SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/96/2010
Hearing Dates: 6th and 7th October 2015
Date of Judgment: 22 December 2015

Before:

THE HONOURABLE MR JUSTICE IRWIN
UPPER TRIBUNAL JUDGE ALLEN
MR WILLIAM FELL CMG

Between:

K2

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

MR H SOUTHEY QC and **MS A WESTON** (instructed by **Birnberg Peirce and Partners**) appeared on behalf of the Appellant.

MR T EICKE QC and **MR S GRAY** (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State.

MR A McCULLOUGH QC and **MR M GOUDIE** (instructed by **Special Advocates' Support Office**) appeared as Special Advocates.

Introduction

1. This case has a long, involved history, under current and former names. We do not intend to rehearse the history, which was summarised in paragraphs 3 to 13 of our judgment of 18 December 2014. This judgment should be read in continuation of that judgment and the rulings of 28 April and 7 July 2015.

2. For convenience, we here restate paragraphs 98 to 100 of the judgment of December 2014:

> "98. On the basis of the OPEN evidence, we conclude that it is very likely NISS is aware of the Appellant, aware of the accusations against him, aware that he has a continuing dispute with the UK authorities. The lack of interest in K2 and the continuing protective effect of his "disputed UK nationality", in our judgment, means that the Sudanese authorities will take no step to interfere with the legal process before this Commission or to prevent the Appellant playing his full part in the appeal.
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> 99. These conclusions are in no way weakened, and may be regarded as confirmed, by our conclusions based on the CLOSED material. We therefore consider that even if NISS were to intercept and read communications between the Appellant and his English lawyers, he is not at risk of serious harm as a consequence.
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> 100. It follows that we reject the submission that there can in this instance be no fair proceedings or that the Appellant is unable to partake properly in his case. The appeal should therefore proceed. The Appellant has ample opportunity to submit evidence in writing. The Commission will facilitate any sensible steps to enable him to give evidence orally to the Commission, whether by video link or simply by a telephone link to the hearing room."

3. We now proceed to consider the substantive national security case against the Appellant and whether the deprivation of his British citizenship was justified in law. We do so on the basis that there is no good reason why the Appellant cannot engage in this appeal, and fully instruct his lawyers. That was the thrust of our conclusions in December 2014. He has had ample time to do so since then. There have indeed been significant communications between him and his solicitors, but he has not engaged with the national security case against him in any full or direct way. We address the detail below. For now, it is clear that position is not going to change and we must proceed to the substantive case.

4. Our approach to the CLOSED evidence in this case has been coloured by the position adopted by the Special Advocates instructed on behalf of the Appellant. In April 2014, the Special Advocates indicated in clear terms that, in the absence of any instructions from K2 as to the substance of the Secretary of State's OPEN case on national security, the Special Advocates were "not realistically able to make any

submissions or challenge in relation to that case in CLOSED beyond expressing general support for K2's position". They went on to conclude that they did not "consider that it could advance K2's interests for them to seek to engage with the CLOSED national security case". That position was communicated in OPEN and restated by the Special Advocates in a Note for Hearing on 6 October 2015. Although not engaging with the substance of the CLOSED national security case, we record that the Special Advocates have maintained their active role in seeking to have disclosed into OPEN that which may be achieved, if necessary by gisting. On the same basis, the Special Advocates have made submissions to the Commission in relation to the (currently academic) issue considered in the addendum to this judgment.

5. The Commission's view all along has been that the Special Advocates could properly have tested the case presented in CLOSED. This is an approach established in other branches of the law. Defence counsel in criminal cases are able to do so properly and with effect, even where the client has admitted his guilt to his lawyers. Nevertheless, the Commission has accepted the decision of the Special Advocates as being one for them to take.

6. Our approach to the case is affected to this extent: we have been astute to look for the most independent and objective evidence in the CLOSED case and to adopt a particular caution in drawing inferences adverse to the Appellant. It is entirely his choice not to provide instructions to his lawyers, more than can be construed from the statements which he has filed. To that extent he cannot complain if he is disadvantaged. However, we have taken this consciously conservative approach because we did not have the assistance of the Special Advocates in testing evidence advanced in CLOSED.

