Neutral Citation Number: [2025] EWCA Civ 41

Case No: CA-2024-000906

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Mrs Justice Cockerill
[2024] EWHC 361 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 January 2025

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE SINGH
and
LORD JUSTICE DINGEMANS

- -

Between :

ANZHELIKA KHAN	**Appellant**
- and -	
SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS	**Respondent**

- -
- -

Clare Montgomery KC and Tim James-Matthews (instructed by **Enyo Law LLP**) for the **Appellant**
David Blundell KC, Catherine Brown and Femi Adekoya (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing dates: 12 and 13 November 2024

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on Friday, 24 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. The Appellant appeals against the order of Cockerill J ("the Judge"), sitting in the Administrative Court, dated 20 February 2024, by which she dismissed her claim under section 38(2) of the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA"). By that claim the Appellant challenged the decision, dated 28 February 2023, of the Secretary of State for Foreign, Commonwealth and Development Affairs ("the Secretary of State" or "the FCDO") to take no action with regard to (i.e. to maintain) her designation under the Russia (Sanctions) (EU Exit) Regulations (SI 2019/855) ("the 2019 Regulations"), following a review of the original designation decision, which had been made on 21 April 2022.

2. On 26 June 2024 permission to appeal was granted by Falk LJ on three grounds. The Appellant requires permission to appeal on a fourth ground; that application for permission was adjourned by Falk LJ, to be considered at the substantive hearing on a "rolled up" basis.

3. Before this Court, as before the Administrative Court, there was a Confidential bundle. It is not necessary to set out any confidential information in this judgment for the proper and fair understanding of the issues which arise on this appeal. When summarising the factual background, I will redact the evidence in so far as it is necessary to do so in order to protect confidentiality.

Legislative framework

4. The legislative framework which governs the UK sanctions regime, so far as relevant to the present case, can be summarised as follows.

5. Section 1 of SAMLA provides for the power to make sanctions regulations. So far as material, it provides:

> "(1) An appropriate Minister may make sanctions regulations where that Minister considers that it is appropriate to make the regulations—
>
> …
>
> (c) for a purpose within subsection (2).
>
> (2) A purpose is within this subsection if the appropriate Minister making the regulations considers that carrying out that purpose would—
>
> …
>
> (b) be in the interests of national security, [or]

> (c) be in the interests of international peace and security,
>
> …"

6. Section 11(2) of SAMLA originally provided as follows:

> "The regulations must contain provision which prohibits the Minister from designating a person by name except where the Minister—
>
> (a) has reasonable grounds to suspect that that person is an involved person (see subsection (3)) and
>
> (b) considers that the designation of that person is appropriate, having regard to—
>
> (i) the purpose of the regulations as stated under section 1(3), and
>
> (ii) the likely significant effects of the designation on that person (as they appear to the Minister to be on the basis of the information that the Minister has)."

7. That provision was amended by the Economic Crime (Transparency and Enforcement) Act 2022 ("the 2022 Act"). Section 58(3) of the 2022 Act amended section 11(2)(b) of SAMLA to remove the requirement that regulations made under SAMLA must contain a provision prohibiting the designation of an individual unless the Minister considers (among other things) "that the designation of that person is appropriate".

8. Section 23 of SAMLA provides that:

> "(1) At any time while a relevant designation has effect, the designated person may—
>
> (a) request the Minister to vary the designation, or
>
> (b) request the Minister to revoke the designation.
>
> …
>
> (3) On a request under this section the Minister must decide whether to vary or revoke the designation or to take no action with respect to it …"

9. Section 38 of SAMLA provides that:

> "(1) This section applies to—
>
> (a) any decision under section 23(3) … (decision, following a request to or review by an appropriate Minister, on whether a designation of a person made under a designation power should be varied or revoked);
>
> …
>
> (2) The appropriate person may apply to the High Court … for the decision to be set aside.
>
> (3) 'The appropriate person' means—
>
> (a) in relation to a decision within subsection (1)(a), the person named by the designation;
>
> …
>
> (4) In determining whether the decision should be set aside, the court must apply the principles applicable on an application for judicial review.
>
> (5) If the Court decides that a decision should be set aside it may make any such order, or give any such relief, as could in the absence of this section be made or given in proceedings for judicial review of the decision; …"

10. The 2019 Regulations were made pursuant to SAMLA. They implement a system of sanction designation for purposes connected with Russian actions in relation to Ukraine. As is well-known, those actions pre-date 2022, for example Crimea was annexed in 2014 and there were destabilisation operations in eastern parts of Ukraine for several years before the full-scale invasion which began on 24 February 2022. The 2019 Regulations were made under the power conferred by section 1(1)(c) of SAMLA, read with section 1(2)(b) and (c).

11. Regulation 4 of the 2019 Regulations sets out the purposes of those Regulations as follows:

> "The regulations contained in this instrument that are made under section 1 of the Act are for the purposes of encouraging Russia to cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine."

12. Regulation 5 empowers the Minister to designate persons under the 2019 Regulations.

13. Regulation 6 sets out the criteria by which that power may be exercised:

> "(1) The Secretary of State may not designate a person under regulation 5 … unless the Secretary of State—
>
> (a) has reasonable grounds to suspect that that person is an involved person, and
>
> (b) considers that the designation of that person is appropriate, having regard to—
>
> (i) the purposes stated in regulation 4 …, and
>
> (ii) the likely significant effects of the designation on that person (as they appear to the Secretary State to be on the basis of the information that the Secretary of State has).
>
> (2) In this regulation, an 'involved person' means a person who—
>
> (a) is or has been involved in—
>
> (i) destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine, or
>
> (ii) obtaining a benefit from or supporting the Government of Russia
>
> …
>
> (c) is acting on behalf of or at the direction of a person who is or has been so involved, or
>
> (d) is a member of, or associated with, a person who is or has been so involved.
>
> …
>
> (6) In paragraph (2)(d), being 'associated with' a person includes—
>
> (a) obtaining a financial benefit or other material benefit from that person;
>
> (b) being an immediate family member of that person.
>
> …"

14. Section 61(3) of the 2022 Act provides that any pre-commencement regulations (which, for present purposes, include the 2019 Regulations) are deemed to have always had effect as if the Regulations do not include any provision required to be included by, among other things, section 11(2)(b) of SAMLA. The effect of this is that regulation 6 is to be read without regulation 6(1)(b), so reflecting the amendment made to SAMLA by the 2022 Act.

15. The consequences of designation are set out in the 2019 Regulations. In particular:

    (1) It is a criminal offence for a person to deal with funds or economic resources owned, held or controlled by a designated person, if that person knows, or has reasonable cause to suspect, that they are so dealing: regulation 11(1).

    (2) It is a criminal offence for a person to make funds or economic resources available directly or indirectly to a designated person, if that person knows, or has reasonable cause to suspect, that they are making the funds or economic resources so available: see regulations 12(1) and 14(1).

