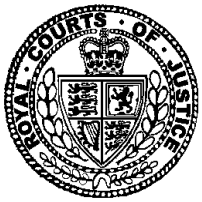

Neutral Citation Number: [2025] EWCA Civ 33

Case No: CA-2023-002462

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
Mr Justice Jay, Upper Tribunal Judge Lindsley & Sir Stewart Eldon
[2023] UKSIAC 1

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2025

Before:

LORD JUSTICE MALES
LORD JUSTICE PHILLIPS
and
LADY JUSTICE ELISABETH LAING

- -

Between:

D8	**Respondent**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**

- -
- -

Jonathan Kinnear KC and **Naomi Parsons** (instructed by **Government Legal Department**) for the **Appellant**
Hugh Southey KC and **Alex Burrett** (instructed by **JD Spicer Zeb Solicitors**) for the **Respondent**

Hearing dates: 9 & 10 December 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 22 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

LORD JUSTICE MALES:

1. This is an appeal by the Secretary of State against the decision of the Special Immigration Appeals Commission ('SIAC') that her revocation of the respondent's refugee status and refusal of a further application for refugee status on the ground of national security were unlawful. The basis of SIAC's decision was that, even though the Secretary of State had determined that the respondent is a danger to national security, she had failed to balance the degree of such danger against the cost, practicability and feasibility of any measures that might be taken to ameliorate the risk and had failed to demonstrate that revocation of refugee status was a measure of last resort.

2. The Secretary of State submits on this appeal that there is no requirement that she carry out such an exercise, which I shall call 'the balancing exercise'. Once she has concluded that a refugee is a danger to national security, she is entitled to revoke his refugee status.

3. I accept that submission and would therefore allow the appeal.

4. This is an OPEN judgment. SIAC produced both OPEN and CLOSED judgments. We have not been shown the CLOSED judgment or the CLOSED material on which it was based. Neither party suggested that it was necessary for us to see this in order to decide the question of law raised by this appeal.

The facts

5. A detailed factual account is set out in SIAC's OPEN judgment. For the purpose of this appeal the following short summary will suffice.

6. The respondent ('D8'), now in his 30s, is an Iranian national of Kurdish ethnicity. He is a Sunni Muslim. In January 2016 he left Iran and travelled to the United Kingdom via Turkey, arriving here clandestinely in a lorry on 17th February 2016. He claimed asylum. His application was refused, but on 30th March 2017 an appeal to the First Tier Tribunal succeeded. The FTT did not believe D8's account of the circumstances in which he had left Iran, and concluded that his posting of anti-Iranian material on his Facebook account and attendance at pro-Kurdish rallies in this country was 'opportunistic', but nevertheless decided that D8 would be at real risk of persecution if returned to Iran.

7. The Secretary of State did not appeal this decision and, on 23rd April 2017, granted D8 five years' leave to remain as a refugee. He was provided with a travel document valid until 22nd April 2022.

8. In February 2020 D8 travelled to the Kurdish region of Iraq. What he did next was in dispute before SIAC, and was the subject of CLOSED material, but SIAC's OPEN finding was that D8 was in Iran between (at the latest) 5th March 2020 and late April or early May 2020.

9. On 2nd April 2020 the Secretary of State personally directed that D8 be excluded from the United Kingdom on the basis that his presence was not conducive to the public good for reasons of national security. This was based on a national security assessment by the Security Service and was because of D8's Islamist mindset and support for the

Islamic State. On 24th April 2020 D8 was sent a letter notifying him of the Secretary of State's intention to revoke his refugee status and his leave to remain was cancelled. As he was not present in the United Kingdom, there was at this time no question of any decision to return (*refoule*) him to Iran.

10. D8's refugee status was formally revoked on 15th October 2020. This is the first decision which D8 challenged before SIAC with which we are concerned.

11. On 23rd March 2021 D8 returned illegally to the United Kingdom on a small boat from France and was detained. He claimed asylum. This claim was refused on 8th July 2022 on national security grounds. This is the second decision with which we are concerned. On this occasion, because D8 was present in the United Kingdom and because the Secretary of State's position was that he had returned voluntarily and openly to Iran in 2020 without adverse consequences, and had thereby re-availed himself of the protection of Iran, the Secretary of State decided that he should be returned to Iran. However, at the hearing before SIAC the Secretary of State conceded that if she failed to prove that D8 had returned openly to Iran, it would not be safe to return him there. There was considerable CLOSED evidence about this, but having considered that evidence, SIAC found that the Secretary of State had failed to prove that D8 returned openly to Iran. That finding has not been challenged on this appeal. Accordingly, this issue no longer arises.

12. Indeed, as SIAC found that D8 would face at least a real risk of torture if returned, contrary to Article 3 ECHR, and even the risk of a violation of his right to life under Article 2 ECHR, there is now no question of him being returned. Thus, whatever the outcome of this appeal, the Secretary of State accepts that some form of leave to remain will have to be granted to D8.

The legal framework

13. In order to understand how the issue arises it is necessary to travel through a variety of legislative and judicial decisions.

The Refugee Convention

14. The 1951 Geneva Convention relating to the Status of Refugees as amended by the 1967 New York Protocol defines a refugee as a person who is outside the country of his nationality and who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is unwilling to avail himself of the protection of the country of his nationality. Article 33 of the Convention provides as follows:

> '**PROHIBITION OF EXPULSION OR RETURN ("*REFOULEMENT*")**
>
> 1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, membership of a particular social group or political opinion.

> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

15. The principle of *non-refoulement* in Article 33(1) is described by the United Nations High Commissioner for Refugees as 'the cornerstone of the international refugee protection regime' which (it says[1]) is binding on all states as a matter of customary international law, including those which are not parties to the Convention (UNHCR Guidance Note of April 2008, para 8). However, the principle is subject to Article 33(2), which contemplates that a refugee may be *refouled*, despite what is *ex hypothesi* his well-founded fear of persecution, if there are reasonable grounds for regarding him as a danger to national security. What this means is explained in the UNHCR Guidance Note:

> '14. The application of this provision requires an individualized determination by the country of asylum that the following criteria in relation to the exceptions to the principle of *non-refoulement* are met:
>
> (i) For the "security of the country" exception to apply, it must be established that the refugee poses a current or future danger to the host country. The danger must be very serious, rather than of a lesser order, and must constitute a threat to the national security of the host country. …'

16. Footnote 15, referring to the discussions in the drafting of the Convention, adds that:

> 'Generally speaking, the "security of the country" exception may be invoked against acts of a rather serious nature, endangering directly or indirectly the constitution, government, the territorial integrity, the independence, or the external peace of the country concerned.'