Some Points of Law

7. In paragraphs 43 to 47 of his written submissions, the Appellant submits that the position adopted by the Commission in relation to material obtained in breach of legal professional privilege as stated in the judgment of 14 November 2014 in *ZZ v SSHD* SC/63/2007 was incorrect. We concluded there was there no basis for a claim of abuse of process. Mr Southey QC did not seek to reopen the arguments before us, recognising that SIAC would wish to adopt a consistent approach here. We would and do. We note that on 7 September 2015, the Investigatory Powers Tribunal informed the Appellant that it "makes no determination in respect of the Claimant's case and dismisses the application for relief". The Appellant has thus failed to establish any systemic failure in the way legally privileged material which may have come to the authorities has been handled. It should be noted that on 15 July 2015, the Chairman ruled that:

> "SIAC has investigated as to whether any legally privileged material has been seen or listened to or used in any way which could properly be thought to have led to an abuse of process in these proceedings. SIAC is satisfied that there has been no such abuse here. Nor has any advantage been gained by the SSHD. Nor has any unfairness been caused to the Appellant as a result of any non-disclosure of material."

8. In written submissions the Appellant states that he has no means of excluding the possibility that LPP material has been obtained by the Security Services and passed to the Sudanese authorities. There is absolutely no evidence of that, in OPEN or in CLOSED.

9. We therefore consider there is no need to address LPP in this judgment.

10. In *J1 v SSHD* SC/98/2010, judgment of 15 April 2011, a different constitution of SIAC addressed the case of a different Appellant, including information relating to two men said by the SSHD to be associates of this Appellant (Bilal Berjawi and Mohamed Sakr) and information bearing on the Appellant's case. Mr Southey rightly says that his client took no part in that case, and was unable to make submissions then. He says we must confine our considerations to the evidence before us and set the other decision aside from our contemplation. Mr Eicke QC for the Secretary of State has argued that the Appellant has chosen to present no evidence to counter the Commission's conclusions in *J1*. In reality, he treats that decision as nothing more than a spur to the Appellant to engage with this appeal. We do not consider it bears any more weight. Our conclusions are based on the evidence before us.

11. The Appellant, in the course of judicial review proceedings, submitted that EU law is applicable to his case, and is the platform for more extensive disclosure than has been provided. It is also said that EU law, if applicable, may be the basis for a rather different approach to proportionality than might arise under English domestic law and/or the European Convention. We address the latter point below, and disclosure in the Addendum to this judgment. However, it is our view, following the binding decision of the Court of Appeal in *G1 v SSHD* [2013] QB 1008, that EU law does not apply to this case. Unlike the Franco-Algerian dual national *ZZ*, this case does not concern the exercise of free movement for an EU national. Save as required by the observation of the Supreme Court in *Pham v SSHD* [2015] UKSC 19, we approach this case on the basis it is not governed by EU law.

The Law Governing this Decision

12. SIAC set out the Commission's approach to deprivation cases in *Y1 v SSHD* SC/112/2011, judgment of November 2013, in paragraph 13, following the previous decision in *Al Jedda v SSHD* (2009) SIAC SC/66/2008. We repeat the approach here. The appeal is a challenge to the merits of the decision itself, not to the discretion to make the decision. We have come to our own decision as to the facts, applying the civil standard of proof. We have given great weight to the assessment of the Secretary of State and her security advisers, but we have reached our conclusions, based on our own assessment as to whether the Appellant represents a threat to the national security of the United Kingdom. We have considered what inferences can properly be drawn from the Appellant's past actions and current capacity and beliefs, so as to inform our assessment of future risk. Finally, we make our own assessment of the impact of the deprivation decision on the Convention rights of the Appellant, and, in relation to Article 8, of members of his family. Because of arguments presented, we address the question of proportionality below.

13. In considering what constitutes a threat to national security we re-state and reaffirm a further passage from *Y1*, as follows:

> "56. We have cited reasonably extensive passages from *Rehman* [*SSHD v Rehman* [2001] UKHL 47] in order to ground our proper approach, when considering what constitutes a threat to national security. The critical points emerging from the speeches in *Rehman* are as follows: firstly, there must be a proper factual basis for the decision; secondly, the Secretary of State is entitled to take the material together, to form an overview, and there is no obligation to treat each discrete piece of information as a separate allegation, which, if refuted or weakened one by one, necessitates without more a decision against deprivation; thirdly, the essence of the test is that the individual represents a "danger" to national security, not that he or she can be proved to have already damaged it: the Secretary of State is entitled to take a preventative or precautionary approach; fourthly, national security is engaged with matters beyond the borders of the United Kingdom, perhaps particularly in relation to terrorism, even where that activity is directed against other States; fifthly, due deference must be shown to the policy of the Executive with regard to national security, and the views of the Secretary of State must be given considerable weight."

