SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/148/2018 and SC/148/2020
Hearing Date: 7th and 8th December 2020
Date of Judgment: 11th February 2021

Before

THE HONOURABLE MR JUSTICE JAY
UPPER TRIBUNAL JUDGE BRUCE
MR ROGER GOLLAND

Between

P3

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Robin Tam QC and James Stansfeld (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Ashley Underwood QC and Dominic Lewis (instructed by **Special Advocates' Support Office**) appeared as Special Advocates

Edward Grieves and Raza Halim (instructed by **Wilson Solicitors**) appeared on behalf of P3

Introduction

1. P3 is an Iraqi national born there on 29th March 1968. He has a wife ("Witness A") and three minor children, Child X (born on 26th June 2002), Child Y (born on 8th June 2004) and Child Z (born on 7th July 2013), all of whom are British citizens. P3 has lived in the UK since 1997 and Witness A joined him here in 2001. P3 was granted British citizenship on 3rd February 2003 and Witness A on 1 October 2007.

2. On 30th December 2017 the Respondent made an Order under s. 40(2) of the British Nationality Act 1981 depriving P3 of his British citizenship on conducive grounds. At that time P3 was in Iraq, and he has not been able to return to the UK since then. P3 has been informed in OPEN that the basis of the Order was that he was assessed "to have links with Iranian intelligence services". Later, he was informed that he was "prepared to accept tasking". P3 has appealed to this Commission against the decision to make this Order ("the deprivation appeal").

3. On 28th November 2019 P3 made an application for entry clearance on the ground that it is essential that he be present in the UK in order that the deprivation appeal be effective. This is in line with the approach indicated by the Court of Appeal in R (*W2) v SSHD* [2017] EWCA Civ 2146. The entry clearance application included a claim that a refusal to allow him to enter the UK would be unlawful under s. 6 of the HRA 1998 as it would breach his rights under articles 2, 3, 8 and 13 of the ECHR. The focus throughout the hearing was on article 8. The Respondent interpreted P3's application, in our view correctly, as being both (i) an application for entry clearance outside the Rules, and (ii) a human rights claim.

4. On 7th February 2020 the Respondent refused both applications. A reconsideration request dated 25th March 2020 was refused on 8th June 2020.

5. On 5th March 2020 P3 appealed the first refusal, and we are now seized of his appeal ("the LTE appeal"). On analysis, it is an appeal under s. 2(1)(a) of the SIAC Act 1997 against the Respondent's refusal of a human rights claim. Such a claim is defined by s. 113 of the Nationality, Immigration and Asylum Act 2002 as including a claim by a person that to refuse him entry clearance would be unlawful under s. 6 of the HRA 1998. The right of appeal derives from s. 82(1)(b) of 2002 Act, and comes before us because the Respondent has provided a certificate under s. 97(3) of the 2002 Act. The parties agree that this is a full merits appeal rather than a review of the Respondent's decision.

6. P3 advances two grounds of appeal before us, namely:
   (1) The Respondent's refusal to grant entry clearance for the duration of the appeal period is incompatible with P3's rights under articles 8 and 13 of the Convention, in relation to:
      (i) Substantive article 8 rights due to ongoing familial separation;
      (ii) Procedural article 8 rights in the linked deprivation appeal.
   (2) The entry clearance refusal engages the jurisdiction of the ECHR and there is a breach of articles 2 and/or 3.

7. We should record that on 9th October 2020 the Commission stayed P3's common law challenge (as an alternative to the article 8 procedural challenge) pending the handing down of the judgment of the Supreme Court in *Shamima Begum*. No one submitted that we should delay handing down this judgment until the Supreme Court had pronounced.

8. In oral argument Mr Edward Grieves, who presented P3's case with conspicuous ability, concision and moderation, did not press the second ground, recognising that authority binding on this Commission was in his path. The principal focus of the hearing was on the article 8 procedural sub-ground, although the substantive article 8 issue remains very much live.

9. The Commission was also assisted by the able submissions of Mr Robin Tam QC (both in OPEN and CLOSED) and Mr Ashley Underwood QC (in CLOSED). The latter raised a further legal submission which can properly be addressed in OPEN. There is a CLOSED judgment which addresses the national security case.

10. Inevitably perhaps, the Commission received a mass of witness evidence and documentary material. We have considered it all very carefully but it would not be a valuable or proportional exercise to set it all out. The parties deserve a greater degree of focus.

The Respondent's Decision-Making

11. P3 was outside the UK between 1st October and 5th November 2017. On 2nd November the Home Secretary decided to deprive him of his nationality and that the Order would be signed as soon as possible after service. It appears that the deprivation decision was not served before P3 returned. It is of interest that the first draft (but not the final version) of the recommendation to the Home Secretary opined that "we do not consider it could be argued that we have deliberately waited for [him] to leave the UK before taking action ...". In fact, it is obvious, as the Respondent now accepts, that such an argument could not merely be made but would be well-founded.

12. P3 left the UK for Iraq on 21st November, intending to return on 31st December. The deprivation decision was served on 28th December, and the Order made two days later.

13. P3's entry clearance application set out in very clear detail the deleterious effect the deprivation decision was having on him and his family. We will summarise the relevant evidence later.

14. In her refusal letter dated 7th February 2020 the Respondent accepted that she had no information at present to contradict the claim that P3's current location in Iraq "is likely to have a negative impact on your family". The point was made that P3 had often been in Iraq before the deprivation decision. For the purposes of para GEN.3.2. of Appendix FM, the Respondent accepted that prolonging this separation "may be considered 'harsh'", but stated that it would not be unjustifiably harsh on account of the "serious threat" to the national security of this country. It is clear from the briefing note/submission that the Respondent well understood that the article 8 case was being advanced on the basis of (i) P3's deteriorating mental health, (ii) the impact of this enforced separation on Witness A, who was struggling to cope, and (iii) the impact on the three children.

15. Dealing expressly with the procedural aspect of the article 8 claim, the submission made by civil servants to the Respondent advised her that P3's presence here was not essential. He had been able to contact his legal representatives by phone. There had been a number of meetings. His legal representatives had been furnished with sufficient instructions to instigate the deprivation appeal and to make a detailed entry clearance application. Thus:

> "These events strongly suggest that it is possible for P3's appeal to be prepared and conducted effectively while he is outside the UK."

16. When the matter came to be reconsidered by the Respondent the briefing note summarised recent psychiatric evidence from Professor Katona. In short, P3 was severely depressed and at increased risk of suicide. There had been an attempt in late January or early February 2020. Further:

> "Professor Katona remains of the clinical opinion that P3's prolonged separation from his family is the main driver for his deteriorating mental health and escalating suicide risk."

17. Despite this, the recommendation to the Respondent was that P3's mental health issues do not outweigh the threat he poses to national security. The suicide risk was accepted, as was the proposition that the longer P3 was away from his family the higher the risk would become. In short, "the separation is the main driver for his current depression" [emphasis supplied by the Respondent]. The point was also made that P3 was in regular contact with his family and that they had visited him in Iraq in December 2019.

18. It is to be inferred that the Home Secretary accepted her officials' advice and recommendations. A summary of the OPEN recommendation was contained in the decision letter dated 8th June 2020 which was signed by an official on the Home Secretary's behalf.

Synopsis of the Evidence Relevant to the Article 8 Claim in its Two Iterations

P3's Evidence

19. P3 gave his evidence without an interpreter using a Skype facility on his mobile phone. We could hear him clearly but the visual imagery was unsatisfactory. It was difficult for us to assess whether the occasions on which he appeared reticent should be explained by (i) evasiveness, (ii) his mental health difficulties, and/or (iii) his professed fears about possible intercept of communications from Iraq or Iran. We will set out our impressions of P3 as a witness at the appropriate time, having given these important caveats. What we can say is that P3's command of English is excellent and that the absence of an interpreter did not create any difficulties. He is completing a PhD – the dissertation was written in English – and we were shown a number of academic papers authored by him. He claimed that some of these have been translated from Arabic, but there is no indication of this on the face of the papers themselves.

20. In his witness statement dated 13th November 2020 P3 set out the difficulties he has had in obtaining his anti-depressant medication, Mirtazapine, in Karbala, Iraq. These difficulties were particularly acute during the "first wave" of the pandemic, between April and June 2020. However, since then pharmacies have been restocked and P3 has had access to his medication. That said, P3 also stated that he has not been able to obtain specialist mental health treatment in Iraq. There remains a considerable taboo in Middle Eastern countries; there is no concept of patient confidentiality; P3 cannot trust any doctor with information that he has been deprived of his nationality in the UK; he does not want anyone to know of his mental health problems.

21. P3 also stated that discussing his mental health with Professor Katona usually makes him feel distressed. However, the situation was different on 5th November 2020 because he had received the good news that his family was planning to visit him in December.

22. P3 is not willing to provide sensitive information to his lawyers relevant to his witness statement in the deprivation appeal because he fears that communications are being monitored by the Iraqi and Iranian security services. Further, P3 is not prepared to have sensitive legal documents printed off at commercial outlets in Karbala through fear that this might arouse suspicion. But for the coronavirus pandemic, P3 states that he would have been able to instruct his lawyers in a safe third country, as he had done on previous occasions. He added that he has worked very hard to do this in the past, notwithstanding the impact on his physical and psychological health.