17. Although this footnote refers to 'acts', it is clear that the concept of 'danger to the security of the country' includes the risk of future acts as well as those which have already been committed.

18. The 2008 Guidance also states that:

> '15. As exceptions to the *non-refoulement* protection of the 1951 Convention, a restrictive application requires that there be a rational connection between the removal of the refugee and the elimination of the danger resulting from his or her presence for the security or community of the host country. A restrictive application also means that *refoulement* should be the last

[1] The Supreme Court of the United Kingdom has only gone as far as saying that the principle 'may be' part of customary international law: *R (AAA) (Syria) v Secretary of State for the Home Department* [2023] UKSC 42, [2023] 1 WLR 4433 at [25].

> possible resort for eliminating the danger to the security or community of the host country. Additionally, the danger for the host country must outweigh the risk of harm to the wanted person as a result of *refoulement*.
>
> 16. The provisions of Article 33(2) of the 1951 Convention do not however affect the requested State's *non-refoulement* obligations under international human rights law, which permit no exceptions …'

19. Footnote 17 adds that:

> 'If less serious measures would be sufficient to remove the threat posed by the refugee to the security or the community of the host country, *refoulement* cannot be justified under Article 33(2) of the 1951 Convention.'

20. Further Guidance issued in April 2014 on the Application of Article 33(2) of the 1951 Convention Relating to the Status of Refugees is to similar effect. It states that:

> 'For the "security of the country" exception to the principle of *non-refoulement* to apply, there must be an individualized finding that the refugee poses a current or future danger to the host country. The danger must be very serious, rather than of a lesser order, and it must be a threat to the national security of the host country. Generally speaking, the "security of the country" exception may be invoked against acts of a serious nature, which endanger directly or indirectly the constitution (Government), the territorial integrity, independence or the external peace of the country concerned. The finding of dangerousness must be based on reasonable grounds and therefore supported by credible and reliable evidence.'

21. The April 2014 Guidance goes on to say:

> '**The Application of Article 33(2) Must Be Necessary and Proportionate**
>
> The application of the exception in Article 33(2) to States' *non-refoulement* obligations, like any exception to human rights guarantees, must be interpreted restrictively and with full respect to the principle of proportionality. The removal of a refugee in application of one of the exceptions provided for in Article 33(2) is lawful only if it is necessary and proportionate. This means that:
>
> i) there must be a rational connection between the removal of the refugee and the elimination of the danger resulting from his or her presence for the security or community of the host country;

> ii) *refoulement* must be the last possible resort for eliminating the danger to the security or community of the host country – if less serious measures, including, for example, expulsion to a third country where there is no risk of persecution, would be sufficient to remove the threat posed by the refugee to the security or the community of the host country, *refoulement* cannot be justified under Article 33(2) of the 1951 Convention; and
>
> iii) the danger for the host country must outweigh the risk of harm to the wanted person as a result of *refoulement*.'

22. The Supreme Court observed in *R (AAA) (Syria) v Secretary of State for the Home Department* [2023] UKSC 42, [2023] 1 WLR 4433 at [65] that 'it is well established that the UNHCR's guidance concerning the interpretation and application of the Refugee Convention "should be accorded considerable weight": *Al-Sirri v Secretary of State for the Home Department* [2013] 1 AC 745, para 36'. However, as the paragraph cited from *Al-Sirri* makes clear, UNHCR guidance is not binding. The weight to be given to such guidance will depend on the context. Referring to UNHCR evidence, as distinct from guidance, the Supreme Court said in *AAA (Syria)* at [68] that such evidence 'will naturally be of greatest weight when it relates to matters within its particular remit or where it has special expertise in the subject matter'. In my judgment a similar approach should apply to UNHCR guidance.

23. The Refugee Convention is binding in international law as an agreement between states, but has not been incorporated into the domestic law of the United Kingdom. Nevertheless domestic statutes will be interpreted so far as possible so as to conform with the United Kingdom's international obligations, while section 2 of the Asylum and Immigration Appeals Act 1993 provides expressly that:

> 'Nothing in the immigration rules (within the meaning of the [Immigration Act 1971]) shall lay down any practice which would be contrary to the [Refugee] Convention.'

24. In addition, section 34 of the Anti-terrorism, Crime and Security Act 2001 (an Act which makes a range of provisions about terrorists and terrorism) provides that:

> '(1) Articles 1(F) and 33(2) of the Refugee Convention (exclusions: war criminals national security, &c.) shall not be taken to require consideration of the gravity of—
>
> (a) events or fear by virtue of which Article 1(A) would or might apply to a person if Article 1(F) did not apply, or
>
> (b) a threat by reason of which Article 33(1) would or might apply to a person if Article 33(2) did not apply.'

25. Thus, when a refugee is reasonably regarded as a danger to national security, Article 33(2) does not require consideration of the gravity of the threat to the refugee's life or freedom which he would face if returned to his country of nationality. In this respect Parliament has disagreed with the final sentence of paragraph 15 of the 2008 UNHCR

Guidance set out above and the equivalent statement in the 2014 Guidance. I note that the Supreme Court of New Zealand has taken the same view, albeit in a case which predated the 2008 Guidance (*Zaoui v Attorney-General (No. 2)* [2005] NZSC 38, [2006] 1 NLR 289).

26. However, as a matter of domestic law it is necessary to consider not only Article 33(2) of the Refugee Convention, but also Articles 2 and 3 of the European Convention on Human Rights. This means, as in the present case, that a refugee who is reasonably regarded as a danger to national security may not be *refouled* if this would infringe his right to life under Article 2 or to freedom from torture or inhuman or degrading treatment under Article 3. Put another way, we do not send people back to be killed or tortured even if they are a danger to the national security of United Kingdom (*Othman v United Kingdom* [2012] 55 EHRR 1 at [185]).