    (3) It is a criminal offence for a person to make funds or economic resources available to any other person for the benefit of a designated person, if that person knows, or has reasonable cause to suspect, that they are making funds or economic resources so available: see regulations 13(1) and 15(1).

    (4) It is a criminal offence for a person to intentionally participate in activities knowing that the object or effect of them is (whether directly or indirectly) to circumvent any of the prohibitions above, or to enable or facilitate the contravention of any such prohibition: see regulation 19(1).

Factual background

16. The Appellant is a British citizen, resident in the United Kingdom ("UK"), with primary responsibility for her family home and the care and supervision of her children, including two dependent children, who are both also British citizens.

17. The Appellant was born on 23 June 1971 in Almaty (now in Kazakhstan) and has lived in the UK since 2013. She became a British citizen on 29 October 2019.

18. The Appellant met her husband, German Khan, in August 1992. They were married in December 1994. They have four children, born in June 1995, July 2001, July 2005 and July 2012 respectively. The three youngest children are British citizens and are ordinarily resident in the UK.

19. In February 2022 Russia extended its invasion of Ukraine. This has led to sanctions against Russia being imposed by many states around the world, including the UK and the European Union ("EU").

20. The Appellant's husband was designated under the UK sanctions regime on 15 March 2022. There has been no challenge to his designation.

21. In the High Court proceedings evidence was filed on behalf of the Respondent from David Reed, who has been the Director of Sanctions Directorate since 26 September 2022. In his first witness statement (dated 6 July 2023), at para 71, he says that:

> "… I note that on 16 March 2023, 16 days after Ms Khan's request for revocation of her designation was refused, it was reported that Mr Khan attended a meeting at the Kremlin hosted by Vladimir Putin. In this meeting, Mr Khan, alongside at least seven other individuals designated by the UK, was urged to invest in Russia's economy to mitigate the effects of Western sanctions and was discouraged from 'hiding' assets in jurisdictions outside of Russia … German Khan's attendance at this meeting further demonstrates that there continues to be a rational link to the objectives of the 2019 Russia Regulations because it is evidence of his ongoing association with Vladimir Putin, contrary to what has been suggested by Ms Khan."

22. The Appellant herself was designated on 21 April 2022 for the purposes of an asset freeze and transport sanctions under the 2019 Regulations. She was designated on the basis that there are reasonable grounds to suspect that she is "associated" with a person (her husband) who is, or has been, involved in obtaining a benefit from or supporting the Government of Russia, including obtaining a financial benefit from, and being an immediate family member of, that person.

23. It is not disputed that Mr Khan is an "involved person" within the meaning of regulation 6(2)(a)(ii) of the 2019 Regulations, as a person obtaining a benefit from or supporting the Government of Russia.

24. There can be no doubt that the Appellant, being the wife of Mr Khan, is an immediate family member of his and therefore falls within the definition of being a person "associated with" him: see regulation 6(6)(b). In addition, the Appellant falls within the definition of "associated with" because she has obtained a financial benefit from him: see regulation 6(6)(a).

25. On 22 November 2022 the Appellant requested the revocation of her designation by way of Ministerial review under section 23(1)(b) of SAMLA. An administrative review was initiated, and her designation was amended and endorsed by the Minister on 27 February 2023. A further submission was sent to the Minister on 28 February 2023, relating to the transport sanctions, and was endorsed by the Minister on the same date. The final decision to maintain the designation was made by an FCDO official on 28 February 2023.

The Appellant's financial position

26. In the Appellant's first witness statement, dated 22 November 2022, she explains her financial assets and income. In particular, she emphasises that her accounts are independent from her husband.

27. She also explains the various gifts which she has received from Mr Khan. In particular, "Gift 14" was made because of the risk that he might become subject to financial sanctions. The gift was made on 1 March 2022 (two weeks before Mr Khan was designated in the EU and the UK). At that stage, the Appellant states, at para 65 of her first witness statement:

> "… We did not know whether [he] would be designated, but we understood (given previous inaccurate reporting regarding his relationship with Mr Putin), that it was possible that he may be at some stage in the future. This was an irrevocable and unconditional gift of money from [Mr Khan] to me. To be clear, the money received in Gift 14 is mine, and not [his]. That money was, and is, only intended to be used for my, and my children's, needs."

28. Appendix 1, which is annexed to the witness statement, describes each of the gifts in more detail.

29. The consequences of the designation of the Appellant in the present case were described by the Judge, at para 68 of her judgment, as being "significant and grave". The freeze on the Appellant's assets has the effect that she is unable to deal with any of her own property, even for such basic needs as paying for food or other essential items for herself and her family. There is, however, a scheme for licensing expenditure which is intended to mitigate the harshness of the consequences of designation. I will return to that licensing scheme below.

The Respondent's reasons for the Appellant's designation

30. The original Statement of Reasons for the Appellant's designation on 21 April 2022 stated the following:

> "There are reasonable grounds to suspect that Anzhelika KHAN is associated with German Borisovich KHAN. Anzhelika KHAN is the wife of German Borisovich KHAN. German Borisovich KHAN, hereafter KHAN, is a prominent Russian businessman. Khan is obtaining a benefit from and/or supporting the Government of Russia through his positions on the Supervisory Board of the Alfa Group Consortium and the Board of Directors of ABH Holdings S.A., owner of Russia's largest privately owned bank 'Alfa-Bank (Russia)', and Chairman of the Supervisory Board of A1 Investment Holdings S.A., entities which are carrying on business in sectors of strategic significance to the Government of Russia. KHAN is also a close associate of Vladimir Putin who has been involved in destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine."

31. It should be noted that, before the original designation of the Appellant in April 2022, there was produced a Sanctions Designation Form, which included an assessment of the "ECHR compatibility/proportionality" of the designation decision.

32. Furthermore, by the time of the administrative review decision, in February 2023, there was an Administrative Review Form produced, which took into account further evidence, including representations which had been made on behalf of the Appellant, and addressed those in some detail. Again, the FCDO made an assessment of whether maintenance of the designation would be compatible with ECHR rights and concluded that it would.

33. At para 24 of Mr Reed's first witness statement, he explained the importance which the Respondent attaches to the concept of "association" in the following way:

> "The concept of association is a key pillar of the UK sanctions regime under SAMLA. It features across all individual UK autonomous sanctions regimes. Designations made on the basis of association with a person who is or has been involved in the activities targeted by the sanctions regime can be justified in a number of ways, one or more of which may be applicable in any given case. This includes increasing the coercive pressure on an involved person to take actions consistent with the objective(s) of the relevant sanctions regime, by incentivising one or more of their associates to influence the involved person's behaviour and/or to distance themselves from and thereby isolate the involved person, and this is clearly relevant in Ms Khan's case as set out in more detail in §72 below. This effect can be amplified if the designation of an associate also incentivises other individuals who are associated with an involved person to take similar actions, or deters other individuals from becoming associated with an involved person. Furthermore, given the widespread practice of designated persons holding assets via their associates - for example, properties held in the names of family members - as a means of seeking to circumvent the effect of sanctions, designations of these associates can also be critical in ensuring that the designation of the relevant involved person has its intended effect. This point is also clearly relevant in Ms Khan's case due to the extensive financial and material benefit she has obtained from German Khan, as outlined below (see, for example, §25, §50 and §72(d))."

