2 of the Special Immigration Appeals Commission Act 1997 against any refusal.

110. W2's case under this ground is also undermined by Begum. Applying what Lord Reed held at [88], even if W2 could show he could not have had a fair and effective appeal, whilst in Algeria, that would in no sense have entitled W2 to succeed in the appeal. On the contrary, just as Lord Reed noted at [90], the likely consequence was that W2 would lose. Lord Reed elaborated upon this at [99] to [111] of the judgment. It is therefore apparent from Begum that, even if the matters in issue could directly be adjudicated under section 2B of the SIAC Act, the likelihood of any appeal succeeding, as opposed to being dismissed or at best stayed, is fancifully small.

111. For these reasons, ground 5(iii) discloses no reasonable prospect of success.

Ground 5(iv)

112. In the light of the fact that W2 now advances no national security case, following his belated admission that he lied about being kidnapped by ISIL and taken to Syria against his will, Mr Vaughan realistically did not pursue ground 5(iv). Given the strength of the national security case, it is entirely inconceivable that the best interests of W2's children could result in an appellate outcome in his favour.

113. In any event, the Commission considers that the criticism of the way in which the respondent addressed section 55 of the 2009 Act is misconceived. The respondent specifically considered that deprivation might have an emotional impact on the children but that, nevertheless, the public interest lay in depriving W2 of his British citizenship.

114. Ground 5(iv) accordingly discloses no reasonable prospect of success on appeal.

Ground 5(ivA)

115. This ground essentially reiterates W2's earlier grounds of challenge, concerning the alleged public law failure of the respondent to have regard, in October 2016, to what are said to be relevant considerations. We refer to what we have said above. We also note [42] to [46] of the judgment of Beatson LJ in W2 concerning the making of an application for leave to enter, where a person is of the opinion that they cannot effectively pursue an appeal from abroad. A similar point was made by Elizabeth Laing J at [35] of the SIAC judgment in W2, invoking the judgment of the Court of Appeal in S1 "that the claimant who complains about the fact that he cannot be present for his appeal must apply for LTE outside the Rules and, if that is refused, apply for judicial review of that decision".

116. Mr Dunlop submitted that, in these circumstances, given that W2 has withdrawn his appeal against the LTE decision, ground 5(ivA) is no less than an abuse of process. Whether or not that is so, it has no reasonable prospect of success.

Ground 5(v)

117. This ground concerns an alleged abuse of power/improper purpose. W2 contends that it was an abuse of the respondent's powers under section 40(2) of the 1981 Act and was otherwise unlawful to deprive W2 of British citizenship whilst he was in Algeria, when the respondent knew that this would prevent W2 from having effective access to an in-country suspensive appeal. The respondent thereby obtained improperly a litigation advantage.

118. Mr Vaughan places heavy emphasis on the judgment of Laws LJ in L1. This case concerned an appeal against a decision of SIAC in a deprivation case (SC/100/2010). SIAC had held that it was lawful for the respondent, in the case before it, to wait until L1 was outside the United Kingdom, before making the decision to deprive L1 of British citizenship.

119. SIAC accepted that the timing of the decision was determined by reference to national security considerations. Those advising the respondent anticipated that if a notice of intention to deprive was served on L1 while in the United Kingdom, he would be present for an extended period of years while he appealed. If he were not served with the notice whilst abroad, there would be a risk that he would return before the deprivation order was made and any advantage sought by moving whilst he was abroad would be lost: [89]. SIAC concluded that this was "a crafted sequence of events designed to ensure, if possible, that L1 would be abroad from beginning to end of any appeal".

120. Although SIAC said that this was not on its face an attractive approach, SIAC identified at [90] the issue as being "whether it is justified, and lawful, because of the national security consideration involved". SIAC concluded at [91] to [93] that it was. Although pursuing the appeal from abroad might mean more practical and logistical problems, it would not deprive L1 of an effective appeal process. There was a high threshold to cross in order to establish an abuse of power. It was legitimate for the respondent to bear in mind national security considerations when looking at the timing of legal action. Although it would be an abuse of power "to act so as to prevent or frustrate an effective appeal, that is not what happened".