27. Although this principle arises most straightforwardly under Articles 2 and 3 of the ECHR, which has been given effect in domestic law by the Human Rights Act 1998, the United Kingdom is also subject to other international obligations to similar effect, such as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 ('the Torture Convention'), as explained by the Supreme Court in *AAA (Syria)* at [19] to [22], while the prohibition of torture is also a rule of customary international law binding on all states. Article 3 of the Torture Convention provides that:

> '(1) No State Party shall expel, return ("*refouler*") or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

The Qualification Directive

28. Although the Refugee Convention was not incorporated into United Kingdom domestic law, its provisions were substantially replicated in European Union law by Council Directive 2004/83/EC of 29th April 2004 ('the Qualification Directive') and became part of United Kingdom law by that route. Chapter IV of the Directive, headed 'Refugee Status', deals with the grant and revocation of such status:

> '*Article 13*
>
> **Granting of refugee status**
>
> Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.
>
> *Article 14*
>
> **Revocation of, ending of or refusal to renew refugee status**
>
> …

> 4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:
>
> (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;
>
> (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.
>
> 5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.
>
> 6. Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31 and 32 and 33 of the Geneva Convention insofar as they are present in the Member State.'

29. Article 21 in Chapter VII, headed 'Content of International Protection', deals with protection from *refoulement*:

> '*Article 21*
>
> **Protection from refoulement**
>
> 1. Member States shall respect the principle of *non-refoulement* in accordance with their international obligations.
>
> 2. When not prohibited by the international obligations mentioned in paragraph 1, Member States may *refoule* a refugee, whether formally recognised or not, when:
>
> (a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;
>
> (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.
>
> 3. Member states may revoke, and will refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies.

30. It can be seen that the language of Articles 14(4) and 21(2) is the same and that Article 21(2) reflects the terms of Article 33(2) of the Refugee Convention.

31. A more specific topic, residence permits, is dealt with in Article 24:

> ‘*Article 24*
>
> **Residence permits**
>
> 1. As soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3). …’

32. The Court of Justice of the European Union has held that the concept of ‘compelling reasons of national security’ which would justify the refusal of a residence permit in Article 24(1) is less demanding than the test of ‘reasonable grounds’ to believe that a person is a danger to national security in Article 21(2): *T v Land Baden-Wurttemberg* [2016] 1 WLR 109. Thus a residence permit may be refused in circumstances which would not justify *refoulement*. Specifically, the court held that support for a designated terrorist organisation may constitute ‘compelling reasons of national security or public order’ within the meaning of Article 24(1), so as to justify refusal of a residence permit to a refugee, even though that support does not reach the level of constituting the refugee a danger to national security within the meaning of Article 21(2).

33. In the course of its judgment the court considered the circumstances in which *refoulement* would be permitted by Article 21(2), in a passage to which SIAC attached considerable importance:

> ‘68. Articles 21(2) and 24(1) of [the Qualification] Directive constitute in that regard the implementation in positive law of the rights conferred on every person by EU law with a view to ensuring lasting protection for him or her against persecution. Those two provisions are, however, part of Chapter VII of the same Directive, entitled “Content of international protection”, the purpose of which is to define the benefits which candidates for refugee or subsidiary protection status, whose claims have been upheld, may enjoy.
>
> 69. Even though, as has been found in para 50 above, there is more than a little overlap between article 21(2) and (3) of Directive 2004/83 and article 24(1) of that Directive, since both provisions concern the possibility offered to member states to refuse to grant a residence permit, to revoke it, to end it or to refuse to renew it, but also complementarity between them, it is nevertheless settled that those provisions have distinct scopes and pertain to different legal regimes.
>
> 70. Article 21(1) of Directive 2004/83 lays down the principle that refugees are normally protected from *refoulement*. However, article 21(2) of that directive provides a derogation from that principle, by permitting *refoulement* of a refugee, whether formally recognised or not, either, pursuant to article 21(2)(a) of that Directive, where there are reasonable grounds

for considering him or her to be a danger to the security of the member state in which he or she is present, or, pursuant to article 21(2)(b) of that Directive, where, he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that member state.

71. The *refoulement* of a refugee, while in principle authorised by the derogating provision article 21(2) of Directive 2004/83, is only the last resort a member state may use where no other measure is possible or is sufficient for dealing with the threat that that refugee poses to the security or to the public of that member state. In the event that a member state, pursuant to article 14(4) of that Directive, revokes, ends or refuses to renew the refugee statues granted to a person, that person is entitled, in accordance with article 14(6) of that Directive, to rights set out *inter alia* in articles 32 and 33 of the Geneva Convention.

72. The consequences for the refugee concerned of applying the derogation provided for in article 21(2) of Directive 2004/83 are potentially very drastic, as Advocate General Sharpston noted in point 81 of her opinion, since he might be returned to a country where he is at risk. It is for that reason that that provision subjects the practice of *refoulment* to rigorous conditions, since, in particular, only a refugee who has been convicted by a final judgment of a "particularly serious crime" may be regarded as constituting a "danger to the community of that member state" within the meaning of that provision. Moreover, even where those conditions are satisfied, *refoulement* of the refugee concerned constitutes only one option at the discretion of the member states, the latter being free to opt for other, less rigorous, options.

73. However, article 24(1) of Directive 2004/83, whose wording is more abstract than that of article 21(2) of that Directive, pertains only to the refusal to issue a residence permit to a refugee and to the revocation of that residence permit, and not to the *refoulement* of that refugee. That provision therefore concerns only situations where the threat posed by that refugee to national security, public order or public of the member state in question cannot justify loss of refugee status, let alone the *refoulement* of that refugee. That is why implementation of the derogation provided for in article 24(1) of Directive 2004/83 does not presuppose the existence of a particularly serious crime.

74. The consequences, for the refugee, of revoking his residence permit pursuant to article 24(1) of Directive 2004/83 are therefore less onerous, in so far as that measure cannot lead to the revocation of his refugee status and, even less, to his refoulement with the meaning of article 21(2) of that Directive.

> 75. It follows that the concept of "compelling reasons" contained in article 24(1) of Directive 2004/83 has a broader scope than the concept of "serious reasons"[2] contained in article 21(2) of that Directive, and that certain circumstances which do not exhibit the degree of seriousness authorising a member state to use the derogation provided for in article 21(2) of that Directive and to take a *refoulement* decision can nevertheless permit that member state, on the basis of article 24(1) of the same Directive, to deny the refugee concerned his residence permit.'