14. Mr Southey argues that deprivation of citizenship is a serious step with broad implications. That was the purport of the judgment of Lord Mance in *Pham v Home Secretary* [2015] 1 WLR 1591, [2015] UKSC 19 at paragraph 98, where such a step was described as "radical". The same emerges from the judgment of Lord Sumption in paragraph 108. There is an important distinction to be made between the position of an alien (such as *ZZ*) and a citizen such as this Appellant, see for example *Rottmann v Freistaat Bayern* [2010] QB 761. Mr Southey submits it can hardly be the law that there are fewer rights (of disclosure or otherwise) attendant on the citizen than on an alien: hence the disclosure obligation should be the same. In addition, any balancing exercise or judgment as to the proportionality of deprivation must reflect the Appellant's status as a citizen.

15. Mr Southey suggests that the EU law as to proportionality imports the notion that the State must employ the "least restrictive measure" test, see the formulation rehearsed by Lords Reed and Toulson in *R (Lumsdon) v Legal Services Board* [2015] 1 WLR 121, [2015] UKSC 41 at paragraph 33. Mr Southey acknowledges that EU law (and Article 9(1)(c) of the Parliament and Council Directive 2006/1123/EC in particular) applied directly in *Lumsdon*. To that extent he was unable to argue that *Lumsdon* is direct authority for the approach in the instant case. However, he did in effect ask the Commission to adopt a similar course as a means of achieving a proportionate outcome.

16. For these reasons Mr Southey argues that the approach laid down in *Y1* was in error. In *Pham* (supra) at paragraphs 59 and 60, 98, and 108-110, the Supreme Court emphasised that proportionality was part of domestic law, and that it may be that domestic law and EU law would reach the same outcome in adjudicating the proportionality of this decision. The approach laid down in *Y1* did not sufficiently accommodate proportionality. However, the impact of EU law on domestic law

meant that the requirements of domestic law now mean that the Commission should "subject the justification presented by [the Respondent] to intense review despite her apparent expertise".

17. Mr Southey also argued that common law principles of fairness apply to this appeal. It is not clear how far he sought to extend this. As is now well-established, the full range of procedures to satisfy the requirements of the common law are not applicable in such circumstances, see: *Home Office v Tariq* [2012] 1 AC 452, [2011] UKSC 35.

18. Mr Eicke QC for the Respondent restated his submission that the approach laid down in *Y1* was correct. The judgments in *Pham* provide no support for a changed approach, and Mr Eicke also relies on the dicta referred to above, suggesting it is unlikely there will be a difference in practice between the domestic and EU requirements on proportionality. He laid particular emphasis on the words of Lord Sumption in paragraph 108 of *Pham*:

> "108. Although the full facts have not yet been found, it seems likely that the outcome of this case will ultimately depend on the approach which the court takes to the balance drawn by the Home Secretary between Mr Pham's right to British nationality and the threat which he presented to the security of the United Kingdom. A person's right in domestic law to British nationality is manifestly at the weightiest end of the sliding scale, especially in a case where his only alternative nationality (Vietnamese) is one with which he has little historical connection and seems unlikely to be of any practical value even if it exists in point of law. Equally, the security of this country against terrorist attack is on any view a countervailing public interest which is potentially at the weightiest end of the scale, depending on how much of a threat Mr Pham really represents and what (if anything) can effectually be done about it even on the footing that he ceases to be a British national. The suggestion that at common law the court cannot itself assess the appropriateness of the balance drawn by the Home Secretary between his right to British nationality and the relevant public interests engaged, is in my opinion mistaken. In doing so, the court must of course have regard to the fact that the Home Secretary is the statutory decision-maker, and to the executive's special institutional competence in the area of national security. But it would have to do that even when applying a classic proportionality test such as is required in cases arising under the Convention or EU law, a point which I sought to make in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] 3 WLR 1404, at paras 31-34."

19. Mr Eicke relied on the decision of the Court of Appeal in *R(Rotherham Borough Council and others) v Secretary of State for Business Innovation and Skills* [2014] PTSR 1387, [2014] EWCA Civ 1080, and in particular paragraph 56. There the Court stated that, where there was a choice of possible measures, the test was whether the member state's assessment of the appropriateness of a given measure was "manifestly wrong", by reference to the broad discretion which must be accorded the State in

political, economic and social choices, and *a fortiori* in matters of national security. Therefore in adjudging the proportionality of deprivation, the expertise of the State must be respected.

