SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: **SC /128/2016**
Hearing Date: 20.10.20 – 23.10.20
Date of Judgment: 7th December 2020

Before

THE HONOURABLE MR JUSTICE JOHNSON
UPPER TRIBUNAL JUDGE GLEESON
SIR ANDREW RIDGWAY

Between

S2

Appellant/Applicant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Ms Amanda Weston QC and Mr Anthony Vaughan (instructed by **Birnberg Peirce Ltd**) appeared on behalf of the Appellant

Mr Robin Tam QC and Ms Natasha Barnes (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Mr Ashley Underwood QC and Mr Martin Goudie QC (instructed by **Special Advocates' Support Office**) appeared as Special Advocates

1. S2 is an Iraqi national currently living in the United Kingdom. He associated with a man who we shall refer to as AH. In June 2017 AH was convicted of offences relating to his support for Daesh/Islamic State (different terminology has been used, but we adopt "Daesh" which was the term that S2 was content to use). The Secretary of State considers that S2 is also supportive of Daesh and its terrorist ideologies, that he has encouraged others to travel to Daesh-controlled territories and may have assisted AH in the transfer of people and funds to Daesh, and that he poses a threat to UK national security that is best mitigated through his exclusion.

2. On 20 May 2016 the Secretary of State directed that S2 should be excluded from the United Kingdom ("the exclusion direction"). On 26 September 2017 the Secretary of State decided to refuse S2's claim for protection under article 33 of the Refugee Convention ("the protection decision").

3. S2 accepts a past and continuing association with AH, but disputes the Secretary of State's case that he, S2, has supported Daesh. S2 applies under section 2C(2) Special Immigration Appeals Commission Act 1997 to set aside the exclusion direction. He appeals under section 2(1) of the 1997 Act against the protection decision. The Commission has directed that the application and the appeal should be heard together.

4. The hearing took place between 20 and 23 October 2020. S2 was represented by Amanda Weston QC and Anthony Vaughan, instructed by Birnberg Peirce Ltd. The Secretary of State was represented by Robin Tam QC and Natasha Barnes, instructed by the Government Legal Department. Ashley Underwood QC and Martin Goudie QC, instructed by the Special Advocates Support Office, appeared as Special Advocates. We are grateful to all for the considerable assistance that they have provided.

5. We heard evidence from S2 and a Security Service witness AA. We also received written evidence from S2's former flatmate, B, and a medico-legal expert. There was a closed component to the hearing in which AA gave further evidence, and was cross-examined by the Special Advocates, and in which further submissions were made on behalf of the Secretary of State and the Special Advocates. We set out our findings on the closed evidence in a separate closed judgment.

Anonymity

6. S2 was granted anonymity by an order of the Commission dated 6 November 2019. We have extended the anonymity to those connected with S2 where their identities and connections with S2 might tend to identify S2. Continued anonymity was not opposed by the Secretary of State or by any representative of the press or by anybody else. We have, nonetheless, considered whether a grant of anonymity continues to be justified. We are satisfied that it does, for the reasons given by the Commission in its order of 6 November 2019, and primarily because if S2's identity were revealed, then: (1) the danger to him if he returns to Iraq will avoidably and permanently be increased, and (2) the safety of his remaining family in Iraq may be compromised.

The legal framework

European Convention on Human Rights

7. It is common ground that if S2 were removed to Iraq he would be at real risk of facing inhuman or degrading treatment. The Secretary of State therefore accepts that she may not lawfully remove him to Iraq because of the obligation under section 6 Human Rights Act

1998, read with article 3 of the European Convention on Human Rights, to act compatibly with the prohibition on inhuman and degrading treatment. It follows that S2 is entitled, at the least, to a form of limited leave to remain in the United Kingdom. This appeal will determine whether he is entitled to the greater package of rights and entitlements that would follow from recognition as a refugee under the Refugee Convention, or to humanitarian protection pursuant to the Qualification Directive 2004/84/EC, incorporated into the Immigration Rules HC395 (as amended) at paragraphs 339C and 339CA.

The Refugee Convention

8. The Secretary of State contends that S2 does not qualify for protection from refoulement as a refugee within the meaning of the Refugee Convention. She relies on articles 1F and 33(2) of the Refugee Convention.

9. Article 1F states:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> ...
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

10. Article 1F(c) should be "interpreted restrictively and applied with caution", recognising that there is a "high threshold" for its application which is "defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security", and there must be "serious reasons for considering that the person concerned bore individual responsibility for acts of that character" – see *Al-Sirri v Home Secretary* [2013] 1 AC 745 *per* Baroness Hale JSC and Lord Dyson MR at [16]. Thus, "an individualised" assessment is required. It is not sufficient that a person is a member of a group that is included in a list of terrorist organisations – it must be shown that they bear individual responsibility for acts that come within the scope of article 1F(c) – see *Al-Sirri* at [15].

11. By section 54(1) Immigration, Asylum and Nationality Act 2006, acts of committing, preparing or instigating terrorism, or of encouraging or inducing others to commit, prepare or instigate terrorism, are to be taken as amounting to acts contrary to the purposes and principles of the United Nations.

12. Article 33 of the Refugee Convention states:

> **"Prohibition of expulsion or return ("refoulement")**
>
> 1. No Contract 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, nationality, 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..."

Humanitarian protection

13. A person who does not qualify as a refugee may nonetheless be entitled to "humanitarian protection" if substantial grounds are shown for believing that if they were removed from the United Kingdom they would face a real risk of suffering serious harm – see paragraph 339C of the Immigration Rules.

14. Exclusion from humanitarian protection under the Qualification Directive at article 12(2), and the power to exclude from the jurisdiction in regulation 14(4), are incorporated into the Immigration Rules at paragraphs 339D and 339GB respectively. It has not been suggested that there is any material difference in these provisions from those in the Directive and accordingly we analyse the Secretary of State's decision with reference to the relevant Rules.