The Immigration Rules

34. As a Directive, the Qualification Directive was not directly applicable in United Kingdom law. It was given effect by changes to the Immigration Rules made under sections 1(4) and 3(2) of the Immigration Act 1971 which, as section 1(4) provides, are 'rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act'. The version of the rules in force on 15th October 2020 when D8's refugee status was revoked provided, in Rule 338A, that a grant of refugee status 'may be revoked or not renewed if paragraph 339AC applies'. Thus revocation is discretionary and not mandatory, exercise of the discretion being for the Secretary of State. Paragraph 339AC provided:

> 'This paragraph applies where the Secretary of State is satisfied that:
>
> (i) there are reasonable grounds for regarding the person as a danger to the security of the United Kingdom; or
>
> (ii) having been convicted by a final judgment of a particularly serious crime, the person constitutes a danger to the community of the United Kingdom.'

35. The version of the Rules in force on 8th July 2022 when D8's application for asylum on his return to the United Kingdom was refused was (so far as material) in similar but not identical terms. Paragraph 336 provided that 'An application which does not meet the criteria set out in paragraph 334 will be refused'. Those criteria included that the Secretary of State was satisfied that:

> '(iii) there are no reasonable grounds for regarding them as a danger to the security of the United Kingdom in accordance with Article 33(2) …'

SIAC's OPEN judgment

36. The first step in SIAC's reasoning was that the obligations in Articles 13 and 21(1) of the Qualification Directive (or strictly speaking, the provisions of the Immigration

[2] The expression 'serious reasons' is an English translation of the French words 'raisons sérieuses' in the French language version of Articles 14(4) and 21(2) of the Directive. In the English language version the term 'reasonable grounds' is used. It may be that the French language version better captures the demanding nature of the test.

Rules giving effect to those Articles) are 'retained EU law'[3] which continue to apply following the United Kingdom's departure from the European Union pursuant to section 2 of the European Union (Withdrawal) Act 2018 ('the Withdrawal Act'). SIAC referred next to paragraphs 70 and 71 of the CJEU judgment in *T*, saying that this case was binding on it (although in later paragraphs of its decision, SIAC referred to *T* as being only 'highly persuasive'), and to paragraphs 14 to 16 of the UNHCR 2008 Guidance set out above. It rejected the submission on behalf of the Secretary of State that *T* was irrelevant as there was no decision to *refoule* D8.

37. SIAC then observed that any obligation on the Secretary of State to balance the danger to national security against the harm to D8 if *refouled* 'is expressly precluded' by section 34(1)(b) of the Anti-terrorism, Crime and Security Act 2001, but held that the scope of this provision 'must be strictly confined':

> '187. In any event, the scope of section 34(1)(b) must be strictly confined. All that this provision precludes is a proportionality exercise which balances the level of danger to national security against the level of danger to the individual if *refouled*. The subsection does not prohibit a proportionality exercise which measures the level of danger to national security against the practicability of surveillance and other measures in the context of a provision of last resort.
>
> 188. As the Commission pointed out in *Shamima Begum* (at para 30), referencing Lord Hoffmann in *Rehman* (para 56), the evaluative assessment that is required in all cases of this nature, whatever the context, must take into account the degree of prejudice to national security and also the importance of the security interest at stake. …'

38. SIAC agreed with the Secretary of State that it was inherent in the concept of a danger to national security that the danger should be serious, and that it was inappropriate to gloss any further the terms of Article 33(2) of the Refugee Convention or its equivalents in European Union or domestic law. However, it regarded *T* as presenting a difficulty for the Secretary of State:

> '190. Of more difficulty for Mr Kinnear [counsel for the Secretary of State] is the judgment of the CJEU in *T* that Article 33(2) is a measure of last resort and should only be applied where no other measure is possible or sufficient for dealing with the threat (para 71). That analysis, if correct, is *not* precluded by section 34(1)(b) of the ATCS 2001. It is a different sort of proportionality analysis which requires that some consideration be given to the level of the danger to national security on the one hand (see para 75 of *T* and the reference to "degree of seriousness") and the measures that could be taken to reduce it to an acceptable level. Furthermore, the CJEU was not, we think, notionally inserting an epithet into Article 21(2) (i.e. "serious"

[3] Strictly, 'retained EU law' until 31st December 2023 and 'assimilated law' thereafter: see section 5 of the Retained EU Law (Revocation and Reform) Act 2023.

> before "danger"). Rather, the CJEU was saying that "danger" is a matter of fact and degree.
>
> 191. Reduced to its essentials, and stripping away those aspects of it that we cannot accept, Ms Knights' [counsel for D8] submission was that the relevant Immigration Rules, construed in the light of Article 33(2) of the Refugee Convention, Article 21(2) of the Qualification Directive and, in particular, *T* in the CJEU, impose on the Secretary of State a more onerous standard in relation to national security than would apply in, for example, a section 2B appeal where asylum issues are not at stake.'

39. SIAC then concluded, albeit 'not without a modicum of hesitation', that paragraphs 68 to 75 of the judgment in *T* were 'highly persuasive and should be applied to the present case', although they were not necessarily binding. It explained its hesitation on the basis that, arguably, the CJEU in *T* had gone further than the terms of Article 33(2) of the Refugee Convention 'in terms of what must be proved by the Member State seeking *refoulement*'. It stated its final conclusion in the following terms:

> '194. It follows that the Secretary of State must balance the degree of danger to national security (assuming that it is possible to assess it in the circumstances of an individual case,[4] and particularly so if it has been assessed) against the cost, practicability and feasibility of any measures that may be taken to ameliorate the risk; and must demonstrate that she has regarded the Article 33(2) exclusion as a measure of last resort. …'

40. As the Secretary of State had not carried out this exercise, it had not been demonstrated that D8 is a danger to national security and the revocation appeal had to be allowed:

> '286. The Commission has concluded that D8 did not voluntarily re-avail himself of the protection of Iran and that it has not been demonstrated, applying the legal analysis we have set forth at length in this judgment, that D8 is a danger to national security. It follows that the revocation appeal must be allowed.'

41. Thus SIAC's ultimate conclusion was that D8 is not a danger to national security even though the Secretary of State has concluded that he is.