20. Mr Eicke adds that it is wrong to impose, by reference to Directive 2004/30/EC, an "imperative grounds" test, before deprivation can be justified. No such special threshold applies. Even in *Rottmann*, the CJEU itself applied a proportionality test with no such special threshold, and concluded that deprivation of citizenship was proportionate by reason of the failure by *Rottmann* to disclose that he was the subject of a judicial investigation into suspected fraud, and did so, despite the fact that the decision rendered *Rottmann* stateless.

21. Mr Southey has also argued that the Appellant can rely on the prohibition on arbitrary deprivation of citizenship under Article 12(4) of the International Covenant on Civil and Political Rights ("ICCPR") and the UN Declaration on Human Rights. He says this imports "high standards of predictability, clarity and due process". As a consequence the "balance of probabilities' threshold, the normal civil standard of proof, is inappropriate. Mr Eicke rejects this argument. The ICCPR and the UN Declaration are not enforceable in English law: see *R(SG and others) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, [2015] UKSC 16. Nor are those international law documents imported into domestic law through the gateway of Article 8.

22. We reject the argument that those provisions apply in English law, and we are sceptical that, even if they did, there would arise the consequences claimed by Mr Southey. The civil standard of proof does apply here. We do of course recognise the need for great care in examining the evidence and reaching our conclusions, given the impact of deprivation. In any event, anything truly resembling an arbitrary deprivation of citizenship would fail the test formulated in *Y1* and would certainly not be proportionate.

23. There was also an argument between the parties as to the engagement of Article 8 of the ECHR. Mr Southey submits that if the exclusion of a settled migrant engages Article 8 (see: *Üner v Netherlands* (2007) 45 EHHR 14), then the Article 8 rights of a citizen who has spent many years living in the UK and whose wife and family are (or have been) based here, must be engaged. Essentially, Mr Eicke replies that the facts here show that Article 8 is not engaged, or at least not infringed. We address this question below after making findings of fact.

24. We return to the formulation of the proper approach summarised in *Y1* and quoted above in paragraph 8. We have followed that approach. For clarity, we add that we have considered the proportionality of the measure adopted to the identified threat: that exercise is implied by the formulation in *Y1*. We make it explicit we have done so.

The Facts: National Security

25. The OPEN evidence in this case bearing on the issue of national security is to be found in the Amended First Open Statement on behalf of the Respondent. The witness NF gave evidence in support of the case and was cross-examined by Mr Southey. The Appellant made four statements in the case. Much of the content of his

statements bears on his fears of giving substantive evidence, an issue we addressed previously. His third and fourth statements are unsigned and undated. However we have admitted and considered them. The circumstances of their creation are addressed in the evidence of the Appellant's solicitor, Mr Graham. We accept Mr Graham's evidence to the effect that through a number of telephone consultations with the Appellant, these statements were drafted and approved by K2.

26. The case against K2 is summarised in the National Security Statement as follows. It is said he:

> "• travelled from the UK to Somalia in October 2009 to engage in terrorism-related activities with BERJAWI and SAKR;
>
> • along with BERJAWI and SAKR, engaged in a variety of terrorism-related activities which are likely to have been linked to, or directly involved with, the Somali based extremist group Al Shabaab;
>
> • engaged in terrorism-related training;
>
> • fought against AMISOM forces;
>
> • has associated with known extremists in the UK and overseas."

27. The Respondent adds that Berjawi and Sakr had travelled to Kenya in February 2009. The Security Service assessment was that this journey was for contact with extremists, possibly for onward travel to fight in Somalia. Berjawi and Sakr were arrested in Nairobi and subsequently deported from Kenya to Britain for reasons of national security. Those events form the backdrop to K2's journey it is asserted in company with Berjawi and Sakr later the same year.

28. This is a case where the nature of the case is broadly known to K2. The Appellant had considerable notice of what was said from the judgment of SIAC in *J1 v SSHD*, given in April 2011, in addition to the matters in the National Security Statement.

29. Some background facts are relevant. It is agreed that K2 was involved in a large demonstration on 10 January 2009 outside the Israeli embassy, stimulated by events in Gaza. The Appellant agrees he was involved, but denies he was "a politically active person" when he attended the event, which he agrees "got out of hand". He was subsequently arrested and charged with violent disorder, and bailed. His account is that he subsequently panicked at the prospect of a trial and of a prison sentence, and for that reason fled the country. His account of events is thereafter sparse.