15. The Secretary of State contends that S2 does not qualify for humanitarian protection under paragraph 339C. She relies on paragraph 339D,

16. Paragraph 339D states:

> **"Exclusion from humanitarian protection**
>
> A person is excluded from a grant of humanitarian protection for the purposes of paragraph 339C(iv) where the Secretary of State is satisfied that:
>
> ...
>
> (ii) there are serious reasons for considering that they are guilty of acts contrary to the purposes and principles of the United Nations or have committed, prepared or instigated such acts or encouraged or included others to commit, prepare or instigate such acts;
>
> (iii) there are serious reasons for considering that they constitute a danger to the community or security of the United Kingdom;
>
> ..."

Appeal against refusal of protection claim

17. A claim that removal of a person from the United Kingdom would breach (a) obligations owed under the Refugee Convention and/or (b) obligations in relation to persons eligible for a grant of humanitarian protection, is a "protection claim" – see section 82(2)(a) Nationality, Immigration and Asylum Act 2002.

18. Where the Secretary of State refuses a protection claim there is, ordinarily, a right of appeal – see section 82(1)(a) of the 2002 Act. Such an appeal may be brought on the grounds that:

    (a) the removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention (see section 84(1)(a));

    (b) the removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection (see section 84(1)(b)).

19. Here, the Secretary of State has issued a certificate that the refusal of the protection claim was in the interests of national security. This means that an appeal under section 82 may not be brought – see section 97(1) of the 2002 Act. Instead, an appeal may be brought to the Special Immigration Appeals Commission – see section 2 of the 1997 Act.

20. The Secretary of State has issued a certificate under section 55 of the 2006 Act that S2 is not entitled to the protection of article 33(1) of the Refugee Convention because of the effect

of articles 1F and 33(2). Section 55(3) and (4) of the 2006 Act makes provision for the effect of such a certificate on an appeal brought on the ground specified in section 84(1)(a):

> "**55 Refugee Convention: certification**
>
> ...
>
> (3) The... Special Immigration Appeals Commission must begin substantive deliberations on the asylum appeal by considering the statements in the Secretary of State's certificate.
>
> (4) If the... Commission agree with those statements it must dismiss such part of the asylum appeal as amounts to an asylum claim (before considering any other aspect of the case)."

21. It is common ground that in the circumstances of the present case the test to be applied under section 55(4) of the 2006 Act is materially identical to that to be applied under paragraph 339D of the Immigration Rules. Accordingly, the appeal must be dismissed under both of the grounds specified in section 84(1)(a) and (b) of the 2002 Act if the Secretary of State has established either that:

    (1) S2 falls within the scope of article 1F(c) (with the result that he is not a refugee), or

    (2) S2 falls within the scope of article 33(2) (with the result that although he qualifies as a refugee he is not entitled to claim the benefit of the prohibition of refoulement under article 33(1)).

Review of exclusion direction

22. There is no statutory right of appeal against a direction (under prerogative powers) to exclude a person from the United Kingdom. Such a direction, ordinarily, is susceptible to judicial review. Here, the Secretary of State has certified that the exclusion direction was made in reliance on information which should not be made public in the interests of national security. It follows that there is a right to apply to the Commission to set aside the direction – see section 2C(2) of the 1997 Act. Section 2C(3) provides that in determining whether the direction should be set aside, the Commission must apply the principles that would be applied in judicial review proceedings.

Procedural background

23. On 19 May 2016 an official in the Special Cases Unit of the Office for Security and Counter-Terrorism made a submission to the Secretary of State in which it was recommended that she should exclude S2 from the United Kingdom, on the basis of the Security Service's assessment that S2's presence in the United Kingdom was not conducive to the public good. The submission recorded that S2 had left the United Kingdom on 22 April 2016.

24. On 20 May 2016 the Secretary of State personally directed that S2 should be excluded from the United Kingdom on the grounds of national security, on the basis that his continued presence in the United Kingdom was not conducive to the public good. As a result, S2's indefinite leave to remain in the United Kingdom was cancelled. The decision to cancel his indefinite leave to remain was certified under section 2C of the 1997 Act. A letter dated 20 May 2016 and addressed to the Applicant (at his address in the United Kingdom) informed him of the decision and said that he should not attempt to travel to the United Kingdom because he would be refused entry. That letter was served when S2 returned to the United Kingdom on 5 June 2016.

25. On 7 June 2016 S2 indicated that he wished to make a fresh asylum claim, and that he would be tortured if he were returned to Iraq.

26. On 9 June 2016 S2 issued proceedings for judicial review of the Secretary of State's decision to exclude him from the United Kingdom.

27. On 5 August 2016 S2 issued proceedings for judicial review of the Secretary of State's decision to revoke S2's indefinite leave to remain. On 6 September 2016 Flaux J granted permission to claim judicial review of that decision, and granted interim relief, such that the effect of the decision to cancel indefinite leave to remain was stayed until the determination of S2's claim for judicial review or further order.

28. On 22 September 2016 S2 made representations in support of his claim for asylum.

29. On 28 September 2016 the Secretary of State withdrew her decision to cancel S2's grant of indefinite leave to remain. As a result, by a consent order made on 13 March 2017 the claim for judicial review of that decision was withdrawn and the order for interim relief was discharged.

30. On 16 June 2017 the Secretary of State informed S2 that she was minded to conclude that he should be excluded from protection under the Refugee Convention pursuant to articles 1F and 33(2), and that he was excluded from a grant of humanitarian protection on the basis that rule 339D(ii) of the Immigration Rules applied. However, she was also likely to conclude that deportation would give rise to a real risk of a breach of article 3 ECHR. It was recognised that in those circumstances S2 could not be deported. However, it was considered that it might be appropriate to revoke the grant of indefinite leave to remain and to replace it with a limited period of leave which would, as necessary, be renewed for as long as there was a legal prohibition on S2's removal. S2 was given the opportunity to make representations, and he did so.