The submissions on appeal

42. Mr Jonathan Kinnear KC for the Secretary of State submits that SIAC was wrong to find that as a matter of law the Secretary of State must carry out the balancing exercise which SIAC described. He advances, broadly speaking, three submissions: (1) the Qualification Directive is not retained EU law, and accordingly neither the Directive

[4] I would comment that it seems odd to express a conclusion as subject to an assumption when the validity of that assumption has not been established. Nowhere in its decision does SIAC say that it would be possible to balance the degree of danger to national security posed by D8 against the cost, practicability and feasibility of any measures to ameliorate the risk. Any attempt to undertake such a balance strikes me as, at best, a somewhat artificial exercise, even assuming that it can be done at all.

nor its interpretation by the CJEU in *T* was of any relevance to the appeal before SIAC; (2) the decisions in issue in this case, to revoke refugee status and to refuse asylum, were not decisions to *refoule* D8, so again *T* is not relevant; and (3) in any event, *T* does not support the proposition that revocation of refugee status requires a balancing exercise or is 'a measure of last resort'.

43. Mr Hugh Southey KC for D8 supports SIAC's reasoning and submits further that in order for refugee status to be revoked, the danger to national security must be sufficiently high to justify *refoulement*. His submission, in essence, is that the principle of *non-refoulement* is a fundamental right, that it is not any danger to national security, no matter how unlikely or minor, which could justify *refoulement* to a state where a refugee faces serious harm, and that accordingly a balancing exercise such as described by SIAC must be necessary in a case where the Secretary of State proposes to return the refugee to his country of nationality. From this premise Mr Southey submits that because the terms of Articles 14(4) and 21(2) of the Qualification Directive, dealing respectively with refugee status and *refoulement*, and their equivalents in the Immigration Rules are the same, the same approach must be applied to revocation of refugee status as to *refoulement*.

Retained EU law

44. Although the Secretary of State's first ground of appeal is concerned with whether the decision of the CJEU in *T* is part of retained EU law, that issue will only matter if *T* requires the Secretary of State to carry out the balancing exercise. I have concluded that *T* does form part of retained EU law, but that it does not require the Secretary of State to carry out the balancing exercise. I shall deal first with the latter issue, before explaining my reasons for concluding that *T* does form part of retained EU law.

Danger to national security

45. It is convenient to begin by considering what is meant by saying that a person is a danger to the security of the United Kingdom as that expression is used in paragraphs 334 and 339AC of the Immigration Rules and the materially identical provisions of Article 33(2) of the Refugee Convention and Articles 14(4) and 21(2) of the Qualification Directive. It is evident, for the reasons given in the UNHCR Guidance, that it is inherent in this concept that the danger must be serious. That is implicit in the word 'danger', which is itself a strong term. To speak of a non-serious or trivial danger would be a contradiction in terms. For this reason, Mr Southey's submission that an unlikely or minor danger to national security would not justify *refoulement* proceeds on a false premise. Something which is unlikely or minor could not be regarded as a danger to national security at all.

46. It is evident also that the values and interests at stake are of fundamental importance, as illustrated by the examples discussed by the drafters of the Refugee Convention and described in the Guidance, which refers to 'endangering directly or indirectly the constitution, government, the territorial integrity, the independence, or the external peace of the country concerned'. Perhaps the paradigm example of a danger to national security in modern times is the danger of a terrorist attack causing death and destruction.

47. In this regard I agree with the conclusion of the Supreme Court of New Zealand in *Zaoui*, which itself echoed the approach of the Supreme Court of Canada in *Suresh v Minister of Immigration and Citizenship* [2002] 1 SCR 3:

> 45. We adopt essentially the test stated by the Supreme Court of Canada in *Suresh*, a test close to that stated by the Court of Appeal and not really disputed before us: to come within art 33.2, the person in question must be thought on reasonable grounds to pose a serious threat to the security of New Zealand; the threat must be based on objectively reasonable grounds and the threatened harm must be substantial.'

48. Bearing in mind what is already inherent in the concept of a danger to national security, I see no justification for any further gloss on the meaning of that term. That a person is a danger to national security is not a conclusion to be reached lightly, but once that conclusion is reached it is obvious that the Secretary of State will need to take appropriate steps to protect the public from the danger. The importance of a decision that a person is a danger to national security is illustrated by the fact that such a decision will often be made by the Secretary of State personally.

49. Under our constitution it is for the Secretary of State to decide whether a person is a danger to national security and there are limited circumstances (not applicable in this case) in which the courts or SIAC may intervene (*Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, per Lord Hoffmann at [53] and [54]; *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] AC 765 at [55] to [59]; and *U3 v Secretary of State for the Home Department* [2023] EWCA Civ 811, [2024] KB 433 at [174] and [193] to [195]). As explained by Lord Reed in *Begum*, echoing Lord Hoffmann in *Rehman*, this is not only because the Secretary of State is best qualified to make such a decision, but also because she is democratically accountable for the decision and its consequences:

> '62. Finally, Lord Hoffmann explained at para 62 that a further reason for SIAC to respect the assessment of the Secretary of State was the importance of democratic accountability for decisions on matters of national security:
>
> > "It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove."
>
> These points have been reiterated in later cases, including *A v Secretary of State for the Home Department* [2005] 2 AC 68 ("*A*") and *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945.'

50. Mr Southey submitted by way of Respondent's Notice that SIAC should have decided for itself whether there were grounds to regard D8 as a sufficient danger to the security of the United Kingdom. That submission, however, runs counter to the decision of the Supreme Court in *Begum* and takes no account of the constitutional position of the Secretary of State. In the present case the Secretary of State has concluded that D8 is a danger to national security. Subject only to whether a further balancing exercise is required, it has not been suggested that she was not entitled to reach this conclusion. For example, there has been no submission on this appeal by the Special Advocates who protected D8's interests at the CLOSED hearing before SIAC, with access to the CLOSED material on which the Secretary of State's conclusion was based, that her conclusion was irrational. The danger which D8 represents must therefore be regarded as real and serious. Such danger does justify *refoulement*, albeit that sometimes (including in this case) this will not be possible due to other international obligations of the United Kingdom or provisions of domestic law.

Is there a requirement to carry out a balancing exercise?

51. The question raised by this appeal is whether, once the Secretary of State has concluded that a person is a danger to national security, she is obliged to carry out a balancing exercise before making a decision to return that person to his country of nationality or revoke his refugee status. I accept that there is nothing in the terms of the Qualification Directive or the Immigration Rules which would justify applying a different test to *refoulement* on the one hand and revocation of refugee status on the other. In particular, the terms of Articles 14(4) and 21(2) of the Qualification Directive are materially the same. For that reason I do not think that *T* can be dismissed, as Mr Kinnear submits, on the basis that it was concerned only with *refoulement* and not with revocation of refugee status.

