Case No: CO/123/2018

Neutral Citation Number: [2018] EWHC 993 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2018

Before :

MRS JUSTICE ELISABETH LAING DBE

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Between :

S2	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

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- -

Amanda Weston QC and Bijan Hoshi (instructed by **Birnberg Peirce Ltd**) for the **Claimant**
Robin Tam QC and Natasha Barnes (instructed by **GLD**) for the **Defendant**

Hearing dates: 12/04/2018

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Judgment

Mrs Justice Elisabeth Laing DBE :

Introduction

1. The Claimant has an application for a review, and an appeal, pending in the Special Immigration Appeals Commission ('SIAC'). In the application for a review, he challenges a decision made and notified by the Secretary of State on 19 May 2016 to exclude him from the United Kingdom. He appeals against the Secretary of State's decision made on 26 September 2017 to refuse his asylum claim. The Secretary of State refused that claim on the basis that the Claimant was excluded from the protection of the Refugee Convention ('the Convention'). The Claimant also challenges, by this application for judicial review in the Administrative Court, the Defendant's decision (also made and notified on 26 September 2017) to revoke his indefinite leave to remain ('ILR').

2. A theme common to those three decisions is that the Secretary of State considers that the Claimant is a risk to national security. That view will be tested, to the greatest extent possible in public, and only to the extent that it is necessary, in closed, in the SIAC proceedings. Materially, on the application for a review of the exclusion decision, SIAC will apply the same principles as this court applies on an application for judicial review (see section 2C(3) of the Special Immigration Appeals Commission Act 1997 ('the 1997 Act')).

3. As the Secretary of State puts it in her summary grounds of defence, 'The core issue in this claim is whether the Secretary of State has acted unlawfully in revoking the Claimant's [ILR] at this stage, on the basis that he poses a danger to the nationality security of the United Kingdom, when there is a pending appeal before SIAC which will address that question'. I should note that, to the extent that that sentence conveys the impression that the revocation decision was made during the pendency of an appeal to SIAC, it conveys a wrong impression. The appeal to SIAC was not pending when the decision was made. Ms Weston accepts in her skeleton argument that the Claimant's ILR was revoked on the grounds of national security (see paragraph 14). She also accepts (ibid) that SIAC has jurisdiction to 'determine the underlying facts'; that is, the facts underlying the Secretary of State's view that the Claimant is a risk to national security.

4. This is my judgment on the Claimant's applications for permission to apply for judicial review of the decision revoking the Claimant's ILR, and for interim relief. The interim relief he seeks is an order, in effect, to restore his ILR, pending a decision on his application for judicial review, or further order. The Claimant was represented by Ms Weston QC and by Mr Hoshi and the Defendant by Mr Tam QC and Ms Barnes. I thank counsel for their helpful written and oral arguments. I am grateful to both leading counsel for the patient and helpful way they answered my questions, and to both legal teams for their careful preparations for the hearing.

5. Ms Weston's essential point is that the Claimant has no statutory right of appeal or of review against the revocation decision. His only remedy is an application for judicial review. It follows that SIAC can grant no remedy in respect of the revocation decision. She is not in a position to challenge the Secretary of State's national security case, of which there has only been limited and recent disclosure, but it will be fully tested in the SIAC proceedings. If the Secretary of State's national security case

does not survive that test, that will mean that the revocation of the Claimant's ILR was not justified, and he should be entitled to an order quashing that revocation. His right to challenge the revocation decision, and to obtain its quashing, should be preserved pending SIAC's decision on the national security case, and his position should be protected in the meantime by the interim relief she seeks. Although she did not make this point earlier in the proceedings, she submitted orally that whatever decision the court made on the applications for judicial review and for interim relief, it should stay the application for judicial review pending the determination of the proceedings in SIAC.

The facts

6. It is not necessary to say much about the facts. The Claimant was born on 3 March 1982 in Iraq. He entered the United Kingdom and claimed asylum. That claim was refused, but he was granted discretionary leave to remain. On 17 July 2008 he was granted ILR. He left the United Kingdom on around 22 April 2016. On 20 May 2016, the Secretary of State decided to cancel the Claimant's ILR and to exclude him from the United Kingdom. He arrived at Gatwick Airport on 5 June 2016 and was detained under immigration powers.

7. On 7 June 2016 he wrote a letter saying that he wished to claim asylum. On 9 June 2016 he filed a notice of review of the exclusion decision in SIAC. He was granted immigration bail on 23 June 2016. On 5 August 2016 he filed an application for judicial review of the decision to cancel his ILR.

8. On 6 September 2016 Flaux J (as he then was) heard an application for permission to apply for judicial review of the cancellation decision and for interim relief. He granted permission to apply for judicial review, and interim relief. I have not seen a record of the reasons for his decision, but it seems, from what counsel told me, that there was a strong argument that the decision to cancel the Claimant's ILR, which was purportedly made under article 13(7) of the Immigration (Leave to Enter and Remain) Order 2000, was ultra vires. The relief which Flaux J granted, having considered two potential variants in drafts submitted by the parties, was (by paragraph 2) an order that 'Any effect' of the cancellation decision 'is stayed' until the determination of the application for judicial review or further order. However, paragraph 3 provided, 'For the avoidance of doubt' that the consequence of paragraph 2 was that 'the Claimant remains, in the interim, the holder of indefinite leave to remain and thus the conditions imposed on the Claimant…until the determination of the Claimant's claim for judicial review or further order, do not apply'. The order provided for a swift hearing of the application for judicial review, no later than 4 November 2016.

9. The Claimant made further submissions on 22 September 2016. On 28 September the Secretary of State withdrew her decision to cancel the Claimant's ILR. The effect of that decision was that the Claimant's ILR continued. The application for judicial review was later settled by a consent order dated 4 April 2017.