121. At [22] of his judgment in the Court of Appeal, Laws LJ said:-

> "22. Though the appellant's case has been put in a number of different ways, in the end there is in my judgment one critical question. Mr Chamberlain was in the course of argument inclined to agree with this formulation: If the Secretary of State proposes to deprive a person of British citizenship, is she obliged to take no steps which would stand in the way of the subject's exercising his right of appeal in country even though in her view, on expert advice, his doing so would or might damage the security of the United Kingdom? In my judgment, statute does not demand an affirmative answer to this question. The procedural provisions relating to appeals do not guarantee an in-country right of appeal.
>
> ...
>
> 26. The common law does not demand an affirmative answer to the question which I posed any more than do the statutes. It goes, I hope, without saying that the common law will be very vigilant to ensure that the Secretary of State takes no action whose purpose is to frustrate an in-country appeal for the sake of doing so as to gain a tactical or procedural advantage; that would be contrary to the ordinarily but vital principle that a

public body must not act for an improper purpose. But once it is recognised, as I have held, that the procedural provisions relating to appeals, save only section 78 of the 2002 Act, do not touch the Secretary of State's powers to act for the protection of national security, the Secretary of State's use of those powers for the purpose for which they are given cannot be said to abuse or frustrate the individual's appeal rights."

122. Just as with L1, the problem for W2 with this ground is that there is no suggestion that the respondent took the deprivation decision with the purpose of frustrating W2's in-country appeal. The OPEN evidence shows that the decision was taken on the grounds of national security. Interestingly, when W2 went to the Court of Appeal, his counsels' OPEN skeleton argument contained a communication from the special advocates. This said that the respondent had decided to exercise her powers knowing that W2 had travelled to Algeria, and knowing that, if she had exercised them while he was in the jurisdiction, he could not have been removed to Algeria because of the risk of ECHR Article 3 ill treatment. The special advocates also said that the respondent had failed to consider whether to defer her decision until W2 returned to the jurisdiction and had had no regard to the factors for and against deferring her decision until W2 returned. The special advocates submitted that W2 had deliberately been deprived of the benefits he would have had if the respondent had exercised her powers while W2 was in the jurisdiction.

123. There is nothing in these utterances from the special advocates to suggest that, in SIAC's words in <u>L1,</u> the respondent acted "so as to prevent or frustrate an effective appeal." The respondent may have acted deliberately, knowing what the effect would be; but her reason for doing so was to protect national security. There is a crucial difference between, on the one hand, taking a decision in the interests of national security, on the basis that depriving a person of citizenship whilst they are abroad will preclude them from being in the United Kingdom (with all the attendant national security risks) whilst they pursue an appeal and, on the other hand, taking the decision wholly or partly *in order to* deprive the person of an in-country appeal. That point emerges plainly from the judgments in <u>L1,</u> both at SIAC and Court of Appeal level.

124. In his witness statement of 28 March 2023, W2 claims for the first time that he was given money by MI5, whilst he was in the United Kingdom, and that he thinks "part of the reason that they took my citizenship is because the authorities are angry and frustrated with me because they think I led them to believe I would be prepared to become a spy for them, and then once I returned to the UK I backed out of it. I think they are punishing me for that".

125. Mr Dunlop rightly draws attention to the fact that this allegation finds no expression in the pleaded grounds of appeal. No application has been made to amend the grounds. The allegation accordingly has no bearing on the respondent's application.

126. Paragraph 61(b) of Mr Vaughan's skeleton argument contends that the assessed risks could properly have been managed in the United Kingdom. In the light of Begum, the Commission does not consider that this contention, even if it could be inferred from the existing grounds, has any prospect of succeeding at appeal.