34. Para 72 of Mr Reed's witness statement, to which he refers in that passage, needs to be set out in full:

> "The designation of Ms Khan, which is based on her association with her husband German Khan, is also rationally connected to the purposes identified in regulation 4 of the 2019 Regulations. The designation of Ms Khan on the grounds of her association

with German Khan is likely to contribute to achieving those purposes in at least the following ways:

a) Designating Ms Khan on this basis will send a signal to Ms Khan, others in her position and the wider international community that there are negative consequences to receiving a financial or other material benefit from persons involved in obtaining a benefit or supporting the Government of Russia. It also signals that associated persons bear some personal responsibility for the consequences of activities which have provided them (whether directly or indirectly) with financial or other material benefit.

b) The designation of Ms Khan will disincentivise her from continuing to obtain a financial or other material benefit from her husband. It will also encourage others to dissociate from those individuals who have carried on business in sectors of strategic significance to the Government of Russia, and disincentivise others from associating themselves in future with (and obtaining a financial or other material benefit from) those individuals. In these ways, the designation will isolate German Khan and others in his position. It will also reduce the benefit they gain from their positions, given that this includes the ability to provide financial or material assistance to their associates, such as the extensive financial and material benefit German Khan has provided to Ms Khan. This, in turn, will intensify the costs of their behaviour and amplify the incentives on German Khan and others in his position to take the actions set out above (see §71).

c) The designation will also encourage Ms Khan to put pressure on her husband German Khan to take the actions set out above (see §71), in the hope of increasing the likelihood of the sanctions being lifted. Ms Khan explains that, at her request, German Khan previously transferred his shares in four properties to her, including the family home in the UK and their Italian property, and provided two financial gifts [REDACTED] … This suggests that, contrary to what has been claimed, Ms Khan does in fact hold significant influence over German Khan and is in a position to put pressure on him as set out above. German Khan may also be incentivised to act on his own initiative and change his behaviour in the hope that sanctions affecting Ms Khan will be lifted.

d) Furthermore, there is a material risk that German Khan could mitigate the impact of his asset freeze by holding assets through and/or moving assets into the names of his family members, including Ms Khan. The holding of assets via associates is a widespread practice. We assess that the likelihood of this risk materialising is increased by the pattern of German Khan's past behaviour, specifically the providing of substantial financial and

> other assistance to Ms Khan. German Khan provided Ms Khan with [REDACTED] in March 2022, shortly before he was designated. The designation of Ms Khan will therefore reduce the likelihood that German Khan is able to circumvent the effect of the sanctions on himself, and in turn increases the likelihood that the designation of German Khan has its intended effect (see §71)."

The financial licensing scheme

35. As I have mentioned, there is a financial licensing scheme, which is intended to mitigate the harshness of the UK sanctions regime. The scheme is operated by the Office of Financial Sanctions Implementation ("OFSI"), which is part of His Majesty's Treasury and was established in March 2016. It operates across the full range of sanctions regimes operative in the UK and, in the present context, the 2019 Regulations. Its power to grant licences derives from Part 7 and, specifically, regulations 64 and 66 of the 2019 Regulations.

36. In relation to the OFSI regime, Mr Reed stated the following, at para 100 of his first witness statement:

> "I understand from colleagues at OFSI that the exponential increase in licence applications and queries since the commencement of the Russian invasion of Ukraine has resulted in longer assessment times in respect of some licence applications. OFSI (and the UK Government more generally) have taken various steps to respond to the evolving situation and to address the risk of delays in processing licence applications. For example, I understand that:
>
> a) OFSI has extended its approach and made increased use of the flexibility granted by general licences to be more responsive to the needs of licence applicants, to address a broad range of recurring issues, and to mitigate the unintended consequences of sanctions on UK persons, while at the same time ensuring that UK sanctions policy objectives continue to be met. Since the invasion of Ukraine OFSI has issued 50 general licences, including the general licences for legal fees and for payments to utilities companies for gas and electricity from which Ms Khan has benefited.
>
> b) OFSI is in the process of developing streamlined procedures for assessing licence applications and prioritising cases appropriately.
>
> c) OFSI is regularly updating its public guidance in relation to financial sanctions in general and the Russia sanctions regime in particular, as well as expanding its engagement across various

> sectors to ensure that it supports applicants in understanding the sanctions regimes and preparing complete licence applications.
>
> d) OFSI has committed significant additional resources to its licensing functions, with a large increase in the number of staff now dedicated to assessing licence applications and queries arising from the conflict in Ukraine."

37. The licensing scheme was described in more detail in a Respondent's Note which was requested by the Court and filed after the hearing of this appeal. More recently still, the Court was provided with the following information by way of update to that Note:

> "On 14 January 2025, OFSI issued a new General Licence 'Interim Basic Necessities for Designated Persons' ('the Basic Needs Licence'). This applies to individuals designated for the purposes of an asset freeze by the UK (excluding those designated for the purpose of compliance with United Nations obligations) under the regulations listed in Annex 1 of the licence ('UK DPs'). The New Licence is available on OFSI's website page of general licences.
>
> In summary, the Basic Needs Licence allows a person to make funds available to or for the benefit of a UK DP up to a permitted maximum of £350 per month in each of the two months following the date of their designation for the purpose of that DP making defined permitted payments. Permitted payments are those for food and beverages, medicines/medical products and personal and household products. The Basic Needs Licence took effect from 00:01 on 15 January 2025 and will apply automatically to each UK DP from the point that they are designated until either a specific basic needs licence in respect of that UK DP takes effect or two months after the date of their designation (whichever is earlier).
>
> OFSI considers the Basic Needs Licence to be a general licence for basic needs …"

38. There are two sorts of licences granted by OFSI: general licences and specific licences. General licences provide a form of automatic authorisation for particular categories of expenditure falling within the scope of the general licence in question and do not require an application to be made. Specific licences are individually assessed by OFSI in relation to a precise set of facts, usually at the request of an applicant. In the course of determining a specific licence application, OFSI may require and seek further information from the applicant in order to enable it to process the application.

39. OFSI policy on general licences is set out in 'UK Financial Sanctions General Guidance'.

40. OFSI has issued general licences for certain categories of payments that would cover a number of matters falling within the scope of basic needs: for example, payment to energy companies for gas and electricity; payment to water companies; payment to local authorities; and payment to revenue authorities.

41. At the time of the Appellant's designation on 21 April 2022, the relevant general guidance included information on basic needs at para 6.9. OFSI aimed to determine licence applications within four weeks, although urgent and humanitarian applications would be prioritised: para 6.10.

42. The guidance which is currently available is the 'OFSI Designated Individuals Licensing Principles' as well as the general guidance. All are available on the Government website.