30. NF confirmed the National Security Statement. She confirmed there was evidence, which could not be produced in OPEN, that K2 had travelled out of the UK with Berjawi and Sakr. When cross-examined, she acknowledged that evading his criminal proceedings might have been part of his motivation for leaving at that time, but confirmed that there were other reasons: the travel was for extremist purposes. Whilst agreeing that Berjawi and Sakr had long been associated with each other, and

that they had earlier that year travelled to Africa without K2, she rejected the suggestion put to her that they were close to each other but not to K2. It was also put to her that, given the departure date in 2009, the journey to Somalia and the arrival in Sudan in early 2010, K2's time in Somalia (if he went there) must have been brief. The witness did not agree, based on CLOSED material. She also rejected the suggestions that if K2 had been engaged in jihadist activity in Somalia, firstly, it would have been difficult to disengage from Al Shabaab and secondly, it would have been risky to enter Sudan, on the grounds the Sudanese authorities were hostile to jihadists. Disengagement from action with Al Shabaab was not problematic. The witness was aware of some open-source material showing the Sudanese authorities acting in specific cases of Al Shabaab activists, however it was not odd for a jihadist to go to Sudan.

31. NF was asked if any national security risk represented by K2 could not have been met by imposing a TPIM or Control Order. She answered that consideration had been given to a range of options, because K2 had left the UK. Given the judgements made about K2, the risk that the authorities wished to mitigate was the return of K2 to Britain. That could not be met by the suggested alternative measures.

32. Following a session of CLOSED evidence, it was agreed that some more information could be made OPEN. This was stimulated by the cross-examination by Mr Southey and his suggestion that there had been, in effect, too short a time for K2 to have been engaged in terrorist activity in Somalia. NF returned to the witness box and confirmed that as of the beginning of November 2009 K2 was located in Somalia, and that at some point between April and May 2010 he left Somalia. She confirmed that for all of that time it was the assessment that K2 was engaged in Al Shabaab-related activity.

33. Although the great preponderance of K2's statements avoid dealing with the allegations against him, he does make some relevant statements. In paragraphs 30 and 31, K2 gives an explanation as to why he instructed his aunt who lives in Khartoum not to tell his family that he was there. On his account, his mother and wife were kept in ignorance of where he was for a considerable period. In paragraph 28 he states that "some months after I arrived [in Khartoum] I went to stay with my aunt, my mother's older sister". He then says in paragraph 29 that his wife and mother came to Sudan in March 2010. Before that, K2 says his aunt had not told his wife and mother he was present in the country: they were told when they arrived in March 2010. This account is nonsensical unless it means K2 claims to have been in Khartoum for some months before his mother and wife arrived in March 2010. Their date of arrival is corroborated by K2's mother in her witness statement of 24 January 2014, paragraphs 11 to 14.

34. Given that there is evidence K2 was in Somalia at this period, Mr Southey could offer no real suggestion as to why this should not be regarded as a misleading account, save that confusion as to dates can arise easily as an error.

35. It has all along been K2's case that he cannot meet the national security case through fear of the Sudanese authorities. We have found there is no basis for an objective or reasonable fear. Nevertheless, Mr Southey urged on us that we should accept that K2 felt a "subjective" fear which should be taken into account when reaching inferences from his silence about the case. In that context, the Commission asked Mr Southey to

consider why K2 would fear entering a denial that he had been in Somalia, if that was the case. He considered the matter. In the end he could make no reasonable suggestion as to why such a denial might cause difficulties for K2. He did suggest perhaps it might be that K2 would be fearful of beginning to speak about his activities, since then he could be drawn into detail.

Conclusions and National Security

36. Even following the cautious approach we have identified, we have come to the firm conclusion that K2 has not been frank in his witness statements. The contents of his statement amount to a denial that he was ever in Somalia. The CLOSED evidence is conclusive that he was present in Somalia at the relevant time.

37. The CLOSED evidence is conclusive that K2 travelled to Somalia in October 2009 to engage in terrorism-related activities, in the company of Berjawi and Sakr. There is convincing evidence that he remained in the company of those men and engaged in a variety of terrorism-related activities connected with Al Shabaab. The evidence is conclusive that he engaged in terrorism-related training.

38. The OPEN evidence is supportive of those conclusions to this degree: we conclude that K2 has no good reason to remain silent to the extent that he has done, or indeed at all. Moreover, his statements are, we find, deliberately misleading about the timing of arrival in Sudan. They are misleading about a period when he was in fact in Somalia, and knows he was in Somalia.

39. We find those matters proved to the civil standard. These conclusions would withstand a review, however intense, with access to the CLOSED evidence. If it were necessary to apply the criminal standard of proof to those matters, we would reach the same conclusions.