127. For these reasons, ground 5(v) has no reasonable prospect of succeeding on appeal.

Ground 5(vi)

128. Under this ground, W2 contends that he was not given the deprivation notice in accordance with section 40(5) of the British Nationality (General) Regulations 2003 before the deprivation order was served on him. That is said to render the deprivation action under section 40(2) unlawful. Instead of serving the deprivation notice at W2's last known address, the respondent should have made reasonable endeavours to ascertain W2's location in Algeria. That could have been done by making inquiries of HM Passport Office in order to obtain W2's telephone number; alternatively, to effect personal service on W2. In this regard, W2 relies upon the judgments in Anufrijeva v Secretary of State for the Home Department [2004] 1AC 604 at [43] and in R(D4) v Secretary of State for the Home Department [2022] QB 508.

129. There is nothing in this ground. Both Anufrijeva and D4 concerned the practice of serving a decision "to the file" in certain circumstances. Both the House of Lords in Anufrijeva and the Court of Appeal in D4 concluded that this did not constitute lawful service.

130. At the time of the decision in the present case, the relevant enactment was regulation 10 (notice of proposed deprivation of citizenship) of the British Nationality (General) Regulations 2003, as in force from 1 April 2003 to 8 August 2018. Under regulation 10(1)(b), where it was proposed to make an order under section 40, the notice required by section 40(5) could be given "(b) in a case where that person's whereabouts are not known, by sending it by post in a letter addressed to him at his last known address".

131. That is what happened in the present case. There is nothing in Anufrijeva or D4 that begins to suggest this was an unlawful means of serving W2. On the contrary, both the majority (Whipple LJ and Baker LJ) and the minority (Sir Jeffrey Voss MR) in D4 held that service at the last known address was permissible: see [58], [73] and [74].

132. W2 contends that there were other, better ways in which he could have been informed of the decision. W2's arguments are not new ones. At paragraph 32 of Elizabeth Laing J's judgment in W2 she said:-

> "Moreover, this ground faces significant hurdles on the facts, at least as they appear at this stage. The open evidence is that the Secretary of State did not know W2's whereabouts. All that the Secretary of State knew was that he was in ██████. It is not obvious, on the language of regulation 10, that, even if, as W2 argues, the Secretary of State had a phone number or email address for W2 that she was obliged to ring the number or use that address in order to try and find out where W2 was. Nor is it obvious that she was obliged to try and effect personal service at a Consulate or Embassy because an official described this as her 'preferred method' in a different case. On the face of it, the Secretary of State is entitled to use the method of service prescribed by the notice regulations. I have some difficulty with the suggestion that she is obliged, whatever the facts, to use a more favourable method because an official has described it as her 'preferred method' in a different case. Finally, I note that W2 was told about the notice by his wife, the day after she received it. He has not, it seems, suffered any injustice on the facts. It would be inappropriate for me to rule this out as an argument which would be available on the SIAC appeal, and I do not do so. I simply note that it does not, at this stage, appear to be a strong argument, for the reasons I have given."

133. We are conscious that Elizabeth Laing J did not rule out this argument being available on the SIAC appeal. [32] of the judgment is, however, very far from being a ruling which precludes us from finding that W2's case on this ground has no reasonable prospect of succeeding on appeal. On the contrary, W2's suggestions in this regard are both unrealistic and spurious. They run directly counter to his alleged concerns as to his position in Algeria. One can readily infer what W2 might have said, had the respondent taken steps to find W2 in Algeria and/or if he had been invited to the British Embassy or a Consulate in that country in order to receive the decision.

134. In any event, we agree with the respondent that this ground inevitably founders for the simple reason that W2 has not shown that he was materially prejudiced in this regard. His wife, IA, told him about the decision soon after she opened the letter from the respondent.