31. On 28 September 2017 the Secretary of State decided that S2 was excluded from the Refugee Convention under article 1F(c) for reasons which it was not in the public interest to disclose. She also decided that there were reasonable grounds for considering that S2 was a danger to the national security of the United Kingdom, such that article 33(2) of the Convention applied. She certified, under section 55 of the 2007 Act, that S2 was not entitled to the protection of article 33(1) of the Convention and that his claim had therefore been refused under paragraph 336 of the Immigration Rules. For the same reasons, she concluded that S2 was excluded from humanitarian protection under paragraphs 339D(ii) and (iii) of the Immigration Rules. The Secretary of State considered that the removal of S2 to Iraq would result in a real risk of a breach of his rights under article 3 of the European Convention on Human Rights.

32. S2's appeal against that decision was issued on 11 October 2017.

33. The Commission has directed that that appeal, and the application for judicial review that was issued on 9 June 2016, should be heard together. Extensive case management directions were given.

The application to adduce further evidence

34. The decisions that are challenged in this case were made in 2016 and 2017. The evidence is focussed on events that, respectively, pre-date those decisions. By June 2019 S2 had filed five witness statements, three from himself and two from his former flat-mate, B. On 24

June 2019 Laing J directed that S2 should not file or serve any further evidence unless he had first applied to and obtained the Commission's prior permission.

35. At the outset of the hearing it was indicated to us that B wished to give evidence beyond that set out in his statement. We were not willing to permit this to occur, for the first time, from the witness box (or video link). We therefore directed that any supplementary evidence should be first set out in a further witness statement. On the second day of the hearing, S2 applied to adduce a further statement from B and a further statement from himself. The further evidence largely concerned S2's social media communications in 2015. Ms Weston QC pointed out that appellants who face a closed case are in a particularly difficult and invidious position in that they have to seek to respond to a case that has not been disclosed to them, so as to prove a negative. It is understandable, she said, that late evidence may emerge in these circumstances. Moreover, S2's mental health difficulties have created significant additional challenges for S2 and his representatives in the collation of evidence. Against this background, she argued that the Commission should fairly take a liberal approach to compliance with its directions.

36. In the event, Mr Tam QC did not object to the application for permission to rely on this further evidence and indicated that the Secretary of State did not wish to cross-examine B, or to cross-examine S2 further. Notwithstanding the attitude taken by the Secretary of State, we declined to grant the application and instead reserved a decision until the conclusion of the case.

37. We do not consider that there is any good reason for the late production of evidence. This appeal and application have been outstanding for more than 3 years. A direction was made on 4 December 2017 that S2 should file all of the evidence on which he sought to rely (together with written confirmation that it was all of the evidence on which he sought to rely) by 8 August 2018. As we have said, S2 filed a significant amount of evidence after that date, resulting in the direction of 24 June 2019.

38. The production of further evidence, on the second day of the hearing, and in respect of matters that occurred as long ago as 2015, flies in the face of the Commission's careful directions. There is no good explanation for it. Aside from the breach of the directions there are two consequences, both of which were identified by Mr Tam.

39. First, a party to proceedings before the Commission is entitled to an opportunity to provision of an opponent's evidence in accordance with the Commission's directions, so that an assessment can be made as to the appropriate response. When such evidence is tended in breach of those directions, and particularly where it is provided at a very late stage, that opportunity is compromised, with the potential for unfairness.

40. Second, because there is a closed component to these proceedings, there is an established process of exculpatory review, so as to seek to secure fairness to the appellant. That process involves the searching of material held by the Secretary of State, in the light of the evidence given by an appellant, in order to identify any evidence that might undermine the case of the Secretary of State or support that of the appellant. The Special Advocates review the product of the exculpatory review. It is open to the Special Advocates to seek to require the Secretary of State to disclose the product of those searches, or to undertake more expansive searches. That process has been diligently and productively undertaken in this case. Inevitably, however, it was, to a degree, dependent on the material that had been filed by

S2. It is unlikely to be practical for comprehensive and reliable exculpatory searches to be undertaken at short notice in the course of a hearing.

41. For these reasons there is considerable risk that permitting late evidence may give rise to an injustice to one or other or both parties. The closed nature of part of the case is a reason for requiring greater, not lesser, rigour in compliance with the Commission's directions, for the reasons Mr Tam gave. If the new evidence had resulted in the disruption of the timetable for the hearing, or if its nature (assessed in the context of all of the open and closed evidence in the case) had given rise to any real risk of injustice, then we would have declined to grant permission for it to be adduced.

42. In the event, there has not been a significant disruption to the timetable for the hearing. We do not consider that (assessed in the nature of the case as a whole) the limited opportunity that the Secretary of State has to respond to the new evidence (or to undertake further evidential searches) gives rise to a significant risk of injustice, and we do not think that it is practically likely that the outcome of the exculpatory review would have been materially different if it had been informed by the further evidence that S2 now seeks to adduce.

43. We have, nonetheless, considered carefully whether to refuse to permit the evidence to be adduced. The importance of requiring compliance with the Commission's directions, and the absence of any good reason for failing to provide the evidence at a much earlier stage, would, in our judgment, amply justify such a decision.

44. Having taken all matters into account, we have decided to grant the application. We appreciate that S2 and B simply do not know what is in the closed case. They have evidently, at the last moment, considered that there are further matters that they wish to address in case those matters feature in the closed evidence. Although we do not consider that this is an adequate explanation, we nonetheless consider it is in the broader interests of justice that all of the evidence on which S2 seeks to rely is fully taken into account.

The factual background

45. S2 was born in the Kurdish region of Iraq on 3 March 1982. On 27 February 2002 he arrived in the United Kingdom and claimed asylum. His asylum claim was refused. He was granted exceptional leave to remain until 17 April 2006. On 14 January 2004 S2's son, K, was born. S2 was not, at that point, in a relationship with K's mother, and S2 did not meet K until he was 11 years old.

46. S2 suffers from depression, as is explained by Dr Deeley in his medico-legal report (see below). On 18 December 2005 S2 poured a can of petrol around his flat and over himself. He set it alight, as an act of attempted suicide precipitated by severe depression. He was admitted to hospital and was in intensive care for several weeks. He subsequently pleaded guilty to an offence of arson, being reckless as to whether life was endangered. He was sentenced to a hospital order under section 37 Mental Health Act 1983.