23. Mr Tam's cross-examination of P3 was primarily designed to undermine his credibility as well as the strength of the article 8 case. P3 was asked about his employment history both in in Iraq and London. He said that he had been working for an organisation in Baghdad as well as for an organisation in the UK, although our interpretation of his evidence was that his contracts with the latter ceased when his citizenship was deprived. P3 accepted that from February/March 2017 his stays in Iraq lengthened. His evidence about that was somewhat vague but in our view nothing turns on the detail, at least in this respect. It is clear from a schedule we have been shown that for the majority of 2017 P3 was in Iraq rather than the UK, a proposition that he accepted.

24. It became clear from Mr Tam's cross-examination that before early 2018 P3 lived in accommodation in Baghdad when he was Iraq. This was in a flat provided by the organisation he worked for. Although he still retains some connection with that organsation, he moved to Karbala in 2018 when his mental health worsened. He said that he lives off benefits provided by the Iraqi state amounting to some $200/month.

25. P3 was in Iraq between May and July 2014. His evidence about this was somewhat guarded. He said that he had no choice in the matter, because he was being put under pressure by MI5. He also said that he was considering moving to Iraq in the long-term. He added that he abandoned this idea because his wife was not coping OK. According to P3's wife's witness statement, it was in 2017 that thought was given to the possibility of moving to Iraq, but the children strongly objected. It was put to P3 that it seemed strange that he might want to move to Iraq in 2017 when this idea had been scotched in 2014. P3 could not answer that question satisfactorily. Even so, we do not think that anything really turns on this. The idea was probably raised in 2017, for whatever reason, and we have no difficulty accepting the proposition that the children would have nothing of it. Whether it was raised before is not significant.

26. P3 was unhappy to answer Mr Tam's questions when pressed to deal with the national security case against him. However, he did say that he was very open with the MI5 agents he claims to have been in contact with. He was somewhat evasive when asked about his contact with his previous solicitors. He claimed that he gave them only very limited instructions by phone and that he did not explain his defence to them. He could not explain the detail set out in the Grounds of Appeal prepared by those solicitors, beyond asserting that they filed the document without his instructions. Mr Tam also asked P3 about his

contacts with his current solicitors in Beirut. He agreed that he provided them with some sensitive information. He also agreed that in September 2019 there was a phone call in Beirut with a potential witness who could provide highly sensitive information. We should add at this point that Ms Anita Vasisht, P3's solicitor who has represented him throughout with commendable tenacity and diligence, told us that she took security precautions in relation to that call.

27. There was a further meeting with the solicitors in November 2019, on this occasion in Istanbul. P3 said that he did not believe that they were getting frustrated. He did say that some of the phone calls included periods when he was ranting and raving.

28. During the course of the afternoon of 7th December 2020, P3 was asked questions about his suicide attempt and whether he had received any threats from the Iraqi and Iranian authorities after December 2017. Beyond saying that he did fear for his safety as a result of the matters he had been speaking to his solicitors about, P3 refused to answer Mr Tam's questions.

Witness A

29. P3's wife has provided witness statements dated 27th November 2019 and 24th August 2020. There is evidence that she has learning difficulties as well as severe anxiety and depression. Witness A understands some English but her evidence was given through an interpreter. It has proved difficult for us to judge her fairly. There may also be cultural issues in play which serve to compound the difficulty.

30. Witness A was vague about P3's employment history and earnings. She was also vague about the length of time P3 was staying in Iraq and over which periods. She said that she thought that his time was divided more or less equally between Iraq and the UK before 2017. In early 2017, according to her witness statement at least, the plan was that P3 would be working 4-6 weeks in Iraq and then be home for 2-3 weeks. Witness A stated that in 2017 there was discussion within the family as to whether they should move to Iraq but the children strongly objected.

31. Mr Tam explored with Witness A the extent to which she is capable of managing without her husband being present in this country. Our interpretation of her evidence is that generally speaking she can manage in a supermarket, save when it comes to trying to ask for assistance to pinpoint the location of an item she could not find. In our view, she was not trying to exaggerate the difficulty. She was asked about an occasion in 2018 when she went to the GP's surgery in order to obtain a prescription for two medications that she would then take with her to Iraq. Witness A said that she asked the GP for the drugs and he provided them, and that she went with her son to the chemist. We did not understand her to be saying that this placed her in any particular difficulty. What she was really saying was that she struggled with matters such as the rent, council tax, letters, phones and banks, and that her eldest son's assistance was required. As against that, we bear in mind that Witness A told a social worker that, during the periods of separation in 2017 before the deprivation decision was made, life was more complicated but they managed and there were no major problems. P3's brother and sister-in-law live in the UK, and their second eldest son has given assistance to his aunt over the phone.

32. Witness A confirmed that the family have been able to see P3 in person on three occasions since December 2017, and that a further trip was planned for Christmas 2020.

Evidence Relating to the Children

33. Witness A's statement covers this aspect, and there is important expert evidence on the topic which we must address. We have in mind in particular the report from Mr Peter Horrocks, Independent Social Worker, given on 14th August 2020. The latter's evidence has not been challenged, and Witness A was not asked any questions in cross-examination about the children.

34. According to Witness A, Child X had to leave college in September 2019 because he was very stressed. He then started working in a restaurant and his health improved. He smokes hashish "as a painkiller for his brain". The family visit to Iraq between 19th December 2019 and 14th January 2020 was fraught with difficulty, and P3's worsening mental state since then has damaged family relationships generally. In the immediate aftermath of the visit, Witness A's evidence was that Child X was reluctant to talk to his father, but things improved in February 2020. Child X is unwilling to travel to Iraq to see him. Witness A's belief is that if P3 could return to the country that would help Child X rebuild his relationship with his father.

35. Mr Horrocks has clear concerns about Child X's physical and mental health. According to Professor Zeitlin, the stresses occasioned by P3's absence from the UK have amounted to a major life event. They have contributed to his cannabis use and the resulting "Amotivational Syndrome". In Professor Zeitlin's opinion, P3's return to the UK would very probably have considerable beneficial effect.

36. Witness A is very worried about Child Z. He has become aggressive and needy, as well as sad a lot of the time. In Mr Horrocks' opinion, the concerns about Child Z have increased over recent months and the "current family situation is having a very harmful and detrimental impact on Child Z's emotional behaviours and well-being". There is a high risk of ongoing deterioration in his functioning, and an increased risk of being excluded from school. His behaviour has worsened in school and this includes violence against other children.

37. Mr Horrocks' overall conclusion is that a "crucial point" may already have been reached, "where some of the damage to this family caused by its separation may be becoming irreversible". P3's return would potentially reverse this trend, but further delay "will increase the degree of harm experienced by all family members and the family unit as a whole and increase the likelihood that some damage may become irreversible".

Professor Katona

38. There is a mass of evidence from Professor Cornelius Katona, consultant psychiatrist. He carried out initial assessments of P3 by phone in April and May 2019. On 5th September 2019 he met P3 in person in Beirut where he assessed him over a number of hours. There were then six further assessments, all conducted remotely, the last of these being in early December 2020.

39. It is clear from Professor Katona's very detailed report dated 8th September 2019 (about which he was asked no questions by Mr Tam) that P3 has developed a complex form of PTSD following his torture at the hands of Saddam Hussein's regime in the 1980s continuing into 1990 and 1991. The Respondent does not dispute the essential truth of P3's account and the core diagnosis of PTSD coupled with a major depressive disorder.

40. P3's account as narrated to Professor Katona is entirely credible, both in terms of the detail provided and its inherent plausibility. P3 is a Shia Muslim. He was detained in Abu Ghraib prison for a number of years, and was tortured in various ways. He says that he was released as part of a prisoner amnesty "just before the uprising". That is known to have taken place shortly after the first Iraq war which ended in late March 1991. This has the ring of truth about it and demonstrates that at least in this respect P3 has not embroidered his account.

41. In terms of the diagnosis and prognosis, Professor Katona's opinion in September 2019 was that the most important driver for P3's major depressive disorder was his prolonged separation from his wife and sons. He assessed the suicide risk as being high.

42. By November 2019 P3's mental health had further deteriorated, and the suicide risk had increased further. This downward trend was persisting by March 2020, following the apparent suicide attempt in late January or early February. By August 2020 P3 was suffering from "command hallucinations" and increasingly prominent suicidal ideation, exacerbated by the pandemic. The suicide risk was now "very high".

43. In his 24th August 2020 report Professor Katona set out the following opinions:

> "As I have made clear above (and is also very clear in Ms Vasisht's statement), P3 has very great difficulty in instructing his legal team.
> In my view, this difficulty is a result of his deteriorating mental state – in particular, of his complex PTSD-related difficulties with trust and in regulating his emotions, and his clear delusional persecutory ideas.
> ... as a result of this further deterioration [were he not to return to the UK], he would in my view be unable to answer questions from his own lawyers, judges and under cross-examination if required to do so from video-link from Iraq. His reluctance to communicate with me by video-link attests to this.
> ... return to the UK is likely to result in significant improvement in P3's mental state. This would greatly increase the prospects of his being fit to answer questions from his own lawyers, judges, and under cross-examination."