52. There is no basis for any obligation to carry out the balancing exercise in the language of any of the provisions with which we are concerned.

53. Dealing first with Article 33 of the Refugee Convention, that Article strikes its own balance between the competing interests arising. Article 33(1) states the basic prohibition of *refoulement*, while Article 33(2) provides a limited exception in the case of the refugee whom there are reasonable grounds for regarding as a danger to national security or who, having been convicted of a particularly serious crime, constitutes a danger to the community. In such a case, Article 33 provides that the refugee may be returned to his country of nationality despite the risks which he may face there. The Convention recognises that *refoulement* in such a case may have severe consequences for the refugee, but it is nevertheless permitted by Article 33(2). *Refoulement* is the most drastic course available to the host state, but is nevertheless permitted. The Convention does not say anything about the lesser sanction of revoking refugee status which is dealt with in the Qualification Directive and the Immigration Rules set out above.

54. Article 33 of the Refugee Convention is itself a carefully calibrated scheme which is the result of an internationally agreed balance between the rights of refugees to international protection on the one hand and the rights of states not to give shelter to persons who represent a danger to their national security on the other. That balance is subject to the host state's other international obligations such as those contained in the ECHR, the Torture Convention or customary international law, so that *refoulement* will

not be possible when it would infringe these obligations, but the Refugee Convention itself contains no indication in its language that it is subject to any further balancing exercise.

55. It is notable that in *Zaoui*, after a careful consideration of the terms of Article 33, its context in the Convention, state practice and relevant rules of international law, and its drafting history, the Supreme Court of New Zealand rejected the submission that a proportionality test needed to be applied. It is true that the test which the court was considering concerned the gravity of the danger which the refugee would face if *refouled*, which is not quite the same as the test now in issue, but its reasoning applies equally:

> '25. Article 33, in its plain terms, first places an obligation on the states parties not to expel a refugee whose life or freedom might be threatened in certain circumstances but, secondly, notwithstanding that prohibition, empowers them to expel a refugee for certain reasons including the endangering of national security. The two considerations are stated distinctly in each paragraph. According to their ordinary meaning, the two provisions operate in sequence. They are not related in any proportionate or balancing way. The second, if satisfied in its own terms, defeats the prohibition in the first. That is so although, as we have said at paras [19] and [20], the second operates and must be interpreted in the context of the serious consequences of return to persecution contemplated in the first.
>
> 26. The dual purpose of the article is plain enough. The prohibition on exit in para 1 of article 33 mirrors the entry definition in art 1A set out at para [28] but, as with art 1 and its exceptions, the prohibition on exit is not absolute. Those who prepared the Convention were, and the 142 states party to it and the 1967 protocol now are, willing to allow the entry of refugees and to protect them against deportation to persecution, but that willingness had and has its limits.
>
> 27. That distinct sequential reading, based as it is on the ordinary meaning of the terms of the two paragraphs of art 33 and their purpose, is supported by a consideration of what the proportionality or sliding scale proposition would require. The decision-maker would have to measure against one another two matters which are very difficult to relate: the level of threat to the life or liberty of an individual, on the one side, and, on the other, the level of reasonably perceived danger to the security of the state. While the law may sometimes appear to require such weighing, such an interpretation is to be avoided unless it is plainly called for.'

56. The same is true of Article 21 of the Qualification Directive. The third recital to the Directive refers to the Refugee Convention as 'the cornerstone of the international legal regime for the protection of refugees', while Article 21(1) requires member states to respect the principle of *non-refoulement* 'in accordance with their international

obligations', which obviously includes but is not limited to the Refugee Convention. Subject to those international obligations, Article 21(2) then expressly permits *refoulement* in the same circumstances as Article 33(2) of the latter Convention. Once again there is nothing in the language to suggest that any further balancing exercise is required.

57. The same analysis applies to the relevant paragraphs of the Immigration Rules.

58. As already noted, section 34(1)(b) of the Anti-terrorism, Crime and Security Act 2001 expressly prohibits balancing the danger to national security on the one hand against the possible consequences to a refugee if returned to his own country on the other. This was the issue in *Zaoui*. While I agree with SIAC that the balancing exercise in issue in the present case is not quite the same as that described in section 34, that section does in my judgment demonstrate Parliament's intention that the straightforward terms of Article 33 of the Refugee Convention and the European Union and domestic law provisions giving effect to that Convention should not be subject to any further gloss beyond what is provided in the language of the Convention. Moreover, to attempt to balance the danger to national security against the cost and practicability of measures to reduce the risk, while at the same time being prohibited by section 34(1)(b) from taking account of the gravity of the threat which the refugee would face if returned to his own country would at best be an artificial exercise (see footnote 4 above).

59. Further, while it may be possible to reduce the risk posed by a person who is a danger to national security but who cannot be removed, it is questionable whether it is ever possible to eliminate it altogether, at any rate without significant expenditure of human and financial resources or the imposition of restrictions which are unacceptable in civil liberties terms on persons who have not actually been convicted of any offence but who represent a danger because of what they might do rather than what they have done. It needs to be borne in mind also that resources are finite while the number of persons whose activities need to be monitored by the Security Service or the police is already extensive. Measures taken to reduce the risk posed by one person inevitably mean that there are fewer resources available to reduce the risks posed by others.

60. Thus the effect of the proposed balancing exercise is to impose on the host country a risk which the Refugee Convention itself does not require the host country to run. It seems to me in those circumstances that where the language of the Refugee Convention, the Qualification Directive and the Immigration Rules does not require any further balancing exercise once it has been concluded that a person is a danger to national security, and where other international obligations such as the European Convention on Human Rights, the Torture Convention and customary international law operate to prohibit *refoulement* where that would lead to the gravest consequences, a strong justification would be needed for imposing such a requirement.

61. Where then does the balancing exercise which SIAC found to be necessary, that is to say balancing the danger to national security against the cost and practicability of measures which may reduce the risk, come from? There are two possible sources. The first is the UNHCR Guidance. The second is the decision of the CJEU in *T*. I shall examine these in turn.