10. On 16 June 2017, the Secretary of State wrote to the Claimant. She told him that '… Your actions mean that your deportation is considered to be conducive to the public good for reasons of national security and as such you are liable to deportation by virtue of section 3(5)(a) of the Immigration Act 1971' ('the 1971 Act'). She also said

that she was considering his asylum claim and was minded to conclude that he was excluded from the protection of the Convention because there were serious reasons for considering that he had been guilty of committing acts contrary to the purposes and principles of the United Nations, and because he was a danger to the national security of the United Kingdom. She further said that she was minded to conclude that he was excluded from humanitarian protection but that she was likely to conclude that he could not be deported 'at the present time' because it would result in a breach of his rights conferred by article 3 at the Europe Convention on Human Rights. In the light of the article 3 barrier to his deportation, she was also considering whether to revoke his ILR. She considered that his 'conduct' after getting ILR, was 'so serious that it would warrant the revocation of your ILR if the section 76(1) conditions were satisfied'. If his ILR were revoked, it would be replaced by a limited period of leave which could, as necessary, be renewed for as long as legal reasons prevented his deportation from the United Kingdom.

11. On 11 August 2017, the Claimant made further representations why his ILR should not be revoked. Those included a report from Dr Deeley, which I will say more about in due course.

12. On 26 September 2017, the Secretary of State wrote to the Claimant. She told him that she had decided to revoke his ILR under section 76 of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act'), and that she had refused his claim for asylum on the grounds that Articles 1F and 33 of the Convention applied and he was excluded from the protection of the Convention. He was similarly excluded from humanitarian protection. She granted him six months' restricted leave to remain. Several conditions were attached to that: a residence condition, a monthly reporting condition, a condition preventing recourse to public funds, and conditions requiring him to get the Secretary of State's consent for various activities. He would have to re-apply for leave before any period of leave expired. He is, I was told, with the consent of the Secretary of State, now running a mobile phone shop as a self-employed person.

13. On 11 October 2017 the Claimant filed a notice of appeal with SIAC against the decision refusing his asylum claim. Some time later, on 22 December 2017, he filed an application for judicial review of the decision revoking his ILR.

14. The application for judicial review was made within three months of the date of the revocation decision. Mr Tam complained that it had, nonetheless, not been made promptly, so it is convenient for me to summarise what Ms Weston told me had been done during that period of just under three months. Her instructing solicitors are publicly funded. They do not have the resources of a big commercial firm, and have to prioritise their work accordingly. Their initial focus was launching the appeal to SIAC. There was a directions hearing in the SIAC appeal at which the possibility of an application for judicial review was discussed. They applied for funding for an application for judicial review on 30 October 2018. Emergency funding was granted on 2 November. Ms Weston explained that she was in a complex case in the Court of Appeal in November, and out of the country for three weeks between the end of November and beginning of December. She accepted, candidly, that she was responsible for delay during that period. Her solicitor decided to use the same counsel for the SIAC appeal and for the application for judicial review, which I consider to be a sensible use of public funds.

15. I asked Mr Tam what prejudice the Secretary of State had suffered as the result of the suggested lack of promptness. He was able to point to none, other than the fact that the Claimant's solicitors gave an unreasonably short deadline for the response to their pre-action protocol letter dated 19 October 2017 (that is, four days), and then did not issue proceedings until 22 December 2017.

16. On 8 November 2017, SIAC ordered that the application for a review of the exclusion decision and the appeal against the refusal of the Claimant's claim for asylum be linked.

17. Dr Deeley's report notes the Claimant's psychiatric history, and the episode on 18 December 2005 which led a sentencing court to make a hospital order in his case. He had pleaded guilty to arson being reckless as to whether life was endangered. He had set fire to his flat, and it appears, by that means, had tried to kill himself. He was discharged from hospital on 12 March 2007. He was treated in the community until 2014. Dr Deeley's opinion was that the Claimant was suffering from recurrent depressive disorder, 'current episode severe with psychotic symptoms'. His depression had got better by 2016, when he was detained and his ILR was cancelled.

18. His diagnosis means that the Claimant is vulnerable to episodes of depression. The main precipitating factor for his current episode of depression was 'the stress associated with his altered immigration status and detention' after his return to the United Kingdom from Iran in 2016. Dr Deeley's view was that the Claimant's 'sense of security and stability in the United Kingdom' was 'an important causal factor in his recovery because it removes the fear of return to Iraq'. He fears a return to Iraq because he is convinced he will be tortured and killed there. This fear provoked extreme anxiety and was 'a precipitant of relapse of his depressive illness'.

19. He had recently started taking anti-depressants, which was appropriate, and he would benefit from taking anti-psychotic medication. He should be seen urgently by the community mental health team, given his history, but was not currently suicidal. He could become suicidal if his mental health got worse. The loss of the Claimant's sense of security associated with [ILR] would act as a pre-disposing and maintaining factor for [his] depression, and therefore worsen his prognosis. It would make his recovery from his current episode of depression less likely, even if he was treated with the best medicine and his psychiatric support were increased. It would put him at an increased risk of self-harm and suicide. The 'active review' process would increase his sense of insecurity and anxiety, and would be a factor which would maintain and worsen the Claimant's current episode of depression.

20. He would have the best chance of recovery if he kept his ILR. It was probable that he would make a full recovery, provided he got appropriate medication and psychiatric support. The revocation of his ILR and the grant of a rolling period of six months' leave would be associated with a poor prognosis. The need to re-apply would give him a greater sense of insecurity, made worse by the stressful experience of regular reporting, and by the need to seek permission for various activities.

The legislative scheme

21. Section 3(5)(a) of the 1971 Act provides that a person who is not a British Citizen is liable to deportation if 'the Secretary of State deems his deportation to be conducive

to the public good'. A person is also 'liable to deportation' if another person to whose family he belongs is or has been ordered to be deported, or if, being over the age of 17 and having been convicted of an imprisonable offence, his deportation is recommended by a court (sections 3(5)(b) and 3(6) of the 1971 Act). In such cases, section 5(1) of the 1971 Act gives the Secretary of State power to make a deportation order. Such an order, if made, invalidates any leave to enter or remain in the United Kingdom (ibid).