44. On 15th October 2020 Professor Katona formed the clinical judgment that P3 had lost capacity. In his oral evidence he made it clear that this assessment was borderline. Essentially:

> "In my opinion, P3 demonstrates very little if any impairment of the ability to understand, retain and communicate.
>
> The key issue however concerns his ability or otherwise to weigh up information – and in particular whether his ability to do so is significantly impaired by his profound

depressed negativity, his PTSD-related avoidant behaviour and/or by his persecutory ideas about the Home Office.

As a result of the combined effects of his PTSD-avoidant behaviour, his depression-related negativity and his near delusional conviction that the Home Office are persecuting him, in my view P3 is unable to weigh up information appropriately in the context of providing instructions to his lawyers. In my view, he therefore currently lacks the capacity to do so."

One of the relevant factors which led to this conclusion was that P3 signed a witness statement without reading it.

45. By 5th November 2020 Professor Katona had noted some improvement. P3 now fulfilled the test for capacity. He made it clear in his oral evidence that he had not been expecting this. On the one hand, the prospect of his family visiting over the holiday period has ameliorated his mood. Conversely, Professor Katona was concerned that the pressure of taking instructions from P3 over the phone would prove to be very stressful for him such that his mental health would require monitoring. There would need to be frequent breaks.

46. Finally, Professor Katona assessed P3 by video-call on 1st December 2020, and we have carefully considered the report signed by him the following day. In Professor Katona's opinion, the improvement in P3's presentation had been short-lived. He feared that P3 would not be able to concentrate for long enough to acquit himself fairly in cross-examination. P3's persecutory ideas about the Home Office are "held with near-delusional intensity". The suicide risk remains very high and P3 is neither feigning nor exaggerating his symptoms.

47. In his oral evidence Professor Katona stated that in his clinical opinion P3's failure to engage with Mr Tam's final questions in cross-examination was attributable to his increasing distress during the process. Under cross-examination, Professor Katona said that P3 was distressed by his lack of full control of himself and that he was being asked to discuss his mental illness. He clarified this by stating that this disinclination was "on the more cerebral end of the spectrum", albeit emotionally driven.

48. It was pointed out to Professor Katona that in four of his reports he had referred to P3's account that he had made a suicide attempt a few weeks' previously. Was Professor Katona saying that there had been four such attempts; or, if not, why did he not comment on the apparent coincidence? In our view, Professor Katona's evidence about this was unclear and not altogether satisfactory. It is not plausible that there were four similar attempts each occurring a few weeks' before Professor Katona's examinations. The latter agreed that there was no documentary or medical evidence to corroborate the claim of admission to hospital, but said that P3 was emotionally distressed when giving these accounts. Professor Katona added that what was clear was that P3's suicidal thinking had been fluctuating and was quite prominent. P3 had difficulty distinguishing between "suicide in his mind" and "suicide that he has acted upon". Professor Katona added that he did not believe that P3 was only talking about the former.

49. Professor Katona was asked whether he was surprised about the apparent improvement in P3's condition in November 2020. He said that he was, and observed that had P3 been exaggerating his symptoms there would have been no improvement between October and November. That is a perfectly fair point, unless P3 is so sophisticated and devious that he was "double-bluffing". That we cannot accept. On the other hand, we are not convinced by Professor Katona's more general observation in answer to the Chairman's question that, if anything, P3 tends to underplay his symptoms.

50. Professor Katona also said that on 1st December 2020 P3 made it clear to him that he finds it very helpful to have things read back to him slowly, one paragraph at a time. Mr Tam asked Professor Katona whether P3's persecutory ideas covered the notion that the authorities' were listening into his phone calls. Professor Katona could not recall but agreed that had P3 mentioned this factor it would have featured in at least one of his reports.

51. We do not lose sight of Professor Katona's overall conclusion that, were P3 able to re-join his family in the UK, that would likely bring about a significant improvement in his mental state and a reduction in the suicide risk. Access to expert mental health services in the UK would also avail him.

Ms Anita Vasisht

52. Ms Vasisht has provided a number of witness statements which we may summarise as follows.

53. It is apparent from the documentation with which we have been provided that P3, with Ms Vasisht's assistance, has been able to assemble all the evidence he needs to deal with the entry clearance application and his case under article 8 of the Convention. The difficulties that there have been have arisen in connection with the preparation of P3's witness statement for the purposes of the deprivation appeal, addressed to the Respondent's national security case.

54. Ms Vasisht began taking instructions remotely in December 2018. P3 found the process tiring and stressful. Ms Vasisht agreed in cross-examination that the discussion covered "to some extent" P3's alleged links to Iranian intelligence. He did not object to this, notwithstanding the medium of communication. In due course P3 was to tell his solicitor that "our sessions remind him of being interrogated by the Ba'ath party". P3 also expressed repeated concerns that their communications were being monitored by intelligence services. It was therefore agreed that P3's legal team would meet him in person to discuss matters that were too sensitive for the telephone. There were conferences in Lebanon in May and July 2019. Ms Vasisht confirmed in oral evidence that, although P3 tired easily, he was working well, and that, by implication, these conferences were productive.

55. But by the end of the May 2019 conference it had become clear to Ms Vasisht that this was a highly complex case which required examination of 30 years of her client's personal history. There remained a lot of work to do, and P3 had great difficulty in providing the detailed and

comprehensive information required by his lawyers. By the end of the July 2019 conference, there was "still a very, very long way to go".

56. A further conference took place in Beirut in early September 2019. Instructions were taken from a sensitive witness whose was speaking from a different country. Ms Vasisht explained the security precautions that were taken. P3 did not object.

57. It was after September 2019 that things got much worse. For example, on 18th October 2019 P3 was extremely distressed and angry. He vented his rage. On 21st October P3 left a voicemail message (on the phone of the interpreter engaged by Wilsons, the interpreter) during the course of which he shouted and complained that Ms Vasisht did not understand how difficult it was to talk about sensitive matters over the phone. By this point Ms Vasisht had come to the conclusion that telephone contact was no longer effective, and she started to arrange a fourth trip to meet P3 in person, on this occasion in Istanbul. The plan was for Ms Vasisht to stay for 19 days.

58. Ms Vasisht has explained the scale of this exercise. The Respondent's case against him has been advanced in OPEN at a high level of generality. P3 has had family links to Iran and links to Iranians through anti-Saddam groups over very many years. Any of these could, potentially at least, constitute a link to Iranian intelligence. Further, it is necessary to investigate P3's mind-set over the whole of this period in order to assail the case that he was prepared to accept tasking.

59. The Istanbul visit took place between 3rd and 15th November 2019. For the majority of the time, P3 was able to co-operate well and, as Ms Vasisht put it, the sessions flowed smoothly. In cross-examination she said that when he was able to, P3 gave instructions on both limbs of the national security case. However, P3 became distressed when asked about the suicide attempt. Ms Vasisht's assessment was that P3 was "mentally sick" and that his condition was obviously deteriorating. After 9th November progress was very slow.

60. P3's draft statement is said to run to 150 pages and 800 paragraphs. In her statement dated 27th November 2019 Ms Vasisht was of the view that completion of the statement would require 3-4 more conferences each of 4 days' length. If P3 were in the UK, this process would take 4-6 weeks. By 24th August 2020 Ms Vasisht was explaining that she was unable to progress P3's statement remotely and that, in view of current circumstances, a face-to-face meeting had to all intents and purposes proved impossible after March 2020.

The Evidence of Hannah Lynes and Zuhair Kahdim

61. Ms Lynes is a senior immigration caseworker at Wilson Solicitors LLP. The effect of her evidence is that, realistically speaking, the only countries where Ms Vasisht and P3 could in theory join each other for a face-to-face meeting are Turkey and Lebanon. Any individual seeking to travel overseas from Iraq is required to obtain a medical certificate showing that they have tested negative for Covid-19 within 48 hours of travel. In order to obtain a visa for Turkey, individuals need to attend an in-person appointment at the Turkish embassy in Baghdad.

62. Mr Kahdim tells us that a visa for Beirut may be obtained on arrival. However, two negative Covid-19 test certificates are required, the second obtained on arrival at a cost of $50.

63. Ms Vashist's evidence, in answer to the Chairman's question, was that Lebanon was unstable at the moment, and Istanbul would be a safer option. There are, of course, potential quarantine issues for her which were not explored in evidence. Until the pandemic subsides, any face-to-face meeting in Asia Minor or the Middle East appears improbable.

Our Impressions of the Witnesses

64. Not all the relevant evidence in this appeal has been summarised. It is convenient at this stage to set out our impressions of the witnesses before we come to our findings of fact.

65. Mr Tam submitted that P3 was a vague and unreliable witness who on too many occasions fenced with counsel. In the event that we rejected P3's evidence about his suicide attempts, Mr Tam invited us to conclude that the suicide risk was not as high as had been suggested. Mr Tam submitted that Witness A was also unreliable and that she also sparred with counsel. As for Professor Katona, Mr Tam's overarching submission was that he was overly generous to P3, and that we should treat his evidence with appropriate caution.

66. Any fair assessment of P3 has proved to be uncommonly difficult. There were numerous impediments brought about by the quality of the video-link and our inability properly to assess P3's demeanour and body-language. The vagueness of some of his answers corresponded to some extent with the forensic difficulty to P3's case that the particular question posed. His claim that he could not understand the question followed a similar pattern. P3's manner was circumspect and guarded. He became troubled and agitated when asked about the Iraqi and Iranian intelligence services and any interest they might have in him.