The UNHCR Guidance

62. I have set out above the relevant provisions of the UNHCR Guidance. As already noted, that guidance is not binding but is entitled to weight in interpreting the Refugee Convention. The Guidance which is relevant in the present case can be viewed as falling under two heads. The first, which deals with the nature of the danger which a refugee must pose in order for Article 33(2) to apply, merely explains, in my judgment, what is already inherent in the use of the term 'danger to national security' in Article 33(2) and emphasises the need for 'reasonable grounds' for a conclusion that a person represents such a danger. Thus the danger must be 'very serious, rather than of a lesser order' (e.g. para 14(i) of the 2008 Guidance) and must be 'based on reasonable grounds and therefore supported by credible and reliable evidence' (the 2014 Guidance).

63. The second, however, in particular in the 2014 Guidance, but also in (for example) footnote 17 of the 2008 Guidance, introduces a proportionality test which goes considerably further than the language of the Refugee Convention itself. In my judgment this goes beyond interpretation. It adds to the Convention an additional requirement which is not contained in the text. Accordingly, while acknowledging the role of the UNHCR, we are entitled to and should reject this additional requirement as going beyond what has been agreed by the contracting states.

64. Once it is appreciated that *refoulement* is always subject to a state's obligations in international law, including the prohibition of torture in customary international law and (in the case of signatories to the relevant Conventions), the obligations contained in Articles 2 and 3 of the ECHR and Article 3 of the Torture Convention, it is apparent that the proportionality test proposed by the Guidance is unnecessary. A person cannot be *refouled* if that would infringe his right to life or his right not to be subject to torture or other inhuman or degrading treatment. That in itself provides sufficient protection, while being faithful to the text of Article 33(2). It represents its own proportionality test, prohibiting *refoulement* where that would be disproportionate because of the particularly grave consequences to the person *refouled*. Nothing more is needed or justified.

65. I would note also that the UNHCR Guidance speaks only of 'less serious measures' which will nevertheless 'eliminate' the danger to national security. It gives the example of expulsion to a third country being 'sufficient to remove the threat'. Unlike the balancing exercise which SIAC regarded as necessary, it does not suggest that *refoulement* may be prohibited when the measures which might be taken would merely reduce the risk. It is one thing to say that *refoulement* is a last resort which should not be taken when the danger to national security can be eliminated without undue difficulty or expense to the host country, for example by expulsion to a third country. It is a considerable leap to say that the host country must give shelter to a person who is a danger to its national security when that danger can only be reduced and not eliminated.

66. No measure short of *refoulement* has been suggested which would eliminate the danger posed by D8 to the security of United Kingdom, and that remains true despite the fact that it is not possible to return him to Iran. Accordingly, even if Article 33(2) were subject to the proportionality test suggested by the UNHCR Guidance, what that Guidance contemplates is something different from SIAC's test and it is not at all clear that the UNHCR test would assist D8.

T

67. In order to determine whether the CJEU decision in *T* supports SIAC's conclusion, it is necessary to see what *T* actually decides. As already noted, the case was concerned with revocation of a residence permit under Article 24 of the Qualification Directive, which requires a renewable residence permit to be issued to a refugee 'unless compelling reasons of national security or public order otherwise require'. The court's decision was that a refugee's support for a terrorist organisation may constitute such compelling reasons. It reasoned that the test of 'compelling reasons' for revoking a residence permit contained in Article 24(1) was less demanding than the test for permitting *refoulement* contained in Article 21(2). Accordingly a residence permit could be revoked even in circumstances where the conditions for *refoulement* were not satisfied. However, the court did not need to decide precisely how the test contained in Article 21(2), or for that matter Article 14(4), should be applied. If it had purported to do so, it would have gone beyond the scope of the questions referred to it.

68. This is the context in which paragraphs 68 to 75 of the court's judgment, set out above, must be considered. The court recognised, with respect correctly, that Articles 21(2) and 24(1) 'have distinct scopes and pertain to different legal regimes' (para 69). It commented in para 71 that *refoulement*, while authorised by Article 21(2), 'is only the last resort a member state may use whenever the measure is possible or is sufficient for dealing with the threat', but I do not read this as meaning that *refoulement* is prohibited, even where the refugee is a danger to national security, unless the host country can demonstrate that no lesser measure would be sufficient. Rather, it acknowledges that *refoulement* is the most drastic measure available, but that states may choose to take some lesser measure instead (revocation of refugee status under Article 14(4) being an obvious example). As the court went on to observe:

> '72. … Moreover, even where those conditions are satisfied, *refoulement* of the refugee concerned constitutes only one option at the discretion of the member states, the latter being free to opt for other, less rigorous, options.'

69. In my judgment the court would not have expressed itself in this way if it had intended to impose a requirement that *refoulement* is prohibited unless a proportionality exercise is undertaken.

70. In my judgment, therefore, SIAC read more into the judgment in *T* than the case contains.

Conclusions

71. Drawing the threads together, the Secretary of State has concluded that D8 is a danger to the national security of the United Kingdom. It is inherent in that conclusion, which the Secretary of State was entitled to reach, that he represents a real and serious danger. If it were not for the fact that to return him to Iran would put his life at risk and would expose him to a real risk of torture or other inhuman or degrading treatment, she would be entitled to *refoule* him. She would not be required to balance the danger which D8 represents against the cost, practicability or feasibility of measures which might be taken to reduce the level of risk which he represents. Although *refoulement* is not possible, the Secretary of State was entitled to take the lesser steps of revoking D8's refugee status by her decision of 15th October 2020 and refusing his claim for such status by her decision of 8th July 2022.

Retained EU law revisited

72. I will now explain why I have concluded that the decision of the CJEU in *T* forms part of retained EU law. This requires consideration of some rather intricate legislation.

73. 'Retained EU law' is defined by section 6(7) of the Withdrawal Act, as amended by the European Union (Withdrawal Agreement) Act 2020, to mean:

> 'anything which, on or after IP completion day[5], continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time)'.

74. The definition recognises, therefore, that there are various routes by which a provision of European Union law may have come to form part of domestic law, and which may therefore qualify as retained EU law. For the purpose of this appeal, the relevant routes are those identified in sections 2 and 4 of the Withdrawal Act.

75. Section 2(1) of the Withdrawal Act, as amended by the 2020 Act, provides that:

> '(1) EU-derived domestic legislation, as it has effect in domestic law immediately before IP completion day, continues to have effect in domestic law on and after IP completion day.'

76. 'EU-derived domestic legislation' is defined by section 1B(7) to mean:

> 'any enactment so far as—
>
> (a) made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972,
>
> (b) passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act,
>
> (c) relating to—
>
> (i) anything which falls within paragraph (a) or (b), or
>
> (ii) any rights, powers, liabilities, obligations, restrictions, remedies or procedures which are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, or
>
> (d) relating otherwise to the EU or the EEA,
>
> but does not include any enactment contained in the European Communities Act 1972 or any enactment contained in this Act

[5] 31st December 2020.