47. On 17 July 2008 S2 was granted indefinite leave to remain. S2 subsequently applied for naturalisation. This was refused because S2 had not declared his conviction. A subsequent application for naturalisation was also refused.

AH

48. AH is a British national. He was arrested in November 2016 and was subsequently charged with terrorism offences. In June 2017 he was tried for an offence contrary to section 11

Terrorism Act 2000 (supporting Daesh) and two offences contrary to section 57 of the 2000 Act (possession of articles for a purpose connected with the commission, preparation, or instigation of an act of terrorism). He was sentenced to two five-year, and one six-year, terms of imprisonment, to be served concurrently. The prosecution opening note for the criminal proceedings explained that:

(1) AH had repeatedly espoused support for Daesh in his writings, speeches, and wider communications, and had sought to justify its activities;

(2) AH had been prolific in his dissemination of materials that were supportive of Daesh;

(3) AH had co-ordinated Daesh sympathisers in the United Kingdom, including as a host/administrator of online chatrooms which promoted Daesh, and by convening meetings and forums which promote extremism;

(4) AH had attempted to raise money for Daesh and was apparently able to deliver funds securely and covertly;

(5) AH had furnished a Daesh commander with intelligence in respect of an upcoming military operation on the Iraqi city of Mosul;

(6) AH had recruited people for Daesh.

S2's account of his association with AH

49. S2's account is that as a result of the hospital order he began to receive the support that he needed to address his depression. In that context he decided to change his life so as to live within the structure and code of Islam. He came across the teachings of Mullah Krekar. By that time, unbeknownst to S2, Mullah Krekar had been designated as an individual who belonged to, or was associated with, Al Qaeda. S2 followed Mullah Krekar on the social networking site Paltalk. S2 contributed to the discussions on Paltalk but did not say anything which could be seen as extreme. One of the Paltalk groups connected with Mullah Krekar was administered by AH. In that context, S2 came to know AH. They met at the Zakariah Mosque in Coventry. They kept in contact, sometimes on Paltalk, sometimes by phone and sometimes by meeting in person – meeting up occasionally for a meal. AH also got to know S2's flatmate, B, who had considerable IT expertise: "[t]here was nothing he could not fix." B would help AH with IT issues. As a result, S2 was invited "into a separate and more select Paltalk group which was really for those who had some kind of co-ordination role." S2 denies doing anything dangerous or extreme in the course of his participation in the Paltalk groups.

50. In 2010 S2 agreed with AH to start a new charity, which would try and engage with young Muslims who were involved in smoking, drinking and taking drugs, to help them get back on track. S2 became a trustee, but was not aware of the legal obligations of a trustee and he left the management of the charity to AH. The charity promoted the teachings of Mullah Krekar.

51. In 2013 the Charity Commission "effectively shut down" the charity, because of concerns about its links with Mullah Krekar. S2 was criticised by the Charity Commission for failing to act in accordance with his obligations as a trustee. In the same year AH gave a public speech which caused S2 considerable concern because of the extremist views espoused. From this point S2 decided to distance himself from AH's political activities, and from the Paltalk groups, and from the charity. He did, however, continue his friendship with AH.

They visited each other and attended social events together. They would lend each other money. But this was all personal, not political. AH was, at this time, also helping to find a wife for S2, which was a matter which much preoccupied S2.

52. In 2014 AH had been in Norway. S2 kept in touch with him. He applied for a visa to visit him but this was refused on grounds of public policy. AH returned to the United Kingdom in December 2014.

53. On 20 November 2015 a man named Mike called S2 and arranged a meeting at Coventry Police Station. He identified himself as an MI5 agent. He asked S2 to provide information to the Security Service about people and activities in his community. A further meeting was arranged. Before that meeting took place S2 contacted MI5 and said that he did not wish to become an informant. Mike's tone changed, and he said that there would be consequences of this decision, that S2 was not a citizen of the United Kingdom and that he could be removed to Iraq. S2 found that this conversation was "chilling." He believes that the action that is now being taken against him is punishment for refusing to become an informant, rather than being motivated by any genuine belief that he poses a danger to national security.

54. On 21 April 2016 S2 was due to fly to Iran to visit his mother, who was said to be having medical treatment there. He was questioned at the airport for many hours and missed his flight. In the event, he travelled the next day, returning to the United Kingdom (without difficulty, even though, by then, the exclusion direction had been made) on 5 June 2016. On arrival, he was made aware of the exclusion direction.

55. In his oral evidence S2 adopted the witness statements that he had made. He said that Islam had been his religion since 2006. He did not claim fully to understand everything about Islam, but he readily agreed with Mr Tam that Islam is a religion of peace, that it is not a religion that encourages violence, and that violence in the name of Islam is unacceptable. He agreed that Daesh is an extremist group who killed people unjustly, purportedly in the name of Islam but incompatibly with the principles of Islam. Although S2 disagreed with Daesh "inside myself" he felt it difficult to express that. He felt that he did not have sufficient knowledge of Islam (primarily because the Quran is written in Arabic) to express criticism of Daesh.

56. Mr Tam challenged S2 over his continued friendship with AH even after it was clear that AH had espoused extremist views. S2 explained that he appreciated that AH held "bad opinions" which he disagreed with, but he stayed friends with him primarily because he was helping to find someone for S2 to marry. He agreed that AH was not the only person who could help S2 in this endeavour, but AH knew a lot of people. One of the people he had proposed was his wife's sister.

57. S2 said that in the 6 weeks between being stopped at Gatwick in 2016, and AH being released from prison, he saw AH a few times. He knew that AH was sought by the Italian authorities. He denied that his association with AH was an indicator of his support for AH's extremist views. Rather, his purpose was to get married.

58. S2 strenuously denies the assessments that have been made by the Secretary of State:

> "I reject the allegation that I am supportive of ISIL and its terrorist ideologies, that I have at any time encouraged others to travel to ISIL-controlled territories or assisted [AH] in the transfer of people and funds to ISIL, or that I pose any danger to national

security. I don't have any connection to ISIS whatsoever and I do not sympathise with them.