22. Section 32(4) of the UK Borders Act 2007 ('the 2007 Act') provides that the deportation of a 'foreign criminal' (as defined in section 32(1) of the 2007 Act) is 'for the purpose of section 3(5)(a) [of the 1971 Act] conducive to the public good'. Subject to the exceptions in section 33 of the 2007 Act, the Secretary of State must make a deportation order in the case of a foreign criminal (section 32(5)).

23. Section 76(1) of the 2002 Act gives the Secretary of State power to revoke a person's ILR if he is 'liable to deportation, but …cannot be deported for legal reasons'. 'Liable to deportation' has the meaning given by section 3(5) and 3(6) of the 1971 Act (section 76(4)).

24. ILR can be revoked on other grounds. It may be revoked if 'the leave was obtained by deception' (section 76(2)). It may also be revoked if the person concerned, or someone of whom he is a dependent, ceases to be a refugee for various reasons (section 76(3)).

25. Before the amendments made by the Immigration Act 2014 ('the 2014 Act'), a decision to revoke ILR, and a decision to make a deportation order under section 5(1) of the 1971 Act were 'immigration decisions' listed in section 82(2) of the 2002 Act. They generated a right of appeal to the First-tier Tribunal ('the FTT') (section 82(1) of the 2002 Act). The available grounds of appeal were listed in section 84. They included that the decision was not in accordance with immigration rules, that the decision was 'not otherwise in accordance with the law' and that the person taking the decision should have exercised differently a discretion conferred by immigration rules (section 84(1)(a), (e) and (f)). Section 82(3A) provided that a decision that section 32(5) of the 2007 Act applied was an 'immigration decision' and, therefore, the effect of section 82(1) was to confer a right of appeal against that decision.

26. The effect of the 2014 amendments is that there is now no right of appeal against an 'immigration decision'. Instead, a right of appeal is conferred when the Secretary of State decides to refuse certain types of claim (a protection claim or a human rights claim) or when the Secretary of State decides to revoke protection status (section 82(1)). The grounds of appeal in each case are set out in section 84(1), (2) and (3) respectively. They are different from, and narrower than, the grounds of appeal which were available before the 2014 amendments.

27. Section 78 of the 2002 Act provides that a person may not be removed from the United Kingdom while an appeal under section 82(1) is pending. That provision only applies to an appeal that may be brought while the appellant is in the United Kingdom (section 78(4)).

28. Up until the amendments made by the 2014 Act, section 79(1) prevented the Secretary of State from making a deportation order against a person while an appeal against the

decision to make a deportation order could be brought or was pending. That provision did not apply to 'automatic' deportations (section 79(3)), but a deportation order made in reliance on section 79(3) did not invalidate any subsisting leave, so long as an appeal was pending (section 79(4)). After the 2014 amendments, the effect of the amended wording of section 79(1) is that if the Secretary of State gives a certificate under section 94B of the 2002 Act, a person can be removed from the United Kingdom before any relevant appeal is lodged, or during its pendency. Its effect, also, is that where there is such a certificate, the Secretary of State is not prevented from making a deportation order, even if there not yet been an appeal, or if one is pending.

29. Before the 2014 amendments, the effect of section 3D of the 1971 Act was that if a person's leave to enter or remain in the United Kingdom was revoked, that leave was extended during any period during which an appeal against the revocation decision could be brought or was pending (while the person was in the United Kingdom). Section 3D was repealed by the 2014 Act.

30. The 2014 amendments to the statutory scheme produced five relevant effects.

i) A person no longer has a right of appeal against a decision made under section 76 of the 2002 Act to revoke his ILR.

ii) A challenge to such a decision can only now be made by an application for judicial review.

iii) It follows that it is no longer possible to challenge the merits of a decision to revoke ILR; any challenge can only be made on conventional public law grounds.

iv) There is no statutory protection from removal while such an application is pending.

v) The effects of the revocation decision are no longer suspended by statute.

31. The current scheme in relation to deportation is that in an automatic deportation case, any current leave continues until any appeal has been determined (see section 79(4)). By necessary inference, in a section 3 deportation case, any current leave is not affected unless, and until, a deportation order is made, at which point section 5(1) invalidates any existing leave. As is clear from the preceding paragraphs, the current legislative scheme confers no equivalent protection of existing leave in respect of a revocation decision.

32. I infer that there may be three reasons for this. First, there is now no right of appeal against such a decision. Second, and perhaps more fundamentally, section 76 confers a power directly to revoke leave, whereas the scheme I have just described in relation to deportation orders deals with the ancillary consequences of a deportation order. Third, the strong underlying rationale for the protection of that scheme is to support the provisions ensuring that an appellant cannot be removed from the United Kingdom while his appeal (which can now only be on, effectively, human rights or protection grounds) is pending. That rationale does not apply when ILR is revoked

under section 76(1), because the premise of section 76(1) is that the person cannot be removed, and because there is no right of appeal against such a decision.

The relevant authorities

Stay of an administrative decision

33. Ms Weston relies on *R v Secretary of State for the Home Department ex p Muboyayi* [1992] 1 QB 244 for the proposition that the court has power to order a stay of a decision of the Secretary of State (see pp 257H-258G per Lord Donaldson MR; pp 263H-264A and pp266H-267A per Glidewell LJ and pp268F-269G per Taylor LJ). It is clear, in any event, from *M v The Home Office* [1994] 1 AC 377 that the court may grant an injunction against a government minister and that he may be found guilty of contempt of court if he disobeys it. The injunction in *M v the Home Office* was an injunction requiring the Secretary of State to return an asylum seeker to the United Kingdom.