> or the European Union (Withdrawal Agreement) Act 2020 or in regulations made under this Act or the Act of 2020.'

77. Section 20(1) of the Withdrawal Act defines 'enactment' as including 'rules … or other instrument made under an Act'. In my judgment it is sufficiently clear that, as a result of this definition, the Immigration Rules fall within the definition of 'enactment' for the purpose of the Withdrawal Act, even though as a matter of ordinary language they are not legislation and there has been some debate whether they are 'made under' the Immigration Act 1971 (cf. *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230 and *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] 1 WLR 2208, which discuss the status of the Rules).

78. Section 4 of the Withdrawal Act, also as amended by the 2020 Act, provides that:

> '(1) any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day
>
> (a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and
>
> (b) are enforced, allowed and followed accordingly,
>
> continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly). …'

79. Thus section 4 of the Withdrawal Act is concerned with European Union law which has effect in domestic law by virtue of section 2(1) of the European Communities Act 1972, while section 2 of the Act is concerned with European Union law which has effect in domestic law by virtue of section 2(2) of the 1972 Act. The distinction between these two provisions of the 1972 Act is that section 2(1) deals with directly applicable European Union law ('without further enactment to be given legal effect'), while section 2(2) enables domestic regulations to be made in order to implement obligations of the United Kingdom under European Union law.

80. Because the Qualification Directive was not directly applicable, it did not have effect in domestic law by virtue of section 2(1) of the 1972 Act, as already explained. Rather, it was given effect by virtue of changes to the Immigration Rules. Therefore the relevant provisions of the Immigration Rules are EU-derived domestic legislation having effect in domestic law within the meaning of section 2 of the Withdrawal Act. The route by which they form part of this retained EU law as defined in section 6(7) of the Act is section 2, not section 4, of the Withdrawal Act.

81. However, the issue in the present case is not concerned with the Immigration Rules themselves, which say nothing about the balancing exercise described in *T*. Rather, it is whether European Union law requires the Rules to be interpreted so as to conform with the CJEU's interpretation of the relevant provisions of the Qualification Directive in *T* and, if so, whether that requirement is itself retained EU law. Before the United Kingdom's departure from the European Union, the position was clear. In accordance

with the *Marleasing* principle (*Marleasing SA v La Comercial Internacional de Alimentación SA* [1991] ECR I-4135), national courts had a duty to interpret national legislation so as to give effect to European Union directives such as the Qualification Directive. After that departure, decisions of the CJEU having effect in European Union law before IP completion day form part of 'retained case law' and 'retained EU case law', by virtue of the definitions contained in section 6(7) of the Withdrawal Act:

> 'In this Act—
>
> "*retained case law*" means—
>
> (a) retained domestic case law, and
>
> (b) retained EU case law; …
>
> "*retained EU case law*" means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before IP completion day and so far as they—
>
> (a) relate to anything to which section 2, 3 or 4 applies, and
>
> (b) are not excluded by section 5 or Schedule1,
>
> (as those principles and decisions are modified by or under this Act or by other domestic law from time to time) …'

82. Section 6(3) of the Withdrawal Act then provides that:

> '(3) Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after IP completion day and so far as they are relevant to it—
>
> (a) in accordance with any retained case law and any retained general principles of EU law, and
>
> (b) having regard (among other things) to the limits, immediately before IP completion day, of EU competences.'

83. The effect of these provisions is that *T* forms part of retained EU case law and therefore of retained case law. If (contrary to the view which I have expressed earlier in this judgment) *T* had decided that the Secretary of State is required to carry out the balancing exercise before revoking or refusing refugee status, the English court would have been required to follow that decision.

84. Mr Kinnear submitted that this conclusion would be negated by paragraph 6 of Schedule 1 to the Immigration and Social Security Coordination (EU Withdrawal) Act 2020, which provides that:

> '(1) Any other EU-derived rights, powers, liabilities, restrictions, remedies and procedures ceased to be recognised and available in domestic law so far as—
>
> (a) they are inconsistent with, or are otherwise capable of affecting the interpretation, application or operation of, any provision made by or under the Immigration Acts (including, and as amended by, this Act) or
>
> (b) they are otherwise capable of affecting the exercise of functions in connection with immigration.'

85. However, sub-paragraph (2) of the same paragraph limits the effect of paragraph (1) to rights, etc which form part of EU retained law by virtue of section 4 of the Withdrawal Act:

> '(2) The references in sub-paragraph (1) to any other EU-derived rights, powers, liabilities, obligations, restrictions, remedies and procedures is a reference to any rights, powers, liabilities, obligations, restrictions, remedies and procedures which—
>
> (a) continue to be recognised and available in domestic law by virtue of section 4 of the European Union (Withdrawal) Act 2018 (including as they are modified by domestic law from time to time) …'

86. As section 4 of the Withdrawal Act deals with directly applicable provisions of EU law, this paragraph has no application in the present case.

87. For these reasons I would reject the Secretary of State's first ground of appeal.

Disposal

88. For the reasons explained at [45] to [71] above, I would allow the appeal.

89. Finally, I would record that in granting permission to appeal to this Court, SIAC observed that even though D8 cannot be returned to Iran, the distinction between full refugee status and the lesser form of discretionary leave which will have to be granted to him is significant. However, this is not a matter which we have been asked to consider.

LORD JUSTICE PHILLIPS:

90. I agree.

LADY JUSTICE ELISABETH LAING:

91. I also agree, with one minor qualification. The question whether the relevant provisions of the Immigration Rules (HC 395 as amended) ('the Rules') are retained EU law was argued by the parties in supplementary notes in SIAC. The Secretary of State specifically accepted that the relevant provisions of the Rules were retained EU law. The Secretary of State's argument in that note, and her relevant ground of appeal in this

court were not, therefore, based on the contention that the Rules were not retained EU law, but on the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. We asked the parties about this during the hearing, but did not hear full argument about it, as it was not an issue in this appeal. Without fuller argument, I am not persuaded that that which is envisaged in section 1(4) of the Immigration Act 1971 (the 1971 Act'), which is the result of the process described in section 3(2) is either 'legislation' or an 'enactment'.