67. On the other hand, we have received expert advice from Professor Katona that by the time some of the particularly difficult questions were being asked by Mr Tam P3 was tiring and was distressed. It was in anticipation of such advice being given that the Chairman adjourned the proceedings for about 15 minutes at 14:35 on 7th December. Fortunately, Mr Tam needed to ask very few questions when the Commission reconvened.

68. P3 is not to be blamed for refusing to answer questions about the national security case. His witness statement is not complete and for him the present proceedings are all about the article 8 case. We have addressed the national security issues in CLOSED on a self-contained basis without reference to anything P3 said or did not say. That is the only fair course of action to take at this stage.

69. Overall, we accept Mr Tam's submission that P3 was not a particularly reliable witness. Despite his mental health difficulties, he comes across as highly intelligent and articulate. He was able to sense the direction of travel of Mr Tam's questions and, to some extent at least, that tended to dictate how forthcoming he would be in answering them. The criticism that he fenced with counsel was fairly made. Furthermore, P3's explanation for his previous solicitors' Grounds of Appeal was not persuasive. P3 must have given them more detailed instructions than he is prepared to accept.

70. All these things having been said, we cannot reach a fair conclusion on all the available evidence on one critical matter: was P3's apparent evasiveness deliberate, in the sense that he knew exactly what he was doing and why; or was it, in part at least, the product of his underlying mental disorder? Professor Katona has of course given evidence on this topic, but in order to reach firmer conclusions upon it we would need to hear more from P3 and – at least ideally – have the fairer opportunity to judge him on the basis of him giving his evidence in person rather than remotely.

71. We do not accept the entirety of Mr Tam's criticisms of Witness A. On occasion she was argumentative with counsel and she stood her corner. Frankly, she came across as more able intellectually than the psychological evidence had prefigured. Her evidence as to dates and detail was unreliable, but that in itself is not particularly surprising: it corresponds with the experience of the Commission. Human recollection is often poor, self-serving and fragmentary. We do not think that Witness A exaggerated the practical problems that she faces, in particular her reliance in her second eldest son for help with administrative chores. The evidence she gave about her family was moderately stated and compelling.

72. Professor Katona's reports are enormously detailed and thorough. He is an experienced witness who could handle Mr Tam's often penetrating questioning very well. We would not necessarily describe him as overly generous to P3, but it would be fair to say that he sometimes crossed the fine line between giving objective evidence and advocacy. Overall, however, his evidence was reasonably balanced and his core conclusions, with some subtraction for a modicum of overstatement, may be accepted.

73. We will need to return to Mr Tam's criticisms of Professor Katona's evidence in the context of Ground 1(b).

74. We do not accept Professor Katona's explanation for P3's various accounts to him about suicide attempts. We are prepared to accept that there may have been one such attempt, probably in late January or early February 2020, but how determined it was is unclear. On the other hand, we reject Mr Tam's submission that the suicide risk should be regarded as very much lower than Professor Katona has indicated. A more accurate assessment would be that it is slightly lower.

75. Ms Vasisht was an excellent witness whose evidence we can accept.

Ground 1(a): Article 8 – Substantive

Submissions

76. Mr Grieves submitted that "the elongated separation is degrading the family life shared between P3 and his wife and children, and the individual lives of his wife and children". His short submission was that, in the light of all the evidence bearing on this issue, this is a case where the interference with family life is extremely serious such that the national security case would need to be powerful indeed to outweigh it.

77. Mr Grieves further submitted that if the suicide risk eventuated that would constitute the "ultimate" interference with family life.

78. Ground 1(a) did not feature in Mr Grieves' oral argument. We surmise that there may have been three reasons for that. First, he was short of time and Ground 1(b) is more complex legally. Secondly, Ground 1(a) had been developed very fully in writing. Thirdly, the Respondent has stated in OPEN that the national security risk was serious. Mr Grieves may well have thought that this would be the premise on which the balancing exercise under article 8 would be conducted.

79. Mr Tam submitted that, given that P3 is outside the jurisdiction of the UK, he cannot avail himself of article 8. Mr Tam accepted that his family could do so. The issue, submitted Mr Tam, was whether the temporary interference with family life – assessed over the period of time leading to the determination of P3's deprivation appeal – was disproportionate. The national security case has not been challenged by P3 and the Respondent's assessments should be respected. Furthermore, were P3 returned to the UK it is also assessed that he would claim asylum if he needed to. This would create further delay which would only serve to magnify the national security risk.

80. In terms of the overall proportionality of the interference, Mr Tam submitted that it is relevant that P3 was living for the majority of the time in Iraq before deprivation action was taken against him, and thereafter the option existed for his family to join him in that country. Mr Tam further submitted that Witness A was able to manage before December 2017 when P3 was in Iraq, and the extent to which she is reliant on her husband has been over-stated.

81. As for the risk of suicide, Mr Tam submitted that P3 is able to exercise a conscious choice and is not suffering from a mental condition that removes his capacity to resist the impulse to commit suicide.

82. Mr Ashley Underwood QC submitted that the present case fell within the exception to the general rule that the jurisdiction of the ECtHR was primarily territorial. The deprivation decision had an immediate effect outside the UK, namely it deprived P3 of his British citizenship while he was temporarily absent and separated from his family. Further, P3 had a statutory right of appeal against the decision under s. 40A(2), and unless re-admitted for the purpose, the consequence of making the decision while he was abroad was that he is constrained to exercise that right out-of-country.

Authorities

83. In *L1 v Secretary of State for the Home Department* [2015] EWCA Civ 1410, the Court of Appeal held that there was nothing in the statutory scheme to prevent the Respondent making a deliberate decision to await an appellant's departure from the UK before giving notice of the deprivation decision (para 20). Laws LJ, giving the sole reasoned judgment, made clear that the Respondent owed no duty to secure an in-country appeal, even if article 3 might be an issue (para 27).

84. That the Respondent has not frustrated the objects of the relevant legislation has some bearing on Mr Underwood's submission that her deprivation action produced effects beyond the UK which fall within one of the exceptions noted in *Bankovic & others v Belgium* [2001] 44 EHRR SE5. Self-evidently, the direct and immediate effect of the Respondent's action is that (i) P3 cannot return to the UK because he has no right so to do, and (ii) his legal challenge must be brought from outside the UK. But it by no means follows from this that the Respondent's action must be regarded as falling within the relevant *Bankovic* exception. The issue is whether the Respondent, in taking the action she did, exercised "authority or control" over P3 for the purposes of article 1 of the Convention.

85. In *S1, T1, U1 and V1 v Secretary of State for the Home Department* [2016] 3 CMLR 37, the Court of Appeal addressed this issue head-on. At para 102 of his judgment Burnett LJ (as he then was) said:

> *"Depriving a national of British citizenship has the effect of divesting the United Kingdom of any authority or control over the person concerned. It is the antithesis of the exercise of control necessary to found jurisdiction under article 1. In my judgment, both the Strasbourg jurisprudence and its application in this jurisdiction at the highest level [the decision of the Supreme Court in Sandiford] vindicate the conclusion of SIAC that for the purposes of article 1 of the Convention the appellants at all times material to these proceedings were outside the jurisdiction of the United Kingdom."*

86. Burnett LJ returned to this issue at para 25 of his judgment in *Abbas v Secretary of State for the Home Department* [2018] 1 WLR 533. He stated that, in the light of *Bankovic* and *Al-Skeini v United Kingdom* [2011] 53 EHRR 18, the article 1 argument could not prosper.

87. There may be room for a possible argument that at the instant before the deprivation decision was made P3 was within the jurisdiction for the purposes of article 1 on an exceptional basis. Be that as it may, the appropriate space cannot be found for it at this level. *S1* and *Abbas* are binding on SIAC and must lead to the conclusion that P3 is not within the reach of the Convention for the purposes of article 1.

88. The fact that P3 cannot rely on article 8 in his own right and without reference to his family makes no difference to the analysis. This is because it is well-established that family life is unitary and indivisible (see *Beoku Betts v Secretary of State for the Home Department* [2009] AC 115, per Baroness Hale at para 4 and Lord Brown at para 20), and Witness A and the children are British citizens present and settled in the UK. In other words, it is sufficient for P3's purposes that the Respondent's deprivation action has had an obvious impact on those members of the family who are undoubtedly within the jurisdiction of the Convention, even if some of the article 8 factors (e.g. his mental health) are particular to him. This much was made clear by the Court of Appeal in *Abbas*, para 19, where a distinction was made between family and private life for the purposes of article 8. In a family life case, the presence of family members within the UK supplies the "jurisdictional peg": see para 25 in the judgment of Burnett LJ.