34. In *Muboyayi* the applicant applied for asylum on his attempted entry to the United Kingdom. He was refused leave to enter and the Secretary of State detained him pending his removal to France. He applied for a writ of habeas corpus shortly before he was due to be removed. A judge asked counsel for the Secretary of State to give an undertaking that the applicant would not be removed pending a decision on the application for the writ of habeas corpus. Counsel refused, and the judge stayed removal pending a hearing. The Court of Appeal held, on appeal by the Secretary of State, that the applicant's challenge to his detention could not succeed unless he successfully challenged the decision to refuse entry. On an application for a writ of habeas corpus the court would investigate whether the objective precedent facts necessary to justify detention had been established, but would not investigate the propriety of a prior administrative decision unless it had been challenged and set aside on public law grounds, by means of a successful application for judicial review.

35. Mr Tam referred to *R v Secretary of State for Education and Science ex p Avon County Council* [1991] 1 QB 558 (CA), *Ministry of Foreign Affairs Trade and Industry v Vehicle and Supplies Limited* [1991] 1 WLR 550 (PC), *R v Ministry of Agriculture Fisheries and Food v Monsanto Plc* [1999] QB 1161 and *R (H) v Ashworth Special Hospital Authority* [2002] EWCA Civ 923; [2003] 1 WLR 127. He accepted that a court could grant a stay of a decision which had taken effect, but submitted, relying on the *Ashworth* case, that such a stay should only be granted in very exceptional circumstances, and that, in general, a court should be reluctant to do more than to stay the consequential effects of a decision. Ms Weston countered that the facts of the *Ashworth* decision were, themselves, exceptional.

Appeals to SIAC against decisions to deport on conducive grounds: Rehman

36. Ms Weston also relies on *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153. Rehman appealed to SIAC, under section 2(1)(c) of the 1997 Act, against a decision of the Secretary of State to make a deportation order on conducive grounds, pursuant to section 3(5)(b) of the 1971 Act. SIAC allowed his appeal. The Court of Appeal allowed the Secretary of State's appeal and the House of Lords dismissed Rehman's appeal.

37. The Court of Appeal held that SIAC had misinterpreted section 15(3) of the 1971 Act (which defined when deportation was conducive to the public good), and that whether those grounds were established was primarily a matter for the executive discretion of the Secretary of State. Any specific facts on which the Secretary of State relied must be established on the ordinary balance of probabilities, but no standard of proof applied to his assessment of the public good. That was a matter for reasonable and proportionate judgment on the material he had.

38. Section 4 of the 1997 Act has now been repealed. When *Rehman* was decided, it provided that SIAC must allow an appeal if it considered that the decision or action against which the appeal was brought was not in accordance with law or in accordance with relevant immigration rules, or where the decision involved the exercise of a discretion by the Secretary of State or by an officer, that discretion should have been exercised differently. These were similar, but not identical to, the grounds on which an adjudicator was required to allow an appeal under section 19(1) of the 1971 Act (see paragraph 13 of the judgment of Lord Woolf). He also recorded in that paragraph that it was not in issue that SIAC could review issues of fact.

39. The conclusion of the Court of Appeal that SIAC was right to hold that it had to determine issues of fact and law is expressed by Lord Woolf to be based on the terms of section 4 of the 1997 Act (see paragraph 42 of his judgment). He nonetheless went on, in paragraph 43, to say SIAC's duty to decide facts did not help with what was the appropriate standard of proof. He held that SIAC was right to accept that the Secretary of State's views about what is conducive to the public good should be given great weight. Questions of policy in this area 'must primarily be for the Secretary of State. The executive is bound to be in a better position to determine what should be the policy to adopt on national security than any tribunal, however eminent'. SIAC had been entitled to decide that specific allegations made against Rehman had not been proved. That was not enough, because even if specific allegations had not been proved, it was necessary to look at the case as a whole and to ask if the person is a danger to national security. The cumulative effect of the case as a whole might be that while specific acts had not been proved to a high degree of probability, the person concerned was to be 'treated as a danger' (paragraph 44).

40. On Rehman's appeal, Lord Slynn gave a speech. Lords Hutton and Steyn agreed with it. Lord Steyn also gave a speech, with which Lord Hutton also agreed, and Lord Hoffmann gave a speech with which Lords Clyde and Hutton agreed.

41. Lord Slynn said, at paragraph 8, that the expression 'conducive to the public good' in section 3(5) of the 1971 Act was not defined and that 'the matter is plainly in the first instance and primarily one for the discretion of the Secretary of State'. Lord Slynn referred to section 4 of the 1997 Act. In paragraph 11 he said, 'on this language' and in order to ensure an effective remedy in accordance with article 13 of European Convention on Human Rights, SIAC was 'empowered to review the Secretary of State's decision on the law and also to review his findings of fact. It was also given power to review the question whether the discretion should have been exercised differently'. That question would 'normally depend on whether on the facts found the steps taken by the Secretary of State were disproportionate to the need to protect national security'.

42. In paragraph 15, Lord Slynn said that the interests of national security could not be used to justify 'any reason the Secretary of State has for wishing to deport an individual from the United Kingdom. There must be some possibility of risk or danger to the security or well-being of the nation which the Secretary of State considers makes it desirable for the public good that the individual should be deported.' He did not accept that the risk had to be a direct threat to the United Kingdom or that the interests of national security are limited to acts aimed at the United Kingdom, although there must be 'a real possibility of an adverse effect on the United Kingdom'. Such an effect, however, did not have to be 'direct or immediate'. Whether there is 'such a real possibility is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to that individual if a deportation order is made' (paragraph 16).

43. He did not accept that the three categories in section 15(3), although expressed as alternatives, were 'to be kept as wholly distinct'. The Secretary of State does not have to 'pin his colours to one mast and be bound by that choice'. The question is whether deportation is conducive to the public good. There was 'a very large element of policy in this, which…is primarily a matter for the Secretary of State. This is an area where it seems to me particularly that the Secretary of State can claim a preventative [sic] precautionary action is justified. If an act is capable of creating indirectly a real possibility of harm to national security it is in principle wrong to say that the state must wait until action is taken which has direct effect against the United Kingdom' (paragraph 17).