135. For this reason, ground 5(vi) has no real reasonable prospect of success.

136. Since none of the pleaded grounds discloses a reasonable prospect of success, the Commission has power under rule 11B(a) to strike out the application. In all the circumstances of this case, we conclude that we should exercise our discretion to strike out on this basis. No legitimate purpose would be served by allowing the case to continue. On the contrary, a considerable sum of public money would be expended unnecessarily. Furthermore, time spent by the Commission considering the substantive appeal would be far better spent on those cases which have the requisite merit.

Rule 11A(b)

137. If the Commission is wrong in its conclusion on rule 11B(a), the respondent submits that we should exercise our discretion under rule 11B(b) to strike out W2's appeal as an abuse of process.

138. Both Mr Dunlop and Mr Vaughan relied on the judgment of the Supreme Court_in Sommers v Fairclough Homes Ltd [2012] UKSC 26. There, it was held that both pursuant to the court's inherent jurisdiction and under CPR 3.4(2), the court has power to strike out a statement of case, on the ground that it was an abuse of process of the court, at any stage of the proceedings. At paragraph 48, Lord Clarke, giving the judgment of the Court, held that, in deciding whether to do so, it must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly.

139. Mr Vaughan sought to lay emphasis upon paragraph 49 of Sommers, in which Lord Clarke said that it was "very difficult indeed to think of circumstances in which such a conclusion would be proportionate", although these might "include a case where there had been a massive attempt to deceive the court but the award of damages would be very small". That last phrase emphasises that Lord Clarke was speaking about the situation, which arose in Sommers, where the issue is whether strike-out was appropriate, at a point after there had been a trial as a result of which the court had been able to make a proper assessment of both liability and quantum. That is, of course, not the position here.

140. The general point, however, is that proportionality lies at the heart of strike out on the basis of abuse of process. A balance needs to be struck. The factors in favour of W2 are that deprivation of nationality is a serious matter affecting an important right and that, having created a right of appeal against a decision to deprive a person of their nationality, Parliament will not assume that that right can be abrogated by means of rule 11B(b), without strong reasons going to the preservation of the integrity of the system of justice, of which the SIAC legislation is a part.

141. With these considerations firmly in mind, the Commission turns to consider the circumstances of the present case. The respondent submits that W2 plainly lied about crucial aspects of his case and that, as a result, a great deal of time and resources have been expended unnecessarily. W2's lies are said to concern (i) the manner in which he entered Syria; (ii) whether he was unable safely to leave Algeria; and (iii) whether he was residing safely in Turkey.

142. There is no doubt at all (and Mr Vaughan accepts) that W2 lied about the circumstances in which he found himself in Syria at the time that ISIL was active there. He claimed that he had been kidnapped by ISIL (aka ISIS). That was untrue.

143. Nevertheless, W2 maintained that lie from at least June 2015 to 28 March 2023. The Commission accepts that this lie was maintained before British officials in Turkey, the police, W2's solicitors, the Commission, the experts instructed on behalf of W2, the High Court in his judicial review proceedings and the Court of Appeal.

144. Mr Vaughan submitted that none of this had any significant effect on the overall appeal. In particular, W2 would always have sought an order for his return to the United Kingdom so that he might participate in his appeal. He would also always have needed to seek leave to enter this country and to appeal against any refusal of that application.

145. The Commission does not accept that W2's lie regarding ISIL can be explained away in this manner. On the contrary, as a direct consequence of W2's belated admission of the lie, he has withdrawn his positive national security case against the respondent. That has profound consequences. It means that the time and effort spent by the respondent upon that aspect of the case can be seen to have been wasted. It means that W2's ECHR

Article 8 case, concerning reuniting with family members in the United Kingdom, was always hopeless: a point reinforced by W2’s abandonment of the challenge based on an alleged failure of the respondent to comply with section 55 of the 2009 Act. Again, time spent by the respondent on this aspect has been time wasted.

146. It appears that W2 still seeks to argue that he was not responsible for the contents of the memory card containing information regarding bomb making equipment, found in his home in the United Kingdom. Given his decision not to contest his exclusion on national security grounds, in the light of his lie regarding the manner in which he entered Syria, there is no rational basis for concluding that the memory card issue would have any material bearing in a substantive appeal.