89. An allied consideration is the relevance of the children's British citizenship. This was addressed by the Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166 in the context of s. 55 of the Borders, Citizenship and Immigration Act 2009. As Lord Hope explained (at para 41):

> *"... there is much more to British citizenship than the status it gives to children in immigration law. It carries with it a host of other benefits and advantages ... They ought never to be left out of account ... The fact of citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose their benefits and advantages for the rest of their childhood."*

90. The final authority we mention at this stage is the decision of the Divisional Court in *Turner v USA* [2012] EWHC 2426 (Admin). This was an extradition appeal which failed on the ground that fresh evidence as to the appellant's mental state was not "decisive" within the meaning of *Fenyvesi v Hungarian Judicial Authorities* [2009] EWHC 231 (Admin). *En route* to his conclusion that extradition would not be oppressive, Aikens LJ observed that, given that the appellant remained rational, any attempt to take her life would flow from the exercise of a choice (para 44). We do not interpret Aikens LJ's judgment as saying that the suicide risk was irrelevant (see, for example, para 49). Rather, in the light of the exercise being undertaken under the extradition statute, on the particular facts of the case and on the available psychiatric evidence, the risk did not weigh heavily.

Discussion

91. P3's entry clearance application does not raise the same article 8 issues which may arise in the context of his deprivation appeal. The reason for this is clear. In the deprivation appeal, the outcomes are both binary and permanent. Either P3 will lose the appeal, for the reason that national security outweighs article 8, or he will win the appeal and the deprivation decision will be reversed. In the entry clearance appeal of which we are presently seized, the application is being made for a particular purpose and for a limited period.

92. At this stage, we are ignoring P3's arguments under Ground 1(b): those raise a further dimension. Ground 1(a) falls to be considered on a self-contained basis and on the premise that P3 may be required to leave the UK after his appeal has been determined. Ordinarily, that would be a factor that militates against entry clearance being granted because, as Mr Tam points out, the interference may well be temporary. Whether P3's case may be regarded as ordinary rather than exceptional is a matter which we will address at the appropriate time.

93. Another consideration is that, although P3's stay here may prove to be temporary were this entry clearance appeal to be allowed, its likely duration is uncertain. This is so for at least two reasons. First, the possibility of P3's deprivation appeal being delayed for good (or, indeed, bad) reasons cannot be ignored. Also, the losing party may well seek permission to appeal. Secondly, that P3 might apply for asylum, generating a potentially lengthy and complex appeal process were it to be refused, cannot be discounted. It follows, in our judgment, that the article 8 balancing exercise applicable to this case must be predicated on

the premise that P3 may be irremovable from this jurisdiction for a considerable period of time. It would be unwise to speculate as to the potential length of that period.

94. The Chairman raised in oral argument the possibility that P3's potential asylum application may be irrelevant to the article 8 balancing exercise. The better view, albeit one underpinned by a degree of pragmatism, is that the fact that P3's temporary stay in the UK may well be quite lengthy, whatever happens, is a consideration that we should take into account as militating *against* him in the article 8 balance. There is no reason to do other than place all known, likely or possible considerations into the balance, according to each of them such weight as is appropriate. As for an asylum claim, all that can fairly be said is that it is possible that such an application would be made regardless of its prospects of success.

95. On the other hand, a factor which tends to militate in P3's favour is that, in the event that he were not permitted to return to the UK, his deprivation appeal would not be heard for a considerable period of time. Putting the matter at its very lowest, there are and have been difficulties in preparing for it.

96. In the context of this entry clearance appeal, it is axiomatic that the strength of P3's article 8 rights must be balanced against the strength of the national security case against him. This is an exercise with which the Commission is well familiar, although as with all cases involving national security its resolution can give rise to particular difficulty. It is a difficulty compounded by the factors we have already enumerated.

97. Usually, if the risk to national security were serious, it would require an extremely strong article 8 case to outweigh it. We were not taken to any authority which vouches that proposition, but in our view it ought to be uncontroversial. If the risk to national security is not serious (and that formulation covers a range of possibilities from slightly less than serious to very weak), the counterbalancing article 8 case need not be as strong. It is unnecessary in these circumstances to be any more precise than that.

98. P3's article 8 case must now be evaluated. In our judgment, it is a particularly compelling case. Its following aspects are especially relevant.

99. First, Professor Katona's psychiatric evidence is deeply troubling. Even if P3's mental state is not as bad as has been depicted, core elements of Professor Katona's diagnosis and prognosis remain unscathed by the forensic challenge. P3 has chronic, severe PTSD which remains largely untreated in Iraq. He has various co-morbidities including anxiety, depression and delusions of persecution. The suicide risk remains high. For obvious reasons, P3's mental health fluctuates to some extent but the trend remains downwards, at least if the premise must be that P3 cannot return to the UK. On the contrary premise P3's mental health would likely significantly improve. Not merely would he be with his family, he would have access to the resources of the NHS and a GP who knows him well.

100. Secondly, and as we have already pointed out, P3's deprivation appeal will not be heard in the near future, particularly if he should remain in Iraq. We will address the evidence in more detail in the context of Ground 1(b), but a combination of P3's psychiatric difficulties and the coronavirus pandemic means that, even if the appeal were conducted

with P3 in Iraq, a considerable amount of work needs to be done with P3 and his solicitor being face-to-face.

101. Thirdly, it is clear to us that Witness A is struggling with the administrative chores that P3 was able to carry out when he was in the UK, even after early 2017 when he was spending longer periods of time in Iraq. Witness A's difficulties must not be overstated because, one way or the other, she has just about managed with the assistance of others. This is a factor that lends some weight, albeit slight, in the article 8 calculus.

102. Fourthly, it is quite clear that P3's absence from the UK is having an important, deleterious effect on the children, in particular the eldest and youngest boys. The continued separation is strongly contrary to their best interests. The Respondent does not challenge any of this evidence. We accept Mr Horrocks' evidence that a "crucial point" may have been reached. The need to promote and safeguard the welfare of the three children carries very considerable weight in this case. This is so notwithstanding that P3 is not seeking entry clearance on a permanent basis.

103. In this context we must reject the Respondent's submission that the family could and should relocate to Iraq. The fact that this possibility was discussed, in 2017 we conclude, very much cuts both ways. It is clear that the children have no wish to live in Iraq. They railed against the idea in 2017, and it would not be in their best interests, not least because the education of the two younger children would be seriously disrupted. The boys speak no more than broken Arabic and have established roots in this country.

104. Overall, the article 8 case that has been presented on behalf of P3 is a very powerful one. It possesses the various components we have sought to outline. The Respondent has said in terms that the effects of the deprivation action have been "harsh". In our judgment, its effects have been very harsh and these are continuing.

105. The article 8 case is fortified by the consideration that, were P3's entry clearance appeal to be allowed, the restoration of family life would likely improve, if not reverse, the damage already done to this family unit, in particular the children, as well as P3's mental health.

106. The Respondent's national security case must now be evaluated. We have covered this in some detail in our CLOSED judgment. For the reasons explained there, it should be understood that our assessment is preliminary. We have concluded, contrary to the assessment of the Respondent, that P3 does not represent a serious threat to the national security of the United Kingdom. We have gone into this more fully in CLOSED, and nothing further can be said in OPEN as to our reasoning and conclusions.

107. The article 8 balancing exercise falls to be undertaken in the light of all the foregoing factors. A powerful article 8 case is being weighed against a case which does not indicate that P3 represents a serious threat to the national security of the United Kingdom. Had we concluded, as did the Respondent, that the national security threat was serious, we would have thought long and hard before allowing the entry clearance appeal on this basis. However, that this is not our conclusion renders the balancing exercise less problematic. We conclude by some margin that it would be disproportionate to treat the national security risk

as outweighing article 8 case. It follows that the entry clearance appeal must be allowed on Ground 1(a).

Ground 1(b): Article 8 – Procedural

Submissions

108. Mr Grieves' essential submission, which was elaborated in writing at some length, was that article 8 entitles P3 to a fair and effective appeal, and that he cannot have one within a reasonable time unless he is granted entry clearance to prepare for it. This is because the medical evidence demonstrates that anything less than being permitted to enter the UK for that purpose would mean that the Respondent's national security case would remain unanswered.

109. Mr Grieves advanced two alternative submissions on the law. His "bold submission" was that, in the event that the Commission concluded that P3 could not enjoy a fair and effective appeal unless he were permitted to return to this country, we should allow this appeal under s.2 of the 1997 Act irrespective of the strength of the national security case. His alternative submission was that it would require a strong national security case to overcome P3's article 8 procedural rights on this premise.

110. In elaboration of this essential submission on the facts, Mr Grieves contended that, given P3's mental health difficulties that are likely to worsen over time, there are insurmountable impediments blocking the effective taking of instructions from him by telephone. Since November 2018 it has not proved possible for Ms Vasisht to take instructions owing to P3's poor mental health: hence her decision to arrange meetings overseas. In any event, it is said that the task of generating P3's national security case is "unique" owing to its complexity. Mr Grieves referred to Professor Katona's opinion that P3 has persecutory ideas about the Home Office of "near-delusional intensity", and even if telephone contact were otherwise possible, P3's poor concentration and motivation mean that he is unable to absorb and reflect upon lengthy and complex documents even if read back to him. Repeated questioning by Ms Vasisht is a cause of distress, only to some extent mitigated by meetings being face-to-face.

111. As for the possibility of further meetings abroad, Mr Grieves pointed out that there has been none since November 2019, due for the most part to the pandemic. It is unlikely that there could be any such meetings, presumably in Istanbul, until the spring of 2021. Assuming no worsening in P3's mental state (and it is probable that there will be), the need for 4 meetings over 4-5 months would mean that P3's evidence would not be settled until the autumn of 2021, at best. Accordingly:

> *"It is submitted that in light of the serious continuing interferences with the article 8 rights enjoyed by P3 and his family members (including the risk of suicide as separation goes on and the risk of losing capacity and worsening mental health) this is obviously too long a time to wait. The hearing would not be effective if P3's family life has been destroyed by the time the hearing is reached, along with P3's mental health.*

...