44. Lord Slynn said that if specific acts are relied on, they should be proved to the civil standard of proof. That was not the whole exercise, however. The Secretary of State was entitled to 'have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned'. He is entitled to be cautious rather than to wait for directly harmful acts to be done. 'In doing so he is not merely finding facts but forming an executive judgment or assessment. There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal show, that all the material before him is proved, and his conclusion is justified, to a "high degree of civil probability". Establishing a degree of probability does not seem relevant to the reaching of a conclusion on whether there should be a deportation for the public good' (paragraph 22).

45. '[S]pecific acts must be proved, and an assessment made of the whole picture and then the discretion exercised as to whether there should be a decision to deportation and a deportation order made' (paragraph 23). If there is an issue about whether the decision was made on grounds of national security, the Government 'is under an obligation to produce evidence that the decision was in fact made on grounds of national security' (paragraph 24). Even though SIAC had powers of review of both fact and the exercise of the discretion, it must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of Government policy, and the means at his disposal of being informed of and understanding the problems involved. He is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him.

46. Lord Steyn agreed with Lord Slynn and with Lord Woolf's judgment in the Court of Appeal. He also gave brief reasons of his own.

47. Lord Hoffmann agreed with the Court of Appeal that SIAC had erred in law in three respects (paragraphs 46-49). He agreed that section 4 gave SIAC 'full jurisdiction to decide questions of fact and law', but held that SIAC had 'made insufficient allowance for certain inherent limitations, first in the powers of the judicial branch of government, and secondly, within the judicial function, in the appellate process'. A court, however broad its jurisdiction, must recognise 'the constitutional boundaries between judicial, executive and legislative power'. A court on an appeal must also, 'in matters of judgment and evaluation…show proper deference to the primary decision maker'. Lord Hoffmann developed those points in paragraphs 50-57.

48. What 'national security' means is a question of law. What is in the interests of national security is not a question of law but 'a matter of judgment and policy'. Decisions whether something is in the interests of national security are not for judicial decision but are entrusted to the executive (paragraph 50). Lord Hoffmann relied, by analogy, on *Chandler v DPP* [1964] AC 763: it was not open to a court to question the decision of the executive that having nuclear bombers was conducive to the safety of the state. SIAC could not interfere with the Secretary of State's opinion about whether the promotion of terrorism in a foreign country by a United Kingdom national would be contrary to the interests of national security. SIAC could not substitute its view on questions of 'expediency' for that of the Secretary of State (paragraph 53). Such decisions must be made by people who are politically accountable, who have been elected, and can therefore be removed at an election (paragraph 62).

49. SIAC's role is to ensure that the factual basis for deportation is established by evidence, and to ensure that the Secretary of State's opinion is not irrational. In some cases, it may be to uphold principles which are not affected by national security, and which do not lie within the exclusive province of the executive, such as the principle that a person may not be deported to a place if that would infringe the rights protected by article 3 (paragraph 54).

50. He agreed with the Court of Appeal that the concept of standard of proof was not helpful in this context. The question in this case was the extent of future risk. 'This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact'. It could not be decided by asking in turn whether each factual allegation had been proved. 'It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the security interest at stake and the serious consequences of deportation for the deportee' (paragraph 56).

51. He described the three reasons in section 15(3) as a 'composite class' (paragraph 59). It followed that SIAC had erred in reading section 15(3) disjunctively (paragraph 60).

Appeals to the Upper Tribunal against deportation orders on conducive grounds: Bah

52. Ms Weston argued that I should be influenced by the approach of the Upper Tribunal in *Bah v Secretary of State for the Home Department* [2012] UKUT 00196 (IAC). In that case, the Secretary of State made a decision to deport the appellant on conducive

grounds, relying on the appellant's criminal record. The appellant was not liable to automatic deportation, because while he had 13 convictions, none had led to a sentence of 12 months' imprisonment or more. The Secretary of State also relied on intelligence suggesting that the appellant was involved in a violent criminal gang. He appealed to the FTT against the Secretary of State's decision to make a deportation order. The FTT dismissed the appeal, accepting evidence of police witnesses about the appellant's involvement in the gang, and rejecting his article 8 claim. He appealed to the Upper Tribunal ('the UT'). The UT's decision was made under the pre-2014 appellate regime (see paragraph 14).

53. The UT considered Lord Slynn's speech in *Rehman* and decided that it showed that, before the enactment of the 2002 Act, an appellant could challenge the basis on which the Secretary of State had decided that he was liable to deportation and the exercise of the discretion to make a deportation order (decision, paragraph 23). The UT could reach a different view on the factual foundation for deportation from the Secretary of State's view (paragraph 31). The UT could also decide that the discretion to make the deportation order should have been exercised differently, for example if the Secretary of State decided to make a deportation order in the case of a long-settled resident who had accumulated a sequence of parking fines (paragraph 32). The power to deport on conducive grounds could be exercised on a precautionary or preventive basis (paragraph 45).

54. The tribunal could admit hearsay evidence and evidence from anonymous sources (paragraphs 58-59). Those factors would affect the weight to be given to it (paragraph 60). Where the Secretary of State relies on past facts, she must prove those on the balance of probabilities (paragraph 63). A reasonable degree of likelihood is the right standard to apply to the assessment of future risk (paragraph 64), and see paragraph 22 of *Rehman*.

The revocation of a deportation order made under section 5 of the 1971 Act does not revive any previous leave to remain: George

55. In *George v Secretary of State for the Home Department* [2014] UKSC 28; [2014] 1 WLR 1831, the UT allowed, on article 8 grounds, an appeal against the Secretary of State's refusal to revoke a deportation order made on conducive grounds, based on the respondent's convictions for drugs offences. The Secretary of State refused to reinstate the respondent's ILR, despite the success of his appeal. A judge dismissed an application for judicial review of that refusal and the Court of Appeal allowed the respondent's appeal. The Supreme Court held section 76 of the 2002 Act did not inform the construction of section 5 of the 1971 Act. The revocation of a deportation order did not retrospectively undo the invalidation of the respondent's ILR which had been effected by section 5(1) of the 1971 Act when the deportation order was made.