43. The provisions on basic needs in the Licensing Principles Guidance include the following principles. Principle 3 is that licensing decisions should not significantly cause harm to the health, or personal security of a designated person ("DP") or a dependent family member.

44. Principle 4 is that licensing should permit basic needs, which OFSI considers to include a reasonable standard of living as compared to a person receiving the net UK median wage. Ordinarily Principle 4 will be satisfied by granting a DP a sum equivalent to the net UK median wage. Where expenditure is in excess of what can reasonably be expected under the net UK median wage, OFSI will take an objective view of what is required to fulfil the individual's ordinary basic needs.

45. Principle 5 is that in most cases licences will not enable a designated person to continue the lifestyle or business activities which they had before they were designated. In particular high net-worth individuals should not expect licences to allow a continuation of their previous lifestyle.

46. Principle 6 is that OFSI accepts that there is always a risk of economic harm to unconnected third party non-designated persons. It will consider the impact of not licensing, or only partially licensing, on those third parties and whether that would have a significant detrimental impact on them. However, this is not a determinative factor and must be balanced against upholding the objectives of the sanctions regime and the operational feasibility of licensing that activity.

47. The general principles in the Licensing Principles Guidance include the following.

48. Principle 12 is that OFSI will generally permit a DP to receive money (for example a salary) into UK accounts. Those funds should be transferred to frozen bank accounts and should not normally be received from another DP and must satisfy the relevant licensing purpose.

49. Principle 14 is that OFSI will not generally license activity which can reasonably be provided by the state (for example healthcare or education): this is because these are usually available free at the point of access.

50. OFSI takes the view that the everyday use by a designated person of their own economic resources for personal consumption is not prohibited by the sanctions regime. Nor does

it prohibit others making available non-frozen assets (such as food) to a designated person for personal consumption.

51. It is important to note that, until 15 January 2025, there was no general licence in place for basic needs. OFSI takes the view that basic needs requests relating to living expenses have been largely managed through the specific licensing regime, which allows it to scrutinise applications and objectively consider the legal and policy justification for issuing a licence and manage the risk of asset flight. OFSI takes as a starting point the consideration that licences should not enable a pre-designation lifestyle to continue but should enable a reasonable standard of living as compared to a person receiving the net UK median wage.

52. It is acknowledged by OFSI that the Russian invasion of Ukraine in February 2022 led to an increase in the work which it had to do and a delay in allocating resources to that work. Consequently, the delays experienced by the Appellant were more acute than would likely be experienced now. For example, OFSI increased the resources in its licensing team by 160 percent in the financial year 2022-23. Since the invasion of Ukraine OFSI has issued over 50 general licences.

53. Until January 2025 OFSI policy provided for a licence capped monthly allowance which was equivalent to the net median wage for the DP and any of their dependants, while considering applications for a special licence on a case-by-case basis.

54. The letter which was sent to the Appellant when she was originally designated was in a standard form in April 2022. This made it clear that she could apply for a licence to allow for "basic needs (such as for food or medical purposes)".

55. It is acknowledged by OFSI that, until January 2025, there was no guidance on how designated persons should meet their basic needs while an application for a specific licence was pending, because its policy was that urgent basic needs licences (on the basis of median salary) were granted in the interim where necessary.

56. Going forward, OFSI and the FCDO can confirm that they remain committed to evaluating further improvements to this framework. As I have mentioned at para 37 above, a new Basic Needs Licence was introduced in January 2025.

57. In my view, it is troubling that, at the time of this case, the position was that a designated person could be put in the position where their own assets were frozen from the date of designation but no exception was made even for basic needs such as food until they had applied for, and been granted, a specific licence to meet those needs. Even with a speedy and efficient licensing process, this would take some time. In the meantime, the designated person, and others who try to provide them with economic resources, would (on the face of the 2019 Regulations) be committing a criminal offence if they did something as basic as buying food. It cannot be a satisfactory answer as a matter of principle that it is unlikely that they would be prosecuted in practice.

58. Nevertheless, I bear in mind that this particular aspect of this case has not featured as a specific ground of challenge in these proceedings. I also bear in mind that, by the time of the only decision which is under challenge in these proceedings (the decision to maintain the Appellant's designation on 28 February 2023), she had obtained relevant licences and was able to meet basic needs.

The impact of the licensing scheme on the Appellant and her family

59. On behalf of the Appellant George Maling, a solicitor, has filed four witness statements relating to the OFSI licensing scheme as it has affected the Appellant.

60. He states that the Appellant's experience has been that for each licence there have been various rounds of correspondence between her solicitors and OFSI before the application progressed to the final approval level, which took many months. At the time of his first witness statement, dated 21 November 2022, solicitors then acting for the Appellant (W Legal) had made 12 licence applications for her but only five had resulted in licences being issued. Schedule 1 to his first witness statement sets out a summary table of the applications and the licences. The first application, for a basic needs and prior obligations licence, was made on 29 April 2022. The final basic needs and prior obligations licence was issued by OFSI on 8 June 2022. A draft of that licence had been issued on 1 June 2022, inviting comments on it, but it was confirmed on 7 June that the Appellant's then solicitors had no comments on it. Before that date, there had been a draft urgent utilities licence issued, which was granted in its final form on 27 May 2022.

61. It is clear from the Schedule that the Appellant was subsequently granted various other licences, including in relation to legal fees and international travel.

62. However, Mr Maling observes that there were considerable delays in the issuing of those licences; and that, even when OFSI does issue a licence, the process of implementing it is problematic because licences do not compel third parties to act. For example, they do not compel a bank to make the payments listed in the licence. He concludes his first witness statement that, as presently structured, the OFSI licensing scheme is "wholly ineffective to mitigate the severe effects of the designation on the lives of Mrs Khan, her (non-designated) dependent children and other (non-designated) individuals connected with Mrs Khan, like her staff."

63. In his second witness statement, dated 4 May 2023, Mr Maling describes in particular the difficulties which the Appellant faced when applying for a licence for school fees.

64. The Appellant's youngest son was born in July 2012. He was 11 months old when he moved to the UK, is a British citizen, and has received all of his education in the UK. On 4 December 2022 W Legal applied to OFSI for a licence to permit the Appellant to make payment to his school for the remainder of the 2022/23 school year. On 8 February 2023 OFSI confirmed that it would shortly issue a licence permitting the payment of the school fees. It was granted under the prior obligations derogation. However, OFSI also notified the Appellant that it did not intend to license the payment of further private school fees after July 2023 and that she should seek alternative arrangements for her child's schooling in good time.

65. In his fourth witness statement, dated 20 July 2023, Mr Maling states that the Appellant's youngest son would have to leave his current fee-paying school and attend a state school from September 2023. The Appellant considered that the impact of a school move on her son's mental health would be deleterious. A psychological report was obtained, in which it was recommended that the Appellant's son should not move schools. The Appellant remained anxious about how he would cope in a new school.