On the current trajectory it would also be extremely unlikely P3 could effectively participate in a deprivation appeal in spring 2022 with an intervening 17 months of worsening mental health."

112. Mr Tam submitted in writing that there is a very short answer to P3's case under this Ground 1(b). Given that he was outside the jurisdiction at the time he was deprived of his British citizenship, he cannot rely on the procedural guarantees vouchsafed by article 8 because he falls at the prior hurdle of article 1 of the Convention. That is the submission we have already rejected.

113. In his closing oral argument Mr Tam changed course and introduced a further consideration. He submitted that, because deprivation of citizenship is not in itself a breach of article 8, there can be no procedural rights capable of invocation in this particular context (c.f. the context of the entry clearance application where article 8 substantive rights are in play). It is necessary, Mr Tam submitted, for P3 to anchor his article 8 procedural claim to the deprivation appeal rather than to the LTE appeal.

114. Mr Tam invited us to pay close attention to paras 45-59 of his skeleton argument. We have done so. We may summarise the Respondent's case on the facts as follows.

115. Mr Tam submitted that there is no objective basis for P3's fear that his telephone communications are being intercepted, and that it is clear from the available evidence that P3 has been able to provide telephone instructions, not least to his previous lawyers. As for the contention that P3 is now too ill to travel, there is nothing to indicate that P3 could not give evidence by video-link, with appropriate adjustments being made.

116. Mr Tam invited us to treat Professor Katona's reports from August 2020 "with a significant degree of caution". All of these reports were prepared without the benefit of face-to-face meetings. On 24th August 2020 Professor Katona was opining that P3's mental health was likely to deteriorate further such that he would not be able to answer questions from his own lawyers or participate in legal proceedings. In October P3 was apparently so unwell that he had lost capacity. However, by November P3 had apparently improved to the extent that he was "able to understand, retain, weigh up and communicate information appropriately". Mr Tam submitted that it is not plausible that this significant improvement in P3's mental state could be attributed to the upcoming family visit. In short:

> *"The lack of detailed analysis to support the most significant change of diagnosis must give the Commission concern as to the credibility of the diagnoses drawn in the first place, particularly those conducted via video or telephone calls, instead of in person.*
>
> ...
>
> *None of the issues advanced by P3 are insurmountable. He may need greater time than normal to give his instructions and in person meetings with his lawyers may need to await a reduction in travel restrictions due to Covid-19, but all these issues can be accommodated, which will ensure P3 has an effective appeal and the UK's national security is protected by P3 being outside the UK."*

Authorities

117. In *G1 v Secretary of State for the Home Department* [2013] QB 1008, the appellant's citizenship was deprived and a separate decision was made to exclude him from the UK. An appeal against the former was brought under s. 2B of the 1997 Act and judicial review was sought of the latter. The Court of Appeal held that G1 enjoyed no right at common law to enter the UK for the purpose of prosecuting his appeal. Furthermore, it was possible for G1 to travel to a safe third country in order to give instructions or evidence by television link. Laws LJ, giving the sole reasoned judgment, noted that no case was being advanced under article 8 (see para 55).

118. In our view, *G1* has no relevance to the present case. First, G1 was not advancing a case under article 8 of the Convention. Secondly, these were judicial review proceedings and not a merits-based appeal under s. 2(1)(a) of the 1997 Act: the bar was much higher. Thirdly, insofar as what was said about the common law has any bearing on the separate case under article 8, no reasons were advanced on behalf of G1 as to why he could not travel to a safe third country.

119. *S1 et al* was broadly similar on its facts to *G1* inasmuch as the appellants contended that the Respondent should permit their return to the United Kingdom to prosecute their case. There were no separate judicial review proceedings and within the substantive deprivation appeal before this Commission it was argued that the Respondent's action was disproportionate for the purposes of article 8. In upholding the decision of this Commission on this latter point, Burnett LJ observed (at para 42):

> "To the extent that their rights under article 8 of the Convention were engaged the deprivation decisions were proportionate."

120. The article 8 case was advanced on the basis that Mrs S and A (the latter was a child and a British citizen) would fare much better here than in Pakistan. The difficulty for them was that they were not in the UK when the article 8 case was being considered and weighed in the balance against a national security case that was "real". Burnett LJ also observed (at para 108) that the position would have been no different had Mrs S and A been in the UK at the relevant time:

> "There can be little doubt in my view that if Mrs S and A had remained in, or returned to, the United Kingdom article 8 would not have provided a basis for contending that S1 should be admitted in the face of a finding that his presence here constituted a danger to national security."

121. It was not argued in *S1* that there were any particular features of the appellants' cases that warranted their return to the UK in order to pursue their SIAC appeals from here as opposed to anywhere else.

122. In *obiter* passages set out at paras 83-86 of his judgment, Burnett LJ addressed the appellants' further argument that, on the hypothesis that SIAC had concluded that the appeals would be unfair unless they were permitted to return to this country, the

deprivation appeals should have been allowed. Burnett LJ concluded that it would be only in rare circumstances on clear and compelling evidence that the Commission should properly come to that conclusion. He also observed that in such circumstances the remedy would not be to allow the appeal but for an application for entry clearance to be made, which could then be subjected to judicial review.

123. Mr Tam's heavy reliance on *G1* and *S1* was, in our judgment, misplaced. We have explained why, but in addition we should mention Beatson LJ's observation at para 74 of his judgment in *W2* that these authorities fall to be "reassessed".

124. In *R (Johnson) v Secretary of State for the Home Department* [2016] 3 WLR 1267, the Supreme Court drew a distinction between acquiring a right to citizenship (which the Convention did not guarantee) and its deprivation. The latter was sufficiently within the ambit of article 8 as to trigger the application of article 14. Mr Tam points out that the appellant's presence in the UK at the time was a clear point of distinction with the instant case. In our view, his physical presence here might have some bearing on the outcome of the article 8 balancing exercise, but it should have no relevance to the prior question of whether the article has any potential application to this factual structure. The point has already been made that the jurisdictional peg for article 8 in the present case is P3's family in the UK. (In this context, it is unnecessary to address the decision of the deputy judge in *R (K) v Secretary of State for the Home Department* [2018] 1 WLR 6000. Although her statement of principle at para 49 is helpful to P3's argument, the facts of *K* were rather different).

125. *G1* applied to the ECtHR. The Court's admissibility decision has been reported as *K2 v United Kingdom* [2017] 64 EHRR SE18. Paras 49 and 57 of its judgment sets out the principles in these terms:

> "49. ... Recently the Court has accepted that the same principles apply to the revocation of citizenship already obtained – interference with the individual's respect for family and private life. ... In determining whether a revocation of citizenship is in breach of article 8, the Court has addressed two separate questions: whether the revocation was arbitrary; and what the consequences of revocation were for the appellant.
>
> ...
>
> 57. First of all, the Court does not accept that an out-of-country appeal necessarily renders a decision to revoke citizenship "arbitrary" within the meaning of article 8 of the Convention. It would not exclude the possibility that an article 8 issue might arise where there exists clear and objective evidence that the person was unable to instruct lawyers or give evidence while outside the jurisdiction: however, article 8 cannot be interpreted so as to impose a positive obligation on Contracting States to facilitate the return of every person deprived of citizenship while outside the jurisdiction in order to pursue an appeal against that decision."

126. The importance of these passages is diluted somewhat by the recognition that *K2* was a decision on admissibility. However, the following points may be made. First, the procedural guarantees vouched by article 8 were generated by the concept of arbitrariness, which is itself derived from the article 8.2 consideration that the relevant interference must be "in accordance with the law". Thus, an arbitrary decision or subsequent judicial process

would be contrary to the rule of law and incapable of justification. Secondly, the ECtHR made clear that out-of-country appeals did not, without more, engage the procedural limb of article 8: what was required was convincing evidence that the appeal could not be pursued from abroad. There was no such evidence in K2's case. Thirdly, K2 had voluntarily left the UK before the decision was made, his family could relocate to Sudan, and the consequences of revocation did not amount to a significant adverse impact. The facts of P3's case are somewhat different.