56. Lord Hughes explained (in paragraph 16) that section 76 gives the Secretary of State power to revoke ILR in those cases where no deportation order is ever made, because a legal bar to deportation becomes obvious before such an order can be made, or because there was never any dispute that a deportation order could not lawfully be made. Absent section 76, there would be no such power (see paragraph 13 of the judgment of Lord Hughes), as the only other legislative provision which can remove ILR is section 5(1).

57. This is a convenient point to record Mr Tam's submission that there is a significant distinction between the revocation and the quashing of a deportation order. As *George* makes clear, revocation operates (in Mr Tam's words) ex nunc, whereas quashing operates ex tunc (again, his phrase). In other words, the revocation of a deportation order does not undo the effects which it had before revocation, such as the invalidation of existing leave. The quashing of a deportation order would, however, have that effect, as if a deportation order is quashed, it was not made, and its effects (such as invalidation of leave) are undone. It is possible that the decision of the Court of Appeal in *Draga v Secretary of State for the Home Department* [2012] EWCA Civ 842, and the Court of Appeal's recent commentary on *Draga* in *DN (Rwanda) v Secretary of State for the Home Department* [2018] EWCA Civ 273 may complicate that position, but I am not concerned with that question.

Interim relief: Cyrus

58. Ms Weston draws my attention to the decision of this court in *R (Cyrus) v Secretary of State for the Home Department* [2016] EWHC 918 (Admin). In that case the claimant applied for judicial review of a decision to make a deportation order and of a decision to make a certificate under section 94B of the 2002 Act (judgment, paragraph 17). He also challenged his detention.

59. The Claimant asked for interim relief requiring the Secretary of State to grant or to reinstate his ILR pending the resolution of the application for judicial review and of his intended appeal against a decision to refuse his human rights claim. Irwin J (as he then was) indicated in paragraph 46 of the judgment that interim relief was appropriate, but, in the event, made no such order, as, it appears from the order which counsel showed me, the application for judicial review was settled between the date of the judgment and the date of the order.

60. The Judge assessed the balance of prejudice in paragraphs 38-43. In paragraph 44 he recorded the parties' agreement that the 'deportation decision' was 'enfranchised by legal error'. He said that the removal of the Claimant's ILR was 'an automatic consequence of the decision to deport. I therefore conclude that the integrity of public administration is best served by an Order to restore the Claimant's ILR'. He accepted that 'at least where section 76 of [the 2002 Act] is concerned, the revocation of the deportation order does not imply automatic restoration of a previously existing [ILR]. However, this Claimant is not in the situation of Mr George and may never be in such a situation.'

61. In paragraph 46 of the judgment, the Judge said that it was a correct application of the modified *American Cyanamid* approach 'that the Claimant should have the restoration of ILR until the resolution of his forthcoming appeal, putting him in the same position in relation to his immigration status as he would have been if (1) he had been an adult convicted of such a serious offence and subject to automatic deportation, or (2) the decision on certification in his case had been approached without legal error'.

62. The facts in *Cyrus* were different from the facts of this case. Ms Weston did not rely on the reasoning of Irwin J, but simply submitted that this case was an example of the grant of interim relief (or, at least, of an indication of an intention to grant interim relief) which involved the restoration of ILR.

The issues

63. The Claimant challenges the decision to revoke his ILR on three grounds.

    i) The decision in this case is inconsistent with the statutory scheme. Ms Weston relies on the decision of the House of Lords in *Padfield v Ministry of Agriculture, Fisheries and Food* [1968] AC 997.

    ii) If and in so far as the Secretary of State had power to revoke the Claimant's ILR, she exercised her discretion unlawfully, unfairly and unreasonably.

    iii) The Secretary of State had no power to revoke the Claimant's ILR because he is not, and was not at the date of the decision, 'liable to deportation'. This argument is said to raise a question of 'precedent fact'.

64. I will consider, first, whether the Claimant was liable to deportation at the date of the decision, second, whether the decision in this case was inconsistent with the statutory scheme, and third, whether the Secretary of State's exercise of any discretion was flawed.

65. However, there is a prior question. This is the extent to which the court should give permission to apply for judicial review when the grounds of the application raise issues which coincide with the issues which will be decided by SIAC in a statutory appeal or application for review. It is clear from *W2 v Secretary of State for the Home Department* [2018] EWCA Civ 761 that the Administrative Court should refuse permission to apply for judicial review to the extent that the application for judicial review raises issues which can more conveniently be determined in a statutory appeal or application. It is obvious that the national security case which lies at the heart of this application for judicial review is better tested in SIAC. As a matter of principle, I should refuse the application for permission to apply for judicial review except and to the extent that, it raises discrete, arguable issues which will not be more conveniently determined in the SIAC proceedings. I am satisfied that, whereas the underlying dispute about the national security case is common to both sets of proceedings, this application for judicial review does not raise the same legal issue as, either, the appeal, or the review, in SIAC. Those proceedings will not, and cannot, affect the revocation decision, except and in so far as they might cast doubt on the national security case. The existence of the proceedings in SIAC is not, therefore, a reason for refusing permission to apply for judicial review.

Was the Claimant liable to deportation at the date of the decision?