The judgment of the High Court

66. In the proceedings before the High Court there were three grounds of challenge:

(1) The Secretary of State failed to consider whether the Appellant's designation was likely to further the statutory purpose of the 2019 Regulations, thereby acting *ultra vires* the 2019 Regulations, and/or failed to have regard to a mandatory relevant consideration, and/or acted unreasonably.

(2) The designation constitutes a disproportionate interference with the Appellant's rights under Article 8 and Article 1 of the First Protocol ("A1P1") to the European Convention on Human Rights ("ECHR").

(3) Regulation 6(2)(d) of the 2019 Regulations is incompatible with Article 8 and A1P1 ECHR.

67. It will be seen that the formulation of Ground 1 in fact compendiously put together three different public law arguments. They were not all based on the *Padfield* principle (that a statutory power can only be used to further the purpose of the legislation that conferred that power and not for some extraneous purpose): see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; only the first argument was.

68. The Judge rejected Ground 1 at paras 80-102 of her judgment. The essence of her reasoning in rejecting the *Padfield* argument can be found at para 92, where she said that:

> "*Padfield* does not say anything about individualised consideration, it speaks only to purpose."

69. The Judge turned to the first limb of Ground 2 (which she described as 'excessive breadth/unforeseeability') at paras 103-117 of her judgment. In that part of her judgment the Judge addressed the "in accordance with the law" limb of Ground 2. She returned to other aspects of Ground 2 later in her judgment.

70. The Judge rejected Ground 3, which concerned the compatibility of regulation 6(2)(d) of the 2019 Regulations, at paras 118-125 of her judgment.

71. The Judge then returned to Ground 2, in relation to rational connection, and fair balance, under the rubric of 'proportionality', at paras 126-156 of her judgment.

72. The Judge did not have the benefit of this Court's judgment in *Dalston Projects Ltd and Others v Secretary of State for Transport* [2024] EWCA Civ 172; [2024] 1 WLR 3327. That judgment, which included consideration of the appeal in *Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs*, was given on 27 February 2024, one week after the judgment in the present case.

73. At the time of her judgment the Judge had the judgment of Garnham J in *Shvidler* and referred to it. Although the decision in *Shvidler* was upheld by this Court, this Court held that Garnham J had erred in law as to the approach which must be taken by the reviewing court when considering the issue of proportionality under the Human Rights

Act 1998 ("HRA"). This Court then conducted the proportionality exercise for itself and came to the same result as Garnham J. It is necessary at this stage to outline what this Court held in *Dalston Projects*, as it will inform how the human rights issues in this appeal should be approached.

The judgment of this Court in *Dalston Projects*

74. The main judgment in *Dalston Projects* was given by Singh LJ, with whom Whipple LJ agreed. Sir Geoffrey Vos MR also agreed and gave a short concurring judgment on one aspect of the issues. For convenience I will therefore refer to the main judgment as this Court's judgment in that case. It is under appeal to the Supreme Court, which heard the appeal in January 2025, but as things stand is binding on this Court.

75. Before addressing each of the two appeals before the Court separately, it addressed two questions which were common to both. First, what principles should a first instance court apply when reviewing a decision of the executive on grounds of proportionality under the HRA? Secondly, what principles should an appellate court apply when reviewing a decision of a lower court in such a case?

76. The Court set out the principle of proportionality at para 9, in particular by reference to the well-known formulation by Lord Reed JSC and Lord Sumption JSC in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, at paras 74 and 20.

77. It is necessary to determine:

(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;

(2) whether the measure is rationally connected to the objective;

(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and

(4) whether the measure's contribution to the objective outweighs the effects on the rights of those to whom it applies. The fourth limb is sometimes referred to as the "fair balance" issue or "proportionality *stricto sensu*", i.e. in the strict sense.

78. At paras 11-21, the Court set out the role of a first instance court when assessing proportionality. At para 11, the Court said:

> "It is well-established that the question whether an act is incompatible with a Convention right is a question of *substance* for the court itself to decide; the court's function is not the conventional one in public law of reviewing the *process* by which a public authority reached its decision…" (Emphasis in original)

79. As the Court went on to say, however, in particular at para 14, the fact that the court is the arbiter of proportionality does not mean there is no room for "appropriate respect and weight" to be given to the views of the executive. As the Court said at para 20, by reference to the judgment of Lord Sales JSC in *Director of Public Prosecutions v Ziegler* [2021] UKSC 23; [2022] AC 408, at para 130, depending on the context, the court may afford a measure of respect to the balance of rights and interests struck by a public authority.

80. At para 21, the Court said:

> "It is also well-established in the authorities that the context will include (1) the importance of the right …; (2) the degree of interference; (3) the extent to which the subject matter is one in which the courts are more or less well placed to adjudicate, both on grounds of institutional expertise (e.g. they are the guardians of due process but are much less familiar with an area such as the conduct of foreign relations or national security) and democratic accountability (e.g. when it comes to social and economic policy, including the allocation of limited resources)."

81. At paras 22-37, the Court addressed the role of an appellate court when considering a decision on proportionality by a first instance court. The Court analysed the earlier authorities as falling into three categories. The first category, described at para 24, is where an appeal lies on a point of law by way of case stated. In that context, an appellate court is not entitled to interfere with the first instance court's assessment of proportionality (which is a question of fact) except on the grounds that the lower court has misdirected itself in law or has reached a conclusion which was not reasonably open to it on the evidence before it.

82. Secondly, as described at para 25, there is a group of cases in which the appellate court will not accord any deference to the assessment of proportionality by the first instance court but will carry out its own proportionality assessment. This second category comprises primarily those cases which concern the compatibility of a rule or policy with Convention rights. It is not concerned with cases where there has simply been an assessment of proportionality on the facts of an individual case: see para 26.

83. At para 28, the third category of cases was described as being those cases where there has been an assessment of proportionality by a first instance court on the facts of an individual case. In that category, this Court held that its role is to exercise the conventional role that it plays on appeals under CPR 52.6. In particular it does not sit to re-hear the issue but sits by way of review of the decision of the lower court and must consider whether the decision was "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings in the lower court": see CPR 52.21.

84. As the Court said at para 32, when an appellate court is considering this third category of cases, it cannot simply substitute its own assessment of proportionality for that of the lower court (as it can in the second category of cases); nor is it bound by that assessment unless it can say that the lower court has erred in law or its conclusion was not reasonably open to it (as in the first category of cases).

85. At para 35, the Court considered it instructive to consider the approach neatly encapsulated in the extradition context by the Divisional Court in *Polish Judicial Authority v Celinski (Practice Note)* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551, at para 24, where Lord Thomas CJ said:

> "The single question therefore for the appellate court is whether or not the District Judge made the wrong decision. It is only if the court concludes that the decision was wrong … that the appeal can be allowed. Findings of fact, especially if evidence has been heard, must ordinarily be respected. In answering the question whether the District Judge, in the light of those findings of fact, was wrong to decide that extradition was or was not proportionate, the focus must be on the outcome, that is on the decision itself. Although the District Judge's reasons for the proportionality decision must be considered with care, errors and omissions do not of themselves necessarily show that the decision on proportionality itself was wrong."