147. The same is true of W2’s contention that, even though he was not kidnapped by ISIL, he did nothing untoward thereafter. The respondent’s assessment is to the contrary. That assessment is no longer challenged.

148. The Commission has had regard to W2’s claim in his witness statement of 28 March 2023 that he lied about the circumstances of his entry to Syria because he was terrified of the consequences of the truth for his own safety; out of fear of losing any hope of rebuilding his life with his family; and that he also feared telling the truth might cause serious problems for his second wife. Understandably, no attempt has been made to give substance to these belated assertions. They completely fail to diminish the significance of W2’s lie. This is borne out by W2's decision not to pursue a positive national security case.

149. The Commission turns to the second of the matters concerning W2’s truthfulness. Given the ambit of the strike out application, the Commission accepts that the respondent has not established that W2 must have lied about his concerns regarding whether he could safely leave Algeria. The fact that he was, in the event, able to do so is not determinative, particularly in the light of the expert evidence.

150. The Commission is, however, entirely satisfied (having applied the necessary caveats) that W2 has lied about his situation in Turkey. After arriving safely and lawfully in that country, the respondent and the Commission were told that W2 was living in Turkey

"clandestinely" and that he could not, as a result, participate in the appeal proceedings from Turkey.

151. W2 travelled to Turkey in January 2019, in possession of a lawful visa, and with a validly-issued Algerian passport. W2 was given permission to remain in Turkey. W2's solicitors informed the Commission and the respondent on 29 April 2019 that W2 was no longer in Algeria but residing in a third state. The solicitors did not inform either the Commission or the respondent of the identity of that State.

152. On 29 May 2019, the solicitors explained that they were not disclosing the name of the third country because to do so "would expose W2 to a real risk of arrest, detention and removal to Algeria in breach of the Refugee Convention and Article 3 ECHR". They had kept contact with W2 to a minimum and had not taken steps to meet him in person. The letter continued by asserting that the appellant's "flight from Algeria was the inevitable consequence of [the respondent's] unlawful decision; as is the fact that the appellant is in a highly precarious position in the relevant third country and at risk of *refoulement* to Algeria as his only existing country of nationality". The letter said that it would be "perverse to expect the appellant to appeal from the relevant third country, whose authorities he has had to mislead in order to enter that country; and would not otherwise be permitted to reside in it". He could not be expected to appear in UK court proceedings "given his clandestine circumstances".

153. Mr Ronald Graham of BP signed a witness statement on 29 May 2019, to which reference is made in the letter of that date. Paragraph 27 of that statement describes a telephone conversation with W2 on 10 January 2019 in which W2 made reference to obtaining a new passport in a different first name, retaining his family name on the new passport, and to obtaining a visa. Paragraph 29 stated that it was "the position of this firm that to disclose the third country to which W2 travelled - in which I understand he remains - will give rise to a significant risk of him being detained by the authorities of that country". W2 had "entered the third state clandestinely, and continues to reside there on that basis". W2 "continues to be careful to refrain from discussing anything about the SSHD's allegations against him; he therefore continues to draw a line between what he feels it is and is not safe to discuss, as I have explained above and in my statement for the judicial review" (paragraph 30). In order to "minimise risk to W2 in the third country of him being monitored, detained and returned to Algeria" Mr Graham had "attempted to act in his best interests by not drawing attention to him. In particular I have attempted to keep contact with him to a minimum and had not taken steps to try to meet him in person" (paragraph 31).

154. In his witness statement of 1 June 2023, Mr Graham says the following:-

> "I interpreted this, based on the reference to the obtaining of a passport in a different first name, as a series of steps taken irregularly because of what I understood to be the intense pressure W2 was under from the Algerian authorities at the time. I do not believe W2 ever explicitly told me that these steps were taken unlawfully (or lawfully). Neither do I recall W2 saying anything about changing his name formally before a passport was obtained with the different first name. As I say, I believe my interpretation of this conversation to have been the result of a simple misunderstanding between the two of us, caused by the difficult nature of our remote communications, which was resolved only once a member of this firm was able to attend on him in person".