... I [did not assist AH] in the transfer of people or funds to ISIL. On the contrary, until after his arrest and conviction I was unaware that he had done so (although I was aware of his views)."

S2's further evidence

59. In the further evidence adduced during the hearing, and not challenged by the Secretary of State, S2 explained an exchange that had taken place on Facebook between a person called SJ and himself on 5 and 6 March 2015. In the course of that conversation SJ said that he had been arrested in Greece and that he needed 1,000 euros. S2 explained that some time earlier, when S2 had been working in a mobile phone shop, SJ had purchased an iPhone from him and had said that he was going to drive to Kurdistan. S2 installed a navigation app on the iPhone for SJ. That was the last that S2 had heard from SJ until this conversation. At the time S2 read the messages he thought that they were a scam – he did not actually believe it was SJ. Although he had agreed to the request to transfer money, he did not recall actually complying with the request – he had felt uncomfortable and had wanted to close down the conversation. S2 said that there was a rumour that SJ and another person had gone to join Daesh but that they had been caught in Greece and arrested. S2 said that AH informed him that he was returning to the United Kingdom because the weather in Norway was bad. In fact, AH had been deported from Norway. S2 said he was unaware of that at the time.

Medical evidence

60. S2 relied on a medico-legal report of Dr Quinton Deeley, Honorary Consultant Psychiatrist, dated 28 July 2017 and a supplementary report dated 12 October 2018 (with appended correspondence).

61. Dr Deeley's expert opinion is that S2 suffers from a recurrent severe depressive disorder with intermittent psychotic symptoms (hearing voices). The psychotic symptoms resolved with antidepressant medication. Dr Deeley did not find any specific evidence relating to a history of exploitation from the medical records or from his questioning of S2. He did, however, observe that socially isolated, vulnerable adults are at increased risk of exploitation, abuse and neglect. In respect of S2's continued association with AH after the latter expressed extreme views, Dr Deeley said:

"[S2] denied sharing [AH]'s extreme political views. He explained their friendship as based on an interest in religious matters and because he was hopeful that [AH] would be able to assist him in finding a wife through his own wife or because he was otherwise well connected. [S2]'s interest in finding a wife was also a prominent concern when I interviewed him in July 2017 as well as in October 2018, and in my opinion this is likely to have influenced his continued association with [AH]. [S2]'s social isolation, desire for friendship and company, and to find a wife, in the context of severe depression, are in my opinion likely to have made it harder for him to distance himself from [AH] should he have wished to do so. These features in my view are likely to have affected his judgment and discernment of the motives others may have for maintaining friendship with him."

B's evidence

62. It had been contemplated that B would give evidence by video-link from Iraq. However, shortly before the hearing he came to the United Kingdom. As a result, he was required to self-isolate under regulation 4(2) Health Protection (Coronavirus, International Travel) (England) Regulations 2020. That did not seem to us to cause any difficulty: he would be able to give evidence by video-link from his accommodation in the United Kingdom. It was pointed out to us, correctly, that a person may leave the place where they are self-isolating in order "to fulfil a legal obligation, including attending court or satisfying bail conditions, or to participate in legal proceedings" – see regulation 4(9)(c). It seemed to us, however, that if it had been necessary for B to give evidence at a time when he was otherwise required to self-isolate, it would be more appropriate for him to do so by way of video-link even if he could have lawfully attended the hearing. Mr Tam indicated that he did not wish to cross-examine B. B was, nonetheless, keen to give oral evidence and attended the court building to do so. We decided it was not necessary for him to give oral evidence – see rule 39(5)(f)(ii) of the 2003 Procedure Rules. He had been given every opportunity to put what he wished to say into witness statements. He had done so, and his evidence was not challenged. We have fully considered his evidence in that context: the weight of his evidence has not been diminished by cross-examination.

63. At the time of his first statement in 2018 B was a doctoral student in cybersecurity at Oxford University. He had lived with S2 as flat-mates between about 2009 and 2011 when he was studying for a Bachelor's degree in "ethical hacking and network security", and then for a Master's degree in Forensic computing. He provided three witness statements in support of S2's appeal.

64. B knows both AH and S2 well. There is no doubt in his mind "[o]n the basis of [his] own associations and experiences" that the Secretary of State's assessment of S2 is mistaken. B explains that S2 is not proficient in English and that he will often misunderstand things. S2 has been very helpful to B. He has helped him to transfer money from Iraq to the United Kingdom. He did so by identifying people in the United Kingdom who wished to send money to their families in Kurdistan. B would then send these monies from Iraq to Kurdistan, and S2 would collect the equivalent amount from the family member in the United Kingdom. That would enable the transfer of money across international borders without commission or overheads.

65. B stressed that S2's interest in Mullah Krekar was similar to that of many thousands of other Kurds, and was not indicative of extremist sympathies. Mullah Krekar did a great deal for the community and, although most Kurds would completely reject his extremism, they nonetheless held a grudging respect for him. It follows that an interest in, or support for, Mullah Krekar should not be taken as an acceptance of, or agreement with, his views.

66. B considered that there was a real risk that S2's actions might be misinterpreted by someone outside the Kurdish community. Between 2009-11 when B was living with S2, and even as late as 2014, there was a great deal of support in the Kurdish community for opposition groups, including Islamic State which was seen as an Islamic group that eliminated corruption and defended Sunni rights. It was only later "that we saw what monsters they were". In that earlier period it was not clear that AH was an extremist – that only became clear later.

67. S2 became known as someone who was proficient in IT, but that was a false impression. It was created because he became the go-between for users of certain groups on Paltalk and B, but it was B who was responsible for resolving any IT issues, not S2. It was only because

of B, and S2's links to B, that S2 got drawn into the circles of people like Mullah Krekar and AH.