86. This Court summarised the single question for it as follows:

> "… Whether the assessment of the lower court was 'wrong' and we must apply the approach in *In Re B*. This means, first, that we are not simply re-hearing the case as if we were the court of first instance. Secondly, findings of fact by the lower court must ordinarily be respected, especially if it has heard oral evidence on factual matters that were in dispute. Thirdly, the focus must be on the outcome of the assessment of proportionality. We are not confined to asking whether the lower court erred in law or reached a conclusion which was not reasonably open to it. There is a spectrum but if, at the end of the day, we consider that the outcome of the assessment of proportionality was wrong, we can and should say so."

Ground 1: *Padfield*

87. Ground 1 in this appeal is that the Judge erred in concluding that the Secretary of State was not required, pursuant to the *Padfield* principle, to consider whether the individual designation of the Appellant was "likely" to further the statutory purpose of dissuading the Government of Russia from destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty, or independence of Ukraine.

88. On behalf of the Appellant Ms Montgomery submits that, on the undisputed evidence, there was no likelihood that the designation of this Appellant would have any material impact on the Government of Russia. The Appellant is not, and never has been, personally involved in political affairs. She has never been a supporter of the Putin regime. She has never made any political donations to Mr Putin or to his party and has never attended any fundraising events for their benefit.

89. In April 2022, before her designation, the Appellant registered for the UK Government's 'Homes for Ukraine' programme, offering to provide accommodation in her home to Ukrainian citizens fleeing the conflict. She has been involved, with her daughter, in charitable work to assist with the sending of essential supplies to the people of Ukraine.

90. I would reject Ground 1. The ground as formulated is based on a misunderstanding of the *Padfield* principle.

91. In *Padfield*, at page 1030, Lord Reid said that there is no such thing as an unfettered discretion in administrative law. Parliament always confers a discretionary power with the intention that it should be used to promote the policy and objects of the Act concerned; and the policy and objects must be determined by construing the Act as a whole. If a public authority uses its discretion to thwart or run counter to the policy and objects of the Act, then the decision will be unlawful.

92. That principle requires that a discretionary power should be exercised so as to further the objects and policy of the legislation which confers it, and not to impede or frustrate that purpose. It is not concerned with whether the exercise of a discretionary power is "likely" to further the statutory purpose. It suffices that a discretionary power has been exercised for that purpose and not for some extraneous purpose (for example to penalise a political opponent). There need not be bad faith: the purpose of the decision may be a benign one but, if it is extraneous to the statute which confers the power, on its correct interpretation, then it will be unlawful.

93. The submission for the Appellant conflates purpose with efficacy. That latter issue may well give rise to a viable legal complaint but it would have to be brought on other grounds, for example that there was no rational connection between the means chosen and the aim in view. That would simply be an application of the public law principle of rationality.

94. For reasons that will become apparent below, when I address the Appellant's human rights arguments under Ground 3, I would in any event reject any suggestion that there was no rational connection between the Appellant's designation and its purpose.

Ground 2: regulation 6(2)(d) of the 2019 Regulations

95. Ground 2 in this appeal is that the Judge erred in concluding that rule 6(2)(d) of the 2019 Regulations is compatible with Article 8 and/or A1P1 ECHR, on the basis that:

(a) the discretion to designate an individual who is merely "associated with" a designated person is not "subject to … conditions provided for by law";

(b) the liability of an individual who is merely "associated with" a designated person to designation is not rationally connected with the objectives sought to be pursued; and/or

(c) the liability of an individual who is merely "associated with" a designated person to designation is disproportionate.

Ground 2(a)

96. Ground 2(a) is concerned with the requirement that any interference with Convention rights must be "in accordance with the law". In my view, the legislative and common law framework in this context does provide sufficient clarity, certainty and safeguards against the possibility of abuse of power as to satisfy this requirement.

97. As Lord Sumption JSC explained in *In Re Gallagher* [2019] UKSC 3; [2020] AC 185, at para 14, the condition of legality is not a question of degree. "The measure either has the quality of law or it does not. It is a binary test. This is because it relates to the characteristics of the legislation itself, and not just to its application in a particular case …" This means that the measure, if it does not have the quality of law, will be incompatible with Article 8, however legitimate its purpose, and however necessary or proportionate it may be to deal with the problem in this particular way.

98. Ms Montgomery relies on the requirements of the quality of law as set out by Lord Sumption at para 17:

> "The accessibility test speaks for itself. For a measure to have the quality of law, it must be possible to discover, if necessary with the aid of professional advice, what its provisions are. In other words, it must be published and comprehensible. The requirement of foreseeability, so far as it adds to the requirement of accessibility, is essentially concerned with the principle summed up in the adage of the American founding father John Adams, 'a government of laws and not of men'. A measure is not 'in accordance with the law' if it purports to authorise an exercise of power unconstrained by law. The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers discretion, in terms or in practice, which make its effects insufficiently foreseeable. Thus a power whose exercise is dependent on the judgment of an official as to when, in what circumstances or against whom to apply it, must be sufficiently constrained by some legal rule governing the principles on which that decision is to be made. But a legal rule imposing a duty to take some action in every case to which the rule applies does not necessarily give rise to the same problem. It may give rise to a different problem when it comes to necessity and proportionality, but that is another issue. If the question is how much discretion is too much, the only legal tool available for resolving it is a proportionality test which, unlike the test of legality, is a question of degree."

99. Ms Montgomery also relies on what was said about the quality of law in *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058; [2020] 1 WLR 5037, at paras 55-56, where the Court of Appeal approved the agreed summary of the general principles in the judgment of the Divisional Court, in particular sub-paragraphs (4) – (6):

> "(4) Where the impugned measure is a discretionary power, (a) what is not required is 'an over-rigid regime which does not contain the flexibility which is needed to avoid an unjustified interference with a fundamental right' and (b) what is required is that 'safeguards should be present in order to guard against overbroad discretion resulting in arbitrary, and thus disproportionate, interference with Convention rights': per Lord Hughes JSC in *Beghal v Director of Public Prosecutions* [2016] AC 88, paras 31 and 32. Any exercise of power that is unrestrained by law is not 'in accordance with the law'.
>
> (5) The rules governing the scope and application of measures need not be statutory, provided that they operate within a framework of law and that there are effective means of enforcing them: per Lord Sumption JSC in *Catt* at para 11.
>
> (6) The requirement for reasonable predictability does not mean that the law has to codify answers to every possible issue: per Lord Sumption JSC in *Catt* at para 11."

100. Ms Montgomery specifically places reliance on the decision of the Court of Appeal in that case at para 91, that there were two fundamental deficiencies in the legal framework in that particular context, which concerned the deployment by the police of automatic facial recognition technology. The first was what was called the "who question" and the second was the "where question". In relation to both of those questions too much discretion was left to police officers. It was not clear *who* could be placed on a "watchlist"; nor was it clear that there were any criteria for determining *where* the automatic facial recognition technology could be deployed.