127. In *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] 1 WLR 2380, the appellants were sought to be deported from the UK and were the subject of certificates under s.94B of the Nationality, Immigration and Asylum Act 2002 which required any appeal to be brought outside this country. The issue was whether the certificates interfered with the appellants' article 8 rights to such an extent as to be disproportionate. The evidence was that there were considerable practical difficulties faced by an out-of-country appellant including an inability to obtain legal aid and video-conferencing facilities were not readily available. Overall, there was no Convention-compliant system for the conduct of such appeals. Lord Wilson JSC (with whom three of his colleagues agreed) concluded that, for the appeals to be effective, the appellants would need at the very least to be afforded the opportunity to give live evidence (para 76). His overall conclusion was expressed in terms of a proportionality balance (para 78):

> *"It remains only to recast the reasoning expressed in this judgment within its proper context of a claim that deportation pursuant to the two certificates under s.94B would breach the procedural requirements of article 8. The claimants undoubtedly establish that the certificates represent a potential interference with their rights under article 8.* ***Deportation pursuant to them would interfere with their rights to respect for their family and private lives established in the United Kingdom and, in particular, with the aspect of their rights which requires that their challenge to a threatened breach of them should be effective.*** *The burden then falls on the Home Secretary to establish that the interference is justified and, in particular, that it is proportionate: specifically, that deportation in advance of an appeal has a sufficiently important objective; that it is rationally connected to that objective; that nothing less intrusive than deportation* ***strikes a fair balance*** *between the rights of the appellants and the interests of the community: ... I therefore turn straight to address the fair balance required by article 8 and I conclude for the reasons given above that, while the claimants have in fact established that the requisite balance is unfair,* ***the proper analysis is that the Home Secretary has failed to establish that it is fair.***" [emphasis supplied]

At this point we must record Mr Underwood's submission in CLOSED that what Lord Wilson was saying was that it would be sufficient for article 8 purposes for an appellant to show that his article 8 procedural rights were interfered with: in other words, that their exercise has become more difficult. He is not required to go so far as to demonstrate that he could not have a fair and effective appeal from overseas.

128. Lord Wilson's conclusion that the Respondent had failed to establish that the balance was fair was predicated on his assessment that Messrs Kiarie and Byndloss would not enjoy an effective appeal right from abroad. He pointed out that the more recent

jurisprudence of the Strasbourg Court "preferred to locate the right to an effective remedy for breach of article 8 within article 13" rather than the "accordance of the law" aspect of article 8.2 (see para 50), although this made no difference on the facts of these cases. This was because the HRA 1998 generally recognises the right to an effective remedy for breaches of substantive Convention rights (see para 49). It is implicit in Lord Wilson's reasoning that it could also make no difference for article 8 purposes whether or not the appellant was physically present here when the issue was being considered.

129. The judgment of Lord Carnwath JSC in *Kiarie and Byndloss* adopts a "rather different" emphasis. We do not understand him to depart from Lord Wilson's approach on the key point of principle. He pointed out that article 8 "does not require access to the best possible procedure" but it does mandate "the essential requirements of effectiveness and fairness" (para 88). Lord Carnwath did not consider that conducting an appeal via a video-link would fail to satisfy these requirements, at least in principle (para 103). Indeed, Lord Burnett CJ returned to this topic in paras 197 and 198 of his judgment in *R (FB Afghanistan and Medical Justice) v Secretary of State for the Home Department* [2020] EWCA Civ 1338, recognising the technological advances that have taken place even since 2017.

130. We return to the decision of the Court of Appeal in *W2*. There, the claimant sought judicial review of the Respondent's deprivation of nationality decision although the real target of this challenge was the former's refusal to permit him to enter the country until his appeal had been determined. There were a number of procedural difficulties with the claim as constituted in this way which it is unnecessary for us to mention. But, as we have already pointed out, the Court of Appeal stated that the correct procedural course in a case such as this is for the out-of-country appellant to apply for an entry clearance to return to the United Kingdom on the ground that without his presence here he could not enjoy the effective exercise of his appeal right. If entry clearance were refused, the correct procedural recourse would be an appeal to this Commission under s. 2 of the 1997 Act in which all the legal issues raised could be determined.

131. Beatson LJ gave the sole reasoned judgment. A limited number of issues flow from a consideration of it.

132. Beatson LJ considered that the decision of the Supreme Court in *Kiarie and Byndloss* could not fully be reconciled with that of the ECtHR in *K2* (paras 81 and 82). Given the obvious factual differences between the cases of *K2* and *P3*, it is unnecessary for us to explore these conflicts. Had the ECtHR been confronted by P3's rather better facts, it seems unlikely that it would have expressed itself so robustly.

133. Paras 85-87 of Beatson LJ's judgment make it clear that the issue for the Commission on a case such as this is whether an out-of-country appeal would be effective. That involves a fact-sensitive inquiry by this specialist tribunal. In the event that this Commission were to conclude that an appellant's presence in this country is necessary in order for his appeal to be effective, it will allow the appeal (para 85). In this regard para 87 is particularly germane:

> *"SIAC, with the participation of its lay members with relevant expertise, will be able to assess the difficulties claimed by W2 in instructing lawyers and the extent to which oral evidence by him is necessary (for example in relation to the impact of separation*

on his family) and to decide whether, in the light of Kiarie and Byndloss, the refusal of entry in these circumstances is unlawful. It will be able to consider whether there is a Convention-compliant system for the conduct of a SIAC appeal from abroad. In doing so, it will be able to take into account the matters relied on before this Court by Ms Giovannetti in distinguishing the circumstances of this case from those of the appellants in Kiarie and Byndloss. They include the fact that SIAC has video-conferencing facilities which have been frequently used in the past by appellants who are abroad, what SIAC will do to facilitate steps to enable W2 to give evidence orally to it, the extent of the legal advice available to W2 and his ability to give his lawyers instructions, and the position in relation to experts."

134. We should not leave *W2* without observing that the late-advanced submission by Mr Tam that article 8 is not in play in a deprivation of nationality case was squarely made by Ms Lisa Giovannetti QC to the Court of Appeal. Beatson LJ recorded the submission in these terms (para 88):

> *"She argued that, by contrast, there is no statutory presumption that out of country appellants should be permitted to travel to the United Kingdom to conduct their appeals here and article 8 does not create such a presumption."*

Beatson LJ declined to express any view on this matter, preferring to leave it to this Commission to decide in the appropriate case.

135. The parties did not draw our attention to Flaux LJ's analysis of *W2* in paras 100-106 of his judgment in *R (Begum) v Secretary of State for the Home Department* [2020] 1 WLR 4267. This is helpful to the extent that it clarifies that paras 85-87 of Beatson LJ's judgment are *obiter dictum* and that the reference in para 85 to allowing the appeal must be taken to be a reference to allowing the LTE appeal and not the deprivation appeal.

136. *Begum* was decided on common law principles and not with reference to article 8, no doubt because her facts were not propitious for that purpose. The Court of Appeal concluded that even if by reference to common law principles it were determined that Ms Begum could not have a fair and effective appeal from outside the United Kingdom, it did not follow that the LTE appeal had to be allowed. A fact-sensitive inquiry was required, and the infringement of Ms Begum's common law rights fell to be balanced against the national security case. Although Flaux LJ made it quite plain that *W2* was distinguishable, not least because it was a case on article 8 and not on the common law, it seems to us that some consideration should be given to whether the Court of Appeal's conclusion has any bearing on this appeal, and in particular on Mr Grieves' bold submission.

Discussion

137. In the light of the parties' submissions and our review of the jurisprudence, the following three issues arise for our determination – and it seems to us in the following logical order.

138. The first issue is whether article 8 applies at all to deprivation of nationality cases. This is Mr Tam's late-advanced submission, possibly inspired by Ms Giovannetti's submission to the Court of Appeal in *W2*.

139. The second issue is whether, in the event that we were to hold that article 8 is engaged, it has been demonstrated that P3 would not have a fair and effective appeal from Iraq.

140. The third issue is whether, in the event that we were to hold that P3 would not have a fair and effective appeal from Iraq, this s. 2 entry clearance appeal should be allowed regardless of the Respondent's national security concerns. If not, the issue would then arise as to whether the appeal should be allowed because P3's procedural rights outweigh those national security concerns.

141. These issues will be considered in isolation and also in conjunction with our conclusion on Ground 1(a).

142. We cannot accept Mr Tam's submissions on the first issue, including his helpful note filed on 15th December 2020. We would naturally agree with him that article 8 cannot be deployed to confer a right to nationality which is not vouchsafed by the relevant statutory provisions. But P3 has a statutory right to appeal the Respondent's deprivation decision on the merits. He does not begin with a *tabula rasa*, as if the entire period covering his possession of British nationality culminating in the decision made in December 2017 were somehow expunged from history. The issue on the deprivation appeal is whether the Respondent was justified in concluding that the deprivation of P3's citizenship was conducive to the public good, and as the cases show (e.g. *Johnson, K2*) article 8 may be relied on by the Appellant in support of the contention that deprivation would not be so conducive – because any threat to the national security of the United Kingdom should be deemed to be outweighed by the family life of P3, his wife and children. Although national security may well outweigh article 8 in the majority of cases, perhaps the vast majority of cases, it does not follow that article 8 is not engaged in all cases. Furthermore, the fact that P3 is currently outside the jurisdiction of the ECHR does not matter: the jurisdictional peg exists, and the reasoning of *Kiarie and Byndloss* does not turn on their physical presence in the UK.

143. It follows, contrary to Mr Tam's oral argument, that the full panoply of the procedural guarantees vouched by article 8 are applicable. Although P3's current difficulties pertain to meeting the national security case and not putting forward a compelling case on family life (he certainly has done the latter), the former is relevant to article 8.2 and the balancing exercise which falls to be conducted. The better able P3 is to assail the Respondent's national security case, the lesser the weight this Commission would accord to it on the deprivation appeal when performing the article 8 balance.

144. As for the second issue, we must begin by addressing Mr Tam's submission that Professor Katona has seriously overstated the difficulties. This is in the context both of preparing for the appeal and giving evidence overseas.