68. S2 was someone who always wished to please others, and he was naïve. This made him vulnerable to exploitation.

69. In his most recent witness statement B explained that he had accessed a complete copy of S2's Facebook account between December 2014 and November 2016. He spent several hours going through the records to see if there was anything that might have been misunderstood by the security services. He did not find anything which he considered could fairly cause concern. He drew attention to the conversation between S2 and SJ which S2 then addressed in his most recent statement (as we have explained above).

AA's evidence

70. AA has been a member of the Security Service since September 2017 (having before that served as an Intelligence Officer in the UK Armed Forces). He confirmed that he agreed with the assessments that had been made about S2 in the open and closed cases, and that he believes that the assertions of fact made in those cases are true. The assessments made in the open national security case were that:

    (1) S2 was a longstanding associate of AH, who had been in contact with a Daesh member, and S2 was supportive of Daesh and its terrorist ideologies;

    (2) Between 21 December 2014 and 16 November 2016 S2 had encouraged others to travel to Daesh-controlled territories and may have assisted AH in the transfer of people and funds to Daesh;

    (3) S2 posed a threat to UK national security, best mitigated through his exclusion.

71. AA was in court when S2 gave his evidence and he read the new witness statements that had been produced on the second day of the hearing. He had also read the medical evidence and, whilst he did not consider that he was competent to comment on the suggestion that S2 was suffering from a serious mental disorder, he readily accepted that he had no reason to doubt what Dr Deeley said. None of that evidence changed AA's view of the validity of the assessments and assertions of fact that had been made. He was confident that the assessments that had been made took account of S2's ability to communicate and his mental disorder. He considered that he could not – in his open evidence - give further detail of the grounds for his confidence in respect of this, without damaging national security. He did explain this further in his closed evidence. We are satisfied that his evidence in the closed hearing could not be communicated to S2 without damaging national security. The Special Advocates (who in other parts of the case have been vigorous in seeking to "open up" evidence) did not suggest otherwise.

The appeal

The issues and submissions

72. The issues on the appeal are:

    (1) Whether there are serious reasons for considering that S2 has been guilty of acts contrary to the purposes and principles of the United Nations, construed in accordance with section 54 (cf article 1F(c) of the Convention);

(2) Whether there are reasonable grounds for regarding S2 as a danger to the security of the United Kingdom (cf article 33(2) of the Convention).

73. It was not suggested that S2 was guilty of any acts that came within the scope of article 33(2) but which did not also come within the scope of article 1F(c). It is therefore sufficient to confine attention to the first of these two issues.

74. Ms Weston emphasised the disadvantages of an appellant in SIAC proceedings where there is a closed process, drawing a comparison with the parlour game "pin a tail on the donkey". She submitted that S2 was at an even greater disadvantage than other appellants, because of his mental health condition. She also pointed out that where the Secretary of State had provided tangible open evidence, S2 had been able to respond effectively. Thus, at one point, the Secretary of State had relied on answers given by S2 in the course of an examination under schedule 7 to the Terrorism Act 2000. It was alleged that S2 had said that he first learned of AH's extreme views in 2016 (when on any view he must have known of this much earlier). In fact, S2 was able to show that his answers had been misconstrued. The Secretary of State accepted that "there may have been difficulties in understanding by both parties in the port stop". Ms Weston fairly observes that this shows that where evidence relied on by the Secretary of State has been disclosed to S2, he has been able to provide a plausible response. Who is to say that he would not be able to do likewise in respect of the evidence that remains in closed?

75. In the light of the evidence of Dr Deely and B, she contended that there was clearly much scope for S2's actions to be misinterpreted or misconstrued, and there was a risk for him to be an unwitting stooge for others whose motivations he may not have understood.

76. Ms Weston placed emphasis on the exacting test imposed by article 1F of the Refugee Convention (see paragraph 10 above) and argued that if membership of a terrorist organisation is not, in itself, sufficient to engage its application then mere association with a person who is a terrorist cannot suffice either.

77. In respect of the evidence about "Mike", she contended that if the Security Service are to use inducements and adverse consequences as a means of obtaining information, then the "carrots that they offer must be carrots, and the sticks must be sticks." She argued that it would be quite wrong to draw any adverse inference against S2 from his unwillingness to act as an informant for the Security Service.

78. Mr Tam relied on the closeness of the relationship between S2 and AH. He contended that S2 had, in his evidence, sought to distance himself from AH whereas in fact they were friends, and that this undermined his credibility. He pointed out that S2 had continued to associate with AH even after it was clear that AH was espousing extremist views and even after AH had got S2 into trouble with the Charity Commission. S2's assertion that the association was due to AH assisting him to find a wife should be treated with caution because S2 had accepted that others could have assisted with that endeavour. Moreover, the proposal that S2 should marry AH's sister-in-law, and S2's association with AH immediately after his release from prison, shows just how close their relationship was. Mr Tam submitted that if the Secretary of State made good her factual assertions about S2's conduct then that would meet the seriousness threshold required by article 1F(c) of the Refugee Convention. There can be no doubt about the horrendous nature of the conduct of Daesh, and that had not been put in dispute in these proceedings.

The open case

79. S2 has accepted close and continuing association with AH. AH is a convicted terrorist. S2 is aware of that and of AH's extremist views.

80. Those two facts do not establish that S2 is guilty of acts contrary to the purposes and principles of the United Nations. Nor do they, in our judgment, give rise in themselves to serious reasons for considering that he is guilty of such acts.

81. In *Raissi v Commissioner of Police of the Metropolis* [2007] EWHC 2842 (QB) McCombe J at [48] (and, on appeal, [2008] EWCA Civ 1237 Sir Anthony Clarke MR at [34]) held that the claimant's close and familial connection with a terrorist did not give reasonable grounds to suspect the claimant of involvement in terrorism. So too here.

82. Even if S2 did understate the extent of his relationship with AH, any lack of credibility on the part of S2 would not, in itself, establish that he fell within the scope of article 1F(c) of the Convention (the burden being on the Secretary of State). Anyway, we accept Ms Weston's submission that S2 had been forthcoming in his evidence in accepting that he was a friend of AH.