101. In my view, everything depends on the context. There were particular reasons in *Bridges* why the quality of law was held to be absent. In my view, the present legal regime has very different features. The analogy with *Bridges* might be good if SAMLA and the 2019 Regulations did not define who was an "associate" of an involved person and simply left that to the discretion of the executive but that is not the nature of the sanctions regime here.

102. Furthermore, I am impressed with the approach taken by the High Court in *Phillips v Secretary of State for Foreign, Commonwealth and Development Affairs* [2024] EWHC 32 (Admin); [2024] 1 WLR 2227. At para 141, Johnson J said the following:

> "The 2019 Regulations are published and thus readily accessible. They operate in a foreseeable manner. They do not give the Secretary of State anything remotely approaching an unfettered

> discretion. A person may not be designated unless the Secretary of State reasonably suspects that the person is an 'involved person': regulation 6(1). The test for being an 'involved person' is tightly defined. The circumstances in which the power of designation might be exercised are foreseeable to a degree that is reasonable. It is, in particular, foreseeable that a person who positively supports Russia's propaganda war against Ukraine (for example, by parroting Russia's propaganda narrative), rather than simply expressing an independent view which happens to align with Russia's interests, might be subject to designation."

103. He added the following important passage, at para 144:

> "There are strong safeguards against arbitrariness. Aside from the need for reasonable suspicion of being an 'involved person', and the tightly drawn test for being 'an involved person':
>
> (1) The purpose of the Regulations is explicitly prescribed, in clear and narrow terms: 'encouraging Russia to cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine' (regulation 4(a)).
>
> (2) The power to designate a person may only be exercised for the narrowly drawn statutory purpose: *Padfield* [1968] AC 997, 1030C per Lord Reid.
>
> (3) The 2019 Regulations were subject to the made affirmative procedure, and, for the first three years of their operation, the Secretary of State was required to provide annual reports to Parliament on their operation: section 30 of the 2018 Act.
>
> (4) The need for the designation to be publicised, together with a statement of reasons: regulation 8(2)(b), 8(6)(a)(ii).
>
> (5) The obligation to withdraw a designation when it no longer fulfils its statutory purpose: section 22(3) of the 2018 Act.
>
> (6) The system of exceptions (for example, to allow payments to be made into a frozen account): regulations 58-63.
>
> (7) The system of licences (whereby a designated person may seek authority to do anything which would otherwise be prohibited by a sanction): regulations 64-68.
>
> (8) The right to request an administrative review of the designation: section 23 of the 2018 Act.

> (9) The right to challenge a decision made on an administrative review, with that challenge being determined by the court: section 38 of the 2018 Act.
>
> (10) The statutory duty not to act incompatibly with Convention rights: section 6(1) of the 1998 Act. It follows that any decision under the Regulations that interferes with qualified Convention rights must be justified. In particular, the stringent four-part proportionality test must be satisfied before a person can be designated: *Bank Mellat* [2014] AC 700, para 74."

Ground 2(b)

104. Turning briefly to Ground 2(b), in my view, it is obvious that regulation 6(2)(d) of the 2019 Regulations does have a rational connection with the legitimate aim which it seeks to pursue.

105. On the issue of rational connection, the Court in *Dalston Projects* said the following, at paras 190-191:

> "190. First, it is important to recall that what is required under the second limb of the *Bank Mellat* test for proportionality is a rational connection, no more and no less. There does not have to be a perfect fit between the legitimate aim and the means chosen to achieve it, provided there is a rational connection between them.
>
> 191. Secondly, this is an objective test. It calls for analysis by the court itself. As I have already mentioned, proportionality is, unlike conventional judicial review grounds, concerned with the substance of the matter, not the process by which the decision was reached. If, as a matter of objective analysis, there is a rational connection proved to the court's satisfaction, it is immaterial whether or not this featured in the reasoning process of the decision-maker at the time."

106. As the Court said in *Dalston Projects*, this calls for legal analysis and evaluation but, if evidence were needed for it, that evidence is to be found in the first witness statement of Mr Reed, at para 24 (quoted above), where he explains the ways in which the 2019 Regulations seek to put pressure on a foreign state by targeting not only those who are directly involved (such as Mr Khan) but those associated with those persons (for example family members such as this Appellant). The underlying philosophy behind the sanctions regime is that the state concerned must come to appreciate that "innocent" persons will suffer unpalatable consequences and so that state should change its behaviour.

107. At para 123, the Court in *Dalston Projects* said that one of the ways in which economic sanctions can be effective is by increasing the disadvantages felt by citizens: "In this sense, the aim and the purpose of sanctions are not restricted to State institutions, or those who exercise political power and influence. In this way sanctions may provide a peaceful way to impose pressure on a hostile State."

108. When considering the issue of fair balance, the Court said in *Dalston Projects*, at para 210:

> "I would accept that these sanctions are both severe and open-ended. But this does not meet the fundamental point that sanctions often have to be severe and open-ended if they are to be effective. If sanctions are to be effective, a serious price has to be paid by those who are within the definition of people to be designated under the 2019 Regulations. On the other side of the balance is Russia's very serious violation of international law and the need to bring the invasion of Ukraine to an end."

Ground 2(c)

109. The only way in which the Appellant could succeed under Ground 2(c) is if she could demonstrate that in all cases, or at least in the generality of cases, the legislation was bound to be disproportionate: see the decision of the Supreme Court in *Christian Institute v Lord Advocate* [2016] UKSC 51; UKSC 29. As Lord Reed explained at para 88, a challenge to the validity of legislation on the basis of a lack of proportionality faces a high hurdle. This is sometimes known as an "*ab ante*" challenge. If a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with Article 8 rights "in all or almost all cases", the legislation itself will not be incompatible with Convention rights. That does not necessarily prevent an individual from challenging the *application* of that legislation in the particular circumstances of their case. But it does prevent a challenge to the underlying legislation itself.

110. Ms Montgomery KC accepted that this is the hurdle which she must overcome but submits that she is able to do so. I do not accept that submission. In my view, it is plain that the question whether a designation of a person, or a decision to maintain that designation is proportionate is highly fact-specific. Regulation 6(2)(d) is not in itself disproportionate but its application to the facts of a particular case may be.

Ground 3: proportionality

111. Ground 3 in this appeal is that the Judge erred in law and/or reached a conclusion which was "wrong" in concluding that the designation of the Appellant was a proportionate interference with her rights and those of her dependent children, pursuant to Article 8 and/or A1P1, on the basis of five sub-grounds, which I will address in turn.

Ground 3(a)

112. Ground 3(a) is that the Judge failed to adopt the correct approach, as clarified by this Court in *Dalston Projects*, that the question whether designation is compatible with Convention rights is a question of substance for the court itself to decide, rather than merely conducting a review of the Secretary of State's decision.

113. I would reject Ground 3(a). When the judgment of the High Court is read as a whole, it is clear, in my view, that the Judge did not fall into this error. Her approach was consistent with the judgment of this Court in *Dalston Projects* even though she did not have the benefit of seeing that judgment at the time.