145. We accept that Professor Katona has been struggling with the difficulties created by the imposition of a considerable physical barrier between him and P3. He is by no means responsible for those difficulties, but the fact that he was able to examine P3 on only one occasion face-to-face is a matter which weakens the cogency of his diagnosis, prognosis and conclusions, at least to some extent. As we have said, Professor Katona has clearly given very careful consideration to P3's case. We do not conclude that he has deliberately "spun" the evidence in P3's favour, nor do we think that he has been overly gullible or uncritical. However, there are respects in which he has overstated the position. Our concerns about P3's witness reliability, and to some extent his credibility, feed into our global assessment of this case: to the extent that Professor Katona appears not to have shared those concerns, his conclusions must be tempered accordingly.

146. Mr Tam was critical of Professor Katona's change of opinion between October and November 2020. However, Professor Katona made it clear in his oral evidence that his assessment in October that P3 lacked capacity was borderline. We do not think that Professor Katona may fairly be criticised for expressing the view that P3 now has capacity. In one obvious respect, this expression of view weakens, rather than fortifies, P3's overall case. Nor is it fair to say that the only basis for Professor Katona's conclusion in November was the expected visit to Iraq of P3's family. Psychiatric disorders fluctuate over time and some considerable variability may be expected.

147. The fact remains, as the Respondent accepts, that P3's mental health whilst he remains in Iraq is on a downward trend and that the suicide risk subsists. Even if the *completely* bleak picture presented by Professor Katona is mitigated to some extent, and we have not overlooked his evidence of deterioration in December 2020, it does remain somewhat bleak and the prognosis is poor.

148. We conclude that the combined effect of the evidence of Professor Katona and Ms Vasisht is that the process of concluding P3's witness statement in the deprivation appeal cannot be conducted over the phone. Ms Vasisht has testified to the complexity of the national security case and the need for face-to-face meetings, and in our view the Respondent has failed to undermine this aspect of her evidence. This is not merely a question of P3's "near-delusional conviction". P3 lacks sufficient powers or concentration, application and focus to enable his instructions in sensitive and complex matters to be taken in this manner. We accept Ms Vasisht's professional judgment that the taking of instructions over the phone is simply not possible in the light of P3's current mental state. In our view, this will remain the position for the foreseeable future. As we have said, P3's mental health is deteriorating and not improving.

149. P3's "near-delusional conviction" is potentially relevant to the suggestion that he cannot be expected to give frank instructions over the phone because his remote communications are being monitored. It is said that there is no objective basis for P3's subjective fears. In a case such as this with an important mental health aspect, we do not think that the absence of an objective basis is the real question. Although we think that P3 has been less than frank with us over the extent of his subjective fears, his delusions form only a small part of the reasons for his being unable to complete his witness statement in the deprivation appeal via a telephonic medium.

150. Mr Grieves did not submit that it would be impossible for proper instructions to be taken from a safe third country such as Turkey. His submission is that this would be very difficult and take far too long. We must bear in mind the practical realities in the light of what we know about the pandemic and its likely future course. A meeting in Istanbul before April 2021 would be overly optimistic, and even then P3 may face practical difficulties in obtaining a Covid-19 test in Baghdad and thereafter a visa. We agree with Mr Grieves that the witness statement could not be concluded before the autumn of 2021. We also concur with his assessment that a substantive appeal before the spring of 2022 would be very unlikely. We bear in mind the complexity of this case and other demands on the resources and time of this Commission.

151. Assuming that P3's mental health does not deteriorate, we would agree with Mr Tam that taking P3's evidence remotely is achievable. The Commission would have to make reasonable adjustments for P3's disability, and these would include taking frequent breaks and sensitive questioning by the Respondent. We have already referred to some of the difficulties which have afflicted the taking of P3's evidence in this LTE appeal. It was far from ideal, and it would also be right to observe that the problems we had ran the risk of causing unfairness to P3. In reality, it would be for him to build up his credibility and reliability in the deprivation appeal, meeting as he must a national security case whose details he does not know. P3's likely failure fully to engage with the process over hours of cross-examination – in significant measure brought about by his mental health difficulties - could well work against him.

152. In any case, in the likely event that P3's mental health were to deteriorate over time – in line with Professor Katona's evidence as accepted by the Respondent in the decision letters to which we have referred – a situation could well arise in which P3 would not be mentally able to give evidence at all in rebuttal of the Respondent's national security case. That risk increases with the elapse of time, and could become acute at some stage in 2021 were P3 to remain in Iraq.

153. The decision for us is whether the procedural guarantees vouched by article 8 would be effectively denied to P3 on the probable footing that his deprivation appeal will not be heard until the spring of 2022, at best, and in the meantime he must remain in Iraq. We must add to this factual substratum the important further ingredient that P3's family life, including the well-being of his immediate family here, would likely deteriorate as time progresses. We accept Mr Grieves' submission that the decision we are required to make must accommodate the practical realities of this case and also reflect the fact that P3's inability to have his appeal heard within a reasonable time could itself frustrate the procedural rights granted by article 8.

154. Even putting to one side P3's family in the United Kingdom, we have concluded that the risk that the procedural guarantees afforded by article 8 would be denied to P3 on the assumption that he remain in Iraq is now unacceptably high. Factoring into the equation the disruption to P3's family life between now and the notional spring 2022 date, including the real possibility that it is irremediably harmed by suicide or family breakdown, compels the conclusion on all the available evidence, making evaluative judgments as to the future where appropriate, that P3 would not enjoy a fair and effective appeal were he to remain overseas.

155. The third issue is whether the Respondent's national security concerns are irrelevant (per Mr Grieves' bold submission), or if not are overcome by the strength of the article 8 procedural case, whether examined in isolation or in combination with the article 8 substantive case.

156. Mr Tam did not advance any submissions directed to this third issue. We have rejected his submission that "P3 has fallen a long way short of establishing that he will be unable to fairly and effectively participate in the deprivation appeal". He had no fall-back submission along the lines that, even if P3 did establish this, the Respondent's national security concerns should win out. However, Mr Grieves did not shrink from advancing P3's case on what we are calling the third issue on the alternative bases we have outlined, and in our opinion he was right to do so. There is no advantage to P3 in our declining to grapple with this issue on the basis that Mr Tam raised no contrary argument. That would expose him to the possibility of an appeal and further delay.

157. If a balancing exercise must be conducted, which would be the more favourable interpretation of the law from the Respondent's perspective, it is the same sort of exercise as we have already undertaken for the purposes of Ground 1(a). Given the relative weakness of the national security case, we must conclude that the interference with the procedural guarantees conferred by article 8 cannot be justified. It is not as if P3 could have nothing to say about the national security issues even if he is not aware of the detail of the CLOSED material. Once the article 8 substantive case is factored into the balancing exercise, the scales come down even more firmly in P3's favour.

158. In the light of this conclusion, both Mr Grieves' bold submission and Mr Underwood's submission (see para 127 above) can make no conceivable difference to the outcome. However, they do merit brief consideration owing to their potential relevance to other SIAC cases.

159. In our judgment, Mr Underwood's submission misinterprets the term "interference" in para 78 of Lord Wilson's judgment in *Kiarie and Byndloss*. Although there is some force in the submission that "interference" should be a matter of fact and degree, the weight of authority indicates that the engagement of article 8 procedural rights raises a threshold question. To establish that the exercise of the appeal right would be more difficult is not sufficient (see, for example, Lord Carnwath in *Kiarie and Byndloss*); it must be shown that the rights under article 8 have to all intents and purposes been stifled because the appeal that is intended to vindicate those rights is unfair and ineffective. This analysis flows from the procedural aspect of article 8 being conceptualised as a "guarantee" that stems, on one view of the authorities at least, from the "in accordance with the law" limb of article 8.2. Thus, the issue is a binary one and not one of fact and degree.

160. *Kiarie and Byndloss* had nothing to say about national security. On the other hand, the overall tenor of the *obiter* passages in Beatson LJ's judgment in *W2* which we have highlighted is that the LTE appeal should be allowed were SIAC to conclude that the appellant would be denied a fair and effective appeal. Even so, we should reiterate that these were *obiter* passages, and in our view the Court of Appeal was not intending to make definitive statements about the content of substantive law. The Court of Appeal left open

the question whether article 8 applied at all (see para 88 of Beatson LJ's judgment); it was not purporting to decide the extent to which, if at all, the article 8 procedural guarantees should yield to national security.

161. We appreciate that the Supreme Court could take a different view, but we respectfully see the legal and practical force of Flaux LJ's judgment in *Begum* that the appellant's common law rights cannot be overriding: they must be weighed against the national security case. We fully appreciate that there need not be complete congruence between article 8 and the common law. The common law is as flexible as it is pragmatic, and in similar vein article 8 is a qualified right notwithstanding that the jurisprudence speaks of procedural guarantees. The proposition that article 8 will always trump national security, however strong the national security case, is difficult to accept. Accordingly, we must reject Mr Grieves' bold submission.

Disposal

162. This LTE appeal has been decided on its very particular facts, namely a powerful article 8 case (on both its limbs) pitted against a national security risk that is – on a preliminary assessment made on the material provided to us - not serious.

163. In these unusual circumstances P3's article 8 rights win out and this appeal must be allowed.

164. The Commission has not heard the parties on whether any conditions, analogous to bail conditions, should be attached to P3's entry clearance. The parties are invited to address this in brief written submissions.