66. Ms Weston contends that the question whether the Claimant was liable to deportation 'is potentially in issue'. That question simply depends, however, on whether the Secretary of State deems that his deportation is conducive to the public good. The Secretary of State has decided that it is, so, on the face of it, the Claimant is liable to deportation. She contended in writing that the revocation power can only be exercised if the Claimant is '"liable to deportation" in its objective legal sense (ie Parliament has not provided a revocation power to be examined through the prism of what the Secretary of State reasonably believes)'. I do not understand this contention. Parliament has provided that a person is 'liable to deportation' in a case like this, in section 3(5)(a) of the 1971 Act, precisely when 'the Secretary of State deems that his

deportation is conducive to the public good'. So Parliament has decided that, in this type of case, liability to deportation does depend on the view of the Secretary of State. Moreover, the extensive citations from *Rehman*, above, show that even where there is an appeal on the merits to SIAC, the question whether deportation is conducive to the public good depends to a great extent on assessments by the Secretary of State to which the court will defer. The approach in *Rehman* is flatly inconsistent with the proposition that the question whether a person is liable to deportation is a question of objective fact.

67. She also argues that this court should adopt the approach in *Bah*. However, Parliament has decided that there should no longer be any right of appeal on the merits against a decision to revoke ILR. Any challenge to that revocation (or to the Secretary of State's linked, but anterior, view that the Claimant's deportation is conducive to the public good) can only be by judicial review and therefore not to the merits of that decision. The UT's decision in *Bah* is of limited help, because *Bah* was an appeal on the merits against a deportation on conducive grounds. As the citations from *Bah* in Ms Weston's skeleton argument show, it was concerned with appellate scrutiny of a decision to make a deportation order, and the premise of the passages she relies on is that the UT was able to investigate, and make findings about, the underlying facts. She accepted, I think, that the court cannot normally do that, on conventional principles, in an application for judicial review.

68. She suggested in her skeleton argument that 'the precedent fact jurisdiction' is important in this context, relying on *R (Abbas) v Secretary of State for the Home Department* [2017] EWHC 78 (Admin); [2017] 4 WLR 34. That was a case in which the Secretary of State revoked the claimant's leave on the grounds that he had used deception. Whether there had been a deception was a precedent fact which the Secretary of State had to establish as the foundation of the power to revoke leave on grounds of deception. She refers to paragraph 38 of *R (Islam) v Secretary of State for the Home Department* [2017] EWHC 3614 (Admin) in which the Deputy Judge contrasts a discretionary refusal of naturalisation (which does not depend on the existence of any precedent fact) with a decision pursuant to section 76(2)(a) of the 2002 Act to revoke ILR. The key point is that the Judge's observation applies to revocation pursuant to section 76(2)(a) (where deception has been used) and not to revocation pursuant to section 76(1)(a) (where the person concerned is liable to deportation). Neither *Abbas* nor *Islam* is authority for any proposition that revocation pursuant to section 76(1)(a) depends on the establishment of any precedent fact. The dictum in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009; [2018] HRLR 5 on which she relies is irrelevant for the similar reasons. *Ahsan* was also a deception case, involving decisions made under section 10 of the Immigration and Asylum Act 1999 and to refuse leave to remain on the grounds that the claimants had cheated in English language tests.

69. I reject her submissions that whether the Claimant is liable to deportation depends on 'an objective question for the court' and that the court should 'adopt on its precedent fact jurisdiction a procedure by which the Claimant's response to the open allegations made against him can be taken into account'. The question whether the Claimant is liable to deportation depends on the Secretary of State's opinion that his deportation is conducive to the public good, not on any precedent fact. As things stand, the Claimant has not mounted any arguable challenge to that opinion. To be fair to Ms

Weston, I sensed that, in oral argument, her enthusiasm for this point waned somewhat. She accepted that the court was not able to investigate the underlying facts, and that it was not open to the court to decide for itself whether or not the Claimant's deportation was conducive to the public good. She submitted that the court should not apply a rationality test, but later accepted that the decision was reviewable on normal public law principles.

70. I accept, however, that the Claimant is unable to attack the national security case which underpins the decision that he liable to deportation, because, until recently, he had had no disclosure about that case, and only has limited disclosure about it now. I also accept that once the SIAC proceedings have been determined, he will know whether the national security case is sound, or not, and whether or not the Secretary of State's opinion that he was liable to deportation was one which it was open to her to hold. In other words, he may now have arguable grounds of challenge, but because this is a national security case, cannot know what those might be.

Was the decision inconsistent with the statutory scheme?

71. This argument, as I understand it, is that the statutory scheme does not permit the Secretary of State to revoke ILR at a time when she knows it is highly likely that there will be a challenge to the relevant decision or decisions, as, I accept, she did, on the basis of the correspondence I was shown in the hearing. I reject that submission for three reasons.

72. First, the statutory scheme is designed at a high level of generality. It applies to all cases, whether or not the Secretary of State knows, or suspects, when she revokes ILR, that there will, or is likely to, be a challenge to the relevant decision. Ms Weston accepted that the Secretary of State can revoke ILR if there is no underlying dispute. But the same words in the statutory scheme cannot mean two different things according to whether or not there is, or is likely to be, a dispute about the legal or factual position.

73. Second, I have described the statutory scheme and its history in some detail, above. Ms Weston submits that 'It is the clear, unequivocal intention of the statutory scheme to preserve leave pending resolution of the matters in dispute'. I can see no arguable support in the statutory scheme as a whole for that broad proposition, or for any suggestion that the Secretary of State must stay her hand before revoking ILR; rather the reverse, given the amendments made by the 2014 Act. The scheme does still provide for some transitional protection; for existing leave, but only in deportation cases until a deportation order is made, or until an appeal has been determined; and from removal, but only where there might be a statutory right of appeal on the limited grounds now available. In that legislative context, I must assume that the express repeal by Parliament of such protection in the case of a section 76 revocation (from which there is now no right of appeal) is deliberate.

74. Third, there is no authority I am aware of which holds that an administrative decision maker cannot make a decision which he has a statutory power to make, and which he considers that it is in the public interest to make, until the person affected has had the opportunity to litigate a factual or legal issue which might bear on the decision. The general scheme of public law, rather, is that Parliament gives powers to decision

makers for them to exercise as they see fit in the exigencies of the moment, subject, ex post facto, to the supervision of the court.