83. Nothing in the open case sustains the Secretary of State's assertions that S2 is supportive of Daesh and its terrorist ideologies, or that he has encouraged others to travel to Daesh-controlled territories or that he may have assisted AH in the transfer of people and funds to Daesh, or that he poses a threat to UK national security. If the evidence were limited to that which appears in the Secretary of State's open national security case, we would, unhesitatingly, have allowed the appeal.

The closed case

84. The closed case is another matter. The evidence called by the Secretary of State in closed has been through the process prescribed by rule 38 of the Special Immigration Appeals Commission (Rules) 2013. That is to say, the Special Advocates have reviewed the closed case in order to test the Secretary of State's contention that revelation of anything within the closed case would be damaging to the interests of national security. The Commission has, independently, reviewed the question of whether the evidence in the closed case can be disclosed (or in some way summarised) to S2. In some instances additional information has been provided in open. In respect of everything that has remained in the closed case, the Commission has upheld the Secretary of State's objection to disclosure, and has done so on the basis that disclosure would be damaging to the interests of national security.

85. Ms Weston rightly stressed that there was a continuing obligation on the Commission to keep under review the question of whether anything in the closed case could be revealed to S2 without damaging the interests of national security. We have sought to discharge that obligation. We have no doubt that the Special Advocates have likewise kept this under review. We remain satisfied that the Secretary of State's objection to disclosure should continue to be upheld, because disclosure would be damaging to the interests of national security.

86. Further, in assessing the closed case we have considered it in the context of the open evidence, including, in particular:

    (1) S2's evidence that he did not support AH's extreme views, and that his association with AH was primarily motivated by his desire to find a wife;

(2) B's unchallenged evidence that, in his opinion, S2 did not have anything to do with extremist ideology or activity;

(3) The potential for naivety on the part of S2 and for him to be to manipulated by others;

(4) The potential for S2's actions and/or motivations to be misunderstood, whether as a result of his lack of literacy or his mental health difficulties, or otherwise.

87. We accept that before the test in article 1F(c) is found to be satisfied, it is necessary for the evidence to meet the high threshold identified in *Al-Sirri* (see paragraph 10 above). That includes establishing personal responsibility on the part of S2 for the acts which he is found to have committed. That is the test we have applied.

88. We do not accept that S2's mental health difficulties and any consequential naivety or vulnerability to manipulation would, in themselves, render S2 less dangerous to national security than might otherwise be the case. If the Secretary of State's assessments of his conduct are well-founded, then S2's motivation for (or manipulation into) engaging in that conduct does not necessarily diminish the consequential threat to the interests of national security: a person who engages in terrorist activities may be just as dangerous if they do so through naivety or exploitation as if they are motivated by ideology. However, we do accept that this may impact on S2's culpability or personal responsibility – and it is clear from article 1F(c), as interpreted by *Al-Sirri*, that it is necessary to establish personal responsibility for the acts before article 1F(c) is engaged.

89. We have also had well in mind that S2 has not had an opportunity to challenge the closed case. The Special Advocates have been vigorous in doing so. But however skilled a special advocate, it can never be known what an appellant might be able to say if presented with the case against them. We do, however, note that S2 has had notice of the nature of the allegations that are made against him and that he has therefore, to that extent, had an opportunity to respond (eg to give, as he has done, reasons for his association with AH, or to explain why, in the period December 2014 to November 2016, he might have encouraged others to travel to Daesh-controlled territories or to have assisted AH in the transfer of people and funds to Daesh).

90. Having considered the closed evidence in this context, and for the reasons that we give in a separate closed judgment, which we will hand down at the same time as this open judgment, we are satisfied that the Secretary of State has amply established that there are serious reasons for considering that:

(1) S2 is supportive of Daesh and its terrorist ideologies.

(2) S2 has encouraged others to travel to Daesh-controlled territories.

(3) S2 may have assisted AH in the transfer of people and funds to Daesh.

(4) S2 poses a threat to UK national security.

91. We also find that S2 is personally responsible for these acts, and that there are serious reasons for considering that his conduct comprises acts contrary to the purposes and principles of the United Nations.

92. It follows that the provisions of the Refugee Convention do not apply to S2.

93. It was common ground (and we find) that, in the circumstances of this case, if article 1F(c) applies (as we find it does) then S2 is likewise excluded from humanitarian protection pursuant to paragraph 339D of the Immigration Rules.

The review

94. In the light of the outcome of the appeal:

    (1) The Secretary of State had a sound factual basis for concluding that S2 should be excluded from the United Kingdom in the interests of national security (and, for the avoidance of doubt, we find that this was so as at the date the direction was made on 20 May 2016);

    (2) The practical benefit to S2 of overturning the exclusion direction would be limited. He might be entitled to leave the United Kingdom and to return within the period of any restricted leave that he is given, but the Secretary of State is entitled to set short periods of restricted leave.

95. Ms Weston argued that because S2 is now in the United Kingdom the direction had "no current practical force". She argued that this meant that the Secretary of State should withdraw the direction. We disagree. Rather, the potential consequence of the direction no longer having practical force is that the challenge may now be academic such that it should be dismissed on that ground alone. Mr Tam nevertheless invites us to deal with the challenge on its merits, and we do so.

96. We address the grounds of review which are advanced in turn.

Procedurally defective

97. S2 contends that the Secretary of State has failed to give adequate reasons for the direction, sufficient for S2 to know the case against him and to have a reasonable opportunity to make representations and thereby answer the case against him. That is, however, a consequence of the nature of the underlying evidence which cannot be disclosed without damaging the interests of national security. This feature of the case is the reason why it is being determined by SIAC, with procedures that seek to accommodate such material, rather than by the Administrative Court.