155. On 18 July 2019, W2 withdrew his appeal against the refusal of leave to enter on the ground which was to be considered at a preliminary issues hearing before the Commission. According to an e-mail from BP of 24 July 2019, this was on the basis that "W2 does not seek to return to the UK for the appeal (having indicated his wish to withdraw the LTE appeal) [and that he] does not seek to have any of those grounds determined as a preliminary issue…".

156. No mention was made at this point of the position of W2 in Turkey. Daniel Furner's second witness statement (1 June 2023) says that it was not until he attended on W2 in Turkey on 14 August 2019 that BP learnt that W2's change of name, and his entry into Turkey, had been effected legally.

157. Whilst we fully bear in mind the forensic limitations inherent in this strike out application, which we have described above, the Commission is in no doubt that W2 is culpable of misleading the Commission and the respondent as to his true position in Turkey. That crucial fact emerged only when the respondent questioned W2's immigration status earlier in 2023. This is clear from the correspondence, including the GLD's letter of 6 March 2023 to BP and their reply of 28 March. At paragraph 14 of that letter, BP accepted that "our letter of 29 May 2019 gave the clear impression that W2's entry into Turkey and residence up to that point had been unlawful. That was the position as we understood it at the time … and it is clear that in this respect we did misunderstand what we were being told."

158. It is, however, quite manifest that the assertions made by BP in May 2019 about W2's position in the unnamed third country cannot be ascribed to any misunderstanding on their part. It would be an extremely serious matter for any solicitor or other legal professional to make the statements in the letter and in Mr Graham's witness statement of 29 May 2019 without a clear understanding that the lawyer was accurately communicating their client's stated position. Any doubt in that regard should either have been investigated or, if that could not be done, properly communicated to the respondent and the Commission.

159. In the circumstances, the inexorable conclusion is that W2 either actively misled Mr Graham or that W2 deliberately chose to withhold what he knew was crucially relevant information from Mr Graham. Given that it is over four years since the relevant conversations, Mr Graham cannot be expected to recall precisely what was said (or not said). Mr Graham's view of the matter as a "simple misunderstanding" is, we are sure, genuinely held by him. From the Commission's vantage point, however, it is not a description that can be accepted. In so concluding, regard must plainly be had to W2's lie about the circumstances in which he entered Syria.

160. Had W2 been truthful about his situation in Turkey in early 2019, it is quite plain that the appeal proceedings would have taken a very different course. It would have been open to the respondent to seek to make arrangements for W2 to give evidence from the Embassy or a Consulate in Turkey. As it is, over four years have elapsed, during much of which time W2 has not seen fit to progress his appeal on a proper basis. W2 has, in short, treated the appellate system with contempt.

161. Even if we were to be wrong in any our assessments under rule 11B(a), the best that can possibly be said of the grounds is that they lie on the margin of what might benevolently be categorised as reasonable prospects of success. That would be a relevant factor in considering the proportionality exercise.

162. Applying the principles described above and fully cognisant of the need for caution, the Commission has firmly concluded that, in all the circumstances, if the notice of appeal were not to fall to be struck out under rule 11B(a), the factors lying on W2's side of the proportionality balance are decisively outweighed by the serious consequences of his misfeasance, such that it is proportionate to strike out W2's notice of appeal under rule 11B(b).

163. It should not be assumed that, by reaching this conclusion, the Commission is to be regarded as encouraging applications to strike out an appeal just because the appellant is alleged not to be credible, as regards an aspect of their case. For the reasons we have given, the effects of W2's lies have had important ramifications for the proceedings. They constitute a pattern of behaviour which is properly categorised as abusive of the appellate process.

Decision

164. W2's notice of appeal is struck out.

MR JUSTICE LANE