Did the Secretary of State exercise her discretion unlawfully?

75. Part of Ms Weston's argument on this aspect of the case overlapped with the arguments I have considered and rejected in the previous section of this judgment. She submitted that the timing points she had advanced also meant that the Secretary of State was wrong to exercise her discretion to revoke ILR in the circumstances when she did so. I reject this argument for reasons similar to the reasons I have set out above. I also reject it because, if, as I have held, the statutory scheme permits the Secretary of State to revoke a person's ILR, then, if she considers that he is a threat to national security, and that the imposition of restricted leave would better enable her to control that risk, she would be acting contrary to her conception of the public interest if she did not revoke ILR. That point is reinforced by the express repeal of section 3D.

76. The rest of Ms Weston's argument related to the effects of the decision on the Claimant. I accept that the decision has had significant effects on the Claimant's sense of personal security, on his mental stability, and on his freedom of action. I accept that the Secretary of State will not remove the Claimant so long as she considers that his removal would breach his article 3 rights; but that is very far from the situation he would be in if he had ILR, because if he had ILR, then, absent a change of circumstances, no question of removal could arise at all. I accept Mr Tam's submission that, given the SIAC proceedings, the Claimant's position is precarious, whether or not he has ILR for the time being. I reject Mr Tam's submission, however, that, as the Claimant can work, he is 'no less secure' than if he had ILR. Nonetheless, the Secretary of State carefully considered Dr Deeley's report, and the Claimant's representations about the other impacts of the decision on him in the decision letter. She evidently took into account the considerations which were put before her and which were relevant to her decision. The weight to be given to those factors, absent irrationality, which is not arguably present, is for the Secretary of State, not for the court.

Promptness

77. I have summarised the relevant facts and Mr Tam's argument, above. I do not consider that permission should be refused on the grounds of lack of promptness. Mr Tam is, of course, right, to say that the three-month period is an outer limit, and that an application is not necessarily made promptly just because it is made within the three-month period. He is also right to submit that the Claimant's representatives do not seem to have treated this application with the urgency they impressed on the Secretary of State in their pre-action protocol letter. Nonetheless, I take into account the realities faced by firms doing publicly funded work, and the difficulty of formulating a challenge in a national security case, against the background of overlapping proceedings in SIAC, in which the same representatives were involved. I do not consider, on the facts, that there has been such a lack of promptness as to mean that I should refuse permission to apply for judicial review, but if I am wrong about that, I would, on the facts of this case, have granted the necessary extension of time under CPR 3.1(2)(a).

78. Claimants' representatives should bear in mind, however, CPR 54.5 does not entitle a Claimant to bring a claim at, or very near the end of, the three-month period, and that, in such a case, depending on the facts, the court may well refuse permission on the grounds of lack of promptness. They should consider whether or not it might be prudent to explain in the claim form why they have made the claim towards the end of the period, and to apply, on a precautionary basis, for any necessary extension of time.

Conclusion on permission

79. For these reasons, I conclude that the current challenges to the revocation decision are not arguable. That formulation recognises that, depending on the outcome of the proceedings in SIAC, an arguable challenge might emerge, for reasons which are outside the control of the Claimant and his representatives, because they depend first, on the outcome of the Rule 38 process in SIAC, and second, on SIAC's ultimate decision. Moreover, apart from the limited disclosure of matters which he contests, the Claimant knows nothing about the national security case against him.

80. Normally, when the court decides that there are no arguable grounds of challenge, it refuses permission to apply for judicial review, and subject to renewal, that is the end of the application. I accept Ms Weston's fall-back submission, however, that judicial review is a sufficiently flexible procedure to permit me, despite the fact that I have found that the current challenges are not arguable, to stay the application for judicial review, and defer the decision on permission to apply, in order, in a case like this, to make the procedure as fair to the Claimant as possible. I recognise that if I do not stay the application for judicial review, and it later turns out that the national security case is flawed, the Claimant will have suffered an injustice, because he will have lost the right to challenge the revocation decision, which, in that event, will have turned out to have been a flawed decision, and if it is flawed, the likely remedy, which would be an order quashing the revocation decision (which, without further intervention by the Secretary of State, would restore his ILR).

Interim relief

81. However, as I have decided that none of the current challenges to the revocation decision is arguable, I do not consider that it would be right to grant interim relief on the basis of a chance, which is, at this stage, no more than speculative, that an arguable ground of challenge may come to light during, or as a result of, the proceedings in SIAC.

82. In the light of that conclusion, I do not consider that I should say anything more about interim relief, other than to make three points. First, grant of interim relief in this case would not, in my judgment require the court to grant ILR, which I accept it has no power to do. Any interim relief would interfere in some way with the effects of, or would stay, the revocation decision, which, in turn, would revive, in some way, the revoked ILR (as would an order quashing the revocation decision, if the application for judicial review were to succeed). Second, however, the fact that I know very little about the national security case would make it difficult for me to decide that balance of convenience favoured the grant of interim relief. Third, in any event, while I do not altogether exclude the possibility of a grant of interim relief in a case like this, I do consider that the court should be particularly cautious in the light of Parliament's

clear intention that there should no longer be any statutory transitional preservation of ILR.

Overall conclusions

83. For the reasons I have given, I have four conclusions.

i) None of the current challenges to the revocation decision is arguable.

ii) Nonetheless, I defer the decision on permission to apply for judicial review.

iii) I stay the application for permission to apply for judicial review pending the determination of the proceedings in SIAC or further order in the meantime.

iv) I refuse the application for interim relief.

84. I would be grateful if the parties could produce, if possible, an agreed draft order which reflects those conclusions, and if they could do their best to agree appropriate directions for the restoration of the application for permission once the proceedings in SIAC have been determined, including directions dealing with potential amendments to the grounds of claim, and to reflect those in the draft order.