40. We conclude on the CLOSED evidence that it is probable that K2 fought against AMISOM forces. Here we could not reach the criminal standard of proof, if that were necessary.

41. We do find that the terrorism-related activities were at least linked to Al Shabaab. On that point we would reach the criminal standard of proof, if that were required. It is highly probable that K2's terrorism-related activities were, at least in part, directly involved with Al Shabaab.

42. We do find that there is conclusive CLOSED evidence that K2 had established associations with known extremists in the UK and overseas. Here too, we would reach this conclusion to the criminal standard if that was necessary. We are further clear that these associations were conscious and deliberate associations, not accidental or unwitting contact.

The Facts: Private and Family Life

43. K2 left Britain voluntarily, avoiding a criminal case, breaching bail and thereby committing a further criminal offence. On his account, he did not inform his wife or his mother of his whereabouts. On his account when they came to Khartoum in March 2010, and were informed he was there, there was "a very emotional reunion".

His wife stayed on in Sudan. K2 and she then lived together, firstly on their own, and then in his wife's family home in Khartoum. Having lost a child to miscarriage previously, K2's wife again became pregnant. In February 2011, she returned to the UK so as to have the benefit of good medical care for the birth (K2, third statement, para 36). Their son was born in England on 4 March 2011. K2 stayed on living at his wife's parents' house, at least for a time.

44. K2's family and his wife have since visited him once. His wife and son came to visit at the end of 2011 and stayed for about six months. They then returned to the UK and he has not seen them since. He has contact by means of the internet. He speaks to his wife and son "once or twice a month". In his fourth statement, K2 tells us that his wife now has "a teaching job abroad". He is not explicit about it, but the natural inference is that his son is also now based out of the UK.

45. We conclude (1) that K2's wife and child are no longer based in Britain, although they still visit there, (2) that K2 and his wife have numerous family members in Sudan, (3) that K2's wife and child can visit Sudan freely and could reside there if they wished to do so, and (4) that K2's own natal family can and do visit reasonably often in Sudan.

46. In terms of his private life, as opposed to family life, K2 on his own account had not settled into adult life in Britain very well, and then left of his own choice. His instructions are that he would wish to return, even though he accepts he would face criminal proceedings, remand in custody and a period of imprisonment. His account of his life in the Sudan is of a quiet but settled life, with a steady part-time teaching job. He expresses continuing anxiety about his security and safety, and that there is some curiosity from those around him as to why he does not return to Britain, with some suggested rumours that he was "involved in something dangerous".

Conclusions on the Deprivation of Citizenship

47. We conclude that the Secretary of State was fully justified in deciding to deprive K2 of his British citizenship. Given the nature and extent of his activities, that would have been justified, in our view, even if it meant a really significant encroachment on the Appellant's Article 8 rights. As we have indicated, we do not in the event find there was significant encroachment.

48. The national security witness NF emphasised that the choice of measure was determined by the desire to prevent K2 returning to the United Kingdom. Given what we find he had done, and what we find to be his associations, that step was proportionate and fully justified. We have not needed to resort to deference to the expertise of the Secretary of State in reaching those conclusions. A Control Order or TPIM (even if available) would not have met the risk identified. In that sense, deprivation was the "least restrictive measure".

49. Equally, we have not found that the law required "imperative grounds" before deprivation was justified. However, had we taken that view, we would firmly have concluded that such grounds existed.

50. For these reasons, this Appeal is dismissed.

Addendum

51. In accordance with the remarks of the Supreme Court in *Pham*, and our earlier ruling, we address the question of disclosure. The test formulated by the CJEU in *ZZ (France) v Home Secretary* [2013] QB 1136, Case C-300/11 *ZZ (France)*, as considered by the Court of Appeal in *ZZ v The Secretary of State for the Home Department* [2011] EWCA Civ 440, was that in that case "the essence of the grounds" against ZZ had to be disclosed to him regardless of the impact on national security. SIAC expressed its interpretation of that test in *ZZ v Secretary of State for the Home Department* SC/63/2007, judgment dated 2 July 2014, see paragraphs 42-46.

52. If that test applied here, we indicate that some further disclosure would be necessary. This would likely take the form of further summary or gist.

53. We further make clear that, if the evidence underpinning those further points were removed from the case, making that further disclosure unnecessary, it is our view the case would have had the same outcome. The deprivation would have been justified. We recognise that providing such a hypothetical view is unusual, but it does appear to be called for by the approach of the Supreme Court in *Pham.*