98. S2 further argues that the Secretary of State should have given S2 advance notification of her intention to make an exclusion direction so that S2 could make representations. However, the nature of an exclusion direction is such that it may often be inapt to give advance notification of the intention to make the direction. First, it may not be practicable to give such notification if, as was the case here, the person is outside the United Kingdom and there is no ready means of contact. Second, if advance notification is given then the proposed direction could be thwarted by the individual coming to the United Kingdom before the direction is made. There is no general rule that representations be sought before a direction of this nature is made, and procedural fairness does not require it. It is sufficient that once the direction has been given representations can then be made, inviting revocation of the direction, and that the direction can be revoked in the light of those representations (or, if not revoked, challenged by judicial review).

99. S2 points out that the Secretary of State could have revoked his indefinite leave to remain under section 76 of the Nationality, Immigration and Asylum Act 2002 (which provides such a power in respect of a person who is liable to deportation but who cannot be deported

for legal reasons). Such a decision would have given rise to a right of appeal. It was, S2 argued, an abuse, and a breach of Parliament's intention in passing section 76 of the 2002 Act, not to exercise the power under section 76 and instead to issue the exclusion direction, and thereby deprive S2 of a right of appeal.

100. We disagree. The Secretary of State has a prerogative power to exclude a non-British national from the United Kingdom. The fact that there is, separately, a statutory power to revoke a grant of indefinite leave to remain does not prevent the Secretary of State from exercising that prerogative power. There is nothing to suggest that the Secretary of State decided to exercise her prerogative power, rather than the power under section 76, so as to deprive S2 of a right of challenge in the courts. In fact, as these proceedings show, S2 has, in effect, had a right of appeal and a right of judicial review against (effectively) the same underlying factual assessment that he is a danger to national security. We do, however, accept Ms Weston's broader submission (by reference to observations in *Bah (EO (Turkey) - liability to deport)* [2012] UKUT 196 (IAT)) that the factual basis upon which the Secretary of State has exercised the power may be subject to scrutiny. That is precisely what we have done, albeit primarily and necessarily in the closed judgment.

101. It is then said that the Secretary of State was bound to withdraw the exclusion direction at the point at which S2 had successfully challenged the decision to cancel the grant of indefinite leave to remain. Again, we disagree. The exclusion direction was not dependent on indefinite leave to remain being cancelled. Indeed, it was made before the cancellation of S2's indefinite leave to remain. The grant of interim relief, whereby S2 was to be treated as continuing to enjoy a grant of indefinite leave to remain, did not invalidate the antecedent exclusion direction. It did mean that it had no or limited legal effect for so long as S2 continued to enjoy indefinite leave to remain, but that is quite different from demonstrating any public law error in the decision-making process.

102. S2 then argues that the direction did not take effect at the time it was made because it was not communicated to S2. He relies on the well-known principle in *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604. At the point at which the direction was communicated to S2 he was in the United Kingdom, and therefore the direction that he be excluded from the United Kingdom had no continuing effect. We reject this argument. It considerably overstates the effect of *Anufrijeva*. The principle there articulated (that a decision could not have the character of a determination with legal effect unless or until it was communicated) was made in the particular context of a decision that would give rise to a statutory right of appeal. It is not of universal application. Many decisions, with public law consequences, take legal effect before they are communicated to those affected. Judgment in *R (FB) Afghanistan)) v Secretary of State for the Home Department* [2020] EWCA Civ 1338 was given in the course of this hearing. It concerned the legal effect of a decision as to the time and date at which removal should take place, where that decision (as opposed to notification of the "removal window") had not been communicated to the individual. We invited the submissions of the parties on the observations of Hickinbottom LJ at [81]-[83]:

> "81. At common law, it is well-established that there is generally a public law duty to give an individual notice of any decision which has a direct adverse impact on his or her rights or interests; but that duty is neither absolute nor stand-alone. It is a duty associated with the obligations of procedural fairness. As Lord Steyn

(with whom Lords Hoffmann, Millett and Scott agreed) put it in *Anufrijeva* at [26]:

"Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice…"

…

85. … the decision to remove is not, in itself, appealable – but whether in the form of removal directions or a removal window, it is subject to judicial review. … Of course, the remedy open to the applicant must be effective, including effective access to the court, but that is a different issue…"

103. We are grateful to S2's representatives for their further submissions on this point. They point out that unlike the removal window notice that was under challenge in *Medical Justice*, at the time the decision to exclude S2 was capable of having effect it was not served and it could not therefore be challenged. That is correct. However, the exclusion direction was not, itself, appealable. Its validity did not depend on it being notified to S2. It was valid from the point it was made.

Breach of article 8 ECHR and failure to consider best interests of S2's child

104. We accept that the exclusion direction engaged S2's right to respect for private and family life, given his long period of residence in the United Kingdom, where he had a child. We have, however, concluded that there were ample grounds to make the direction in the interests of national security. To the extent that there was an interference with S2's right to respect for private and family life, that interference was necessary for and proportionate to the need to protect national security. The direction to exclude was made in response to a submission that explicitly and fully took account of the duty regarding the welfare of S2's child imposed by section 55 Borders, Citizenship and Immigration Act 2009.

Took account of irrelevant matters, or reached an irrational conclusion

105. For the reasons we have given in the closed judgment we find that the Secretary of State had ample justification for directing that S2 should be excluded from the United Kingdom. We accept Mr Tam's submission that any misunderstanding of what was said by S2 during the port interview was immaterial to the direction and does not impact on the cogency of the overall national security case.

Decision was motivated by the improper purpose of punishing S2 for refusing to act as an informant.

106. S2's case, which we set out above, is that he refused to be an informant in November 2015. The direction to exclude S2 from the United Kingdom was made in May 2016. A redacted version of the submission that led to that direction has been disclosed. Nothing in that submission supports S2's contention. There was, as we have found, an ample lawful basis for the Secretary of State's decision. We have separately considered S2's contention in the closed judgment. We dismiss the claim on this ground.

Review of closed judgment for disclosure to S2

107. We have considered whether there is anything in the closed judgment that can be disclosed to S2 without damaging the interests of national security. The Special Advocates have done likewise, and we are grateful to them for doing so. We are satisfied that there is nothing in the closed judgment which can be disclosed to S2 without damaging the interests of national security.

Outcome

108. The appeal and the application are dismissed.