114. Further, and in any event, even if I had thought that the Judge erred in her approach, I would reach the same conclusion, having conducted the proportionality assessment for myself. In my view, far from being "wrong", the Judge was right.

115. At para 36 of her judgment, the Judge quoted in full paras 91-92 in the judgment of Garnham J in *Shvidler*. At para 91, Garnham J had said:

> "Undoubtedly, this is a case where close scrutiny is necessary in order to adjudicate on a complaint that Convention rights have been infringed. And it is the structured analysis articulated in *Bank Mellat* that must be applied. But the Court does not assume the role of primary decision maker on issues that turn on the exercise of judgment or the determination of policy, *limiting itself instead to asking whether the decision was one properly open to the Executive*. …" (Emphasis added)

116. Ms Montgomery KC points out that that was one of the passages which led this Court to conclude in *Dalston Projects* that Garnham J had fallen into error as to the approach which the court itself has to take when assessing the proportionality of an interference with Convention rights: see paras 164 and 168.

117. Nevertheless, I accept Mr Blundell's submission that, when it came to assessing the proportionality of the interference with Convention rights in the present case, the Judge did not in fact err in the way that Garnham J had erred.

118. The Judge considered the issue of rational connection at paras 126-135 of her judgment. Reading that part of her judgment fairly and as a whole, it is clear that the Judge asked herself the right question and answered it for herself. She concluded in clear terms that there was "a more than rational connection": see para 131. The Judge based herself on the evidence which she had considered and which she summarised, in particular the evidence of Mr Reed on behalf of the Secretary of State.

119. It is notable that, at para 139, the Judge observed that there was no real challenge to the "less intrusive measure" limb of the *Bank Mellat* test. That is essentially because any less intrusive measures have to be equally effective, and the Secretary of State (to whom in this context considerable deference is due) is clear that no less intrusive measures would be equally effective. The Judge concluded on this aspect of the case, at para 140,

that "it cannot be said that the Secretary of State was wrong to conclude that no less intrusive measures would suffice and that less intrusive measures would compromise the objective which lies at the heart of the sanctions regime."

120. The Judge then turned to the fair balance test itself, at paras 141-155 of her judgment.

121. The Judge weighed the various factors on each side of the balance. She said that on one side of the balance there was a factor which had to be given "a very heavy weight indeed" but that had to be balanced against "the very considerable negative impacts on Ms Khan … and also her family, including her dependent children …". The Judge then considered in detail the evidence before her, including as to the Appellant's health and the mental health issues concerning her children. At para 148, the Judge said that, while it is impossible not to have sympathy for both the emotional toll and the serious day-to-day difficulties which life as a designated person (or the child of a designated person) involves, "*I do conclude* – even giving full weight to the personal cost of this family which I have had made very clear to me – that the decision taken does not fall foul of the fair balance test." I have emphasised the introductory words in that sentence because they show that the Judge was expressing her own conclusion, not simply saying that the Secretary of State was entitled to reach the conclusion which he did.

122. Having considered other aspects of the balancing exercise, including the availability of the licensing regime by OFSI (at para 153), the Judge concluded at para 155:

> "In the circumstances I conclude that the Secretary of State has not failed to strike a fair balance between the rights of Ms Khan and her family and the interests of the community."

123. It was that passage which formed the high point of Ms Montgomery's criticism that the Judge fell into the same error as Garnham J in *Shvidler*. I do not accept that submission. In my view, the Judge was simply answering the question which the fair balance limb of *Bank Mellat* required her to answer, namely whether the decision-maker has, or has not, struck a fair balance between the rights of the individual and the general interests of the community. That is not to abdicate the proper judicial responsibility for assessing proportionality but it is to recognise that there is still a decision made by the executive which is here being subjected to review by a court. This Court said as much in *Dalston Projects* itself: see e.g. para 19, where it said that the court is never the "primary decision-maker", because its function is still one of reviewing the decision of the public authority concerned to see whether it is compatible with a person's Convention rights.

Ground 3(b)

124. Ground 3(b) is that the extent to which the Judge afforded "considerable respect" to the judgment made by the Secretary of State had the effect that the Judge erred in failing to determine the proportionality of the Appellant's designation objectively on the basis of her own assessment.

125. Again I would reject this submission. As this Court pointed out in *Dalston Projects*, the Court can and should give "considerable respect" to the judgments made by the Secretary of State in this context, for example in relation to the conduct of foreign relations.

Ground 3(c)

126. Ground 3(c) is that the Judge erred in affording "considerable respect" to, and thereby failing properly to scrutinise, the Secretary of State's assessment of the extent to which the designation of the Appellant could contribute to achieving the objective of the 2019 Regulations.

127. Again I would reject this submission. It adds nothing to what has been said earlier.

Ground 3(d)

128. Ground 3(d) is that, in the alternative, the Judge erred in failing to consider, as part of the proportionality balance, the extent to which the Appellant's individual designation was likely to further the objective of the 2019 Regulations. In this context it is submitted that, to the extent that a contrary approach is suggested by the decisions of the High Court in *Dalston Projects* and *Shvidler*, those cases were wrongly decided.

129. I would reject this submission because it fails to take into account that this Court has now decided the cases of *Dalston Projects* and *Shvidler* and the submission is inconsistent with what this Court said in its judgment.

Ground 3(e)

130. Ground 3(e) is that the Court erred in failing to consider the best interests of the Appellant's dependent children as "a primary consideration" in conducting the proportionality balance.

131. Ms Montgomery places reliance on the decision of the Supreme Court in *H (H) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25; [2013] 1 AC 338 on the importance of the best interests of children. The underlying obligation flows from an unincorporated treaty, namely the United Nations Convention on the Rights of the Child, Article 3.1 of which provides that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

This has been held to inform the interpretation of the right to respect to private life in Article 8 of the ECHR, which is why this unincorporated treaty provision has some relevance in domestic public law.

132. However, as Lady Hale JSC pointed out at para 11, "a primary consideration" is not the same thing as "the primary consideration", still less as "the paramount consideration". Where the decision directly affects the child's upbringing, such as the decision to separate a child from her parents, then her best interests are the paramount or determinative consideration. Where the decision affects the child more indirectly, for example by detention or deportation of one of the parents, then the child's interests are primary, but not the paramount, consideration.

133. I do not accept that the Judge failed to have regard to the best interests of the Appellant's children as a primary consideration in this case. To the contrary, she had obvious sympathy for those interests, as do I.

The relevance of the licensing scheme

134. Although the topic of the licensing scheme did not expressly feature in the grounds of appeal as such, it became clear during the course of the hearing that it lies at the heart of some of the complaints that Ms Montgomery makes. She submits that the way in which the licensing scheme has operated in practice has had such a detrimental impact on the Appellant and her children, particularly her youngest child, including his education and his health, that the Respondent's decision should be held to be disproportionate.

135. In *Dalston Projects*, the Court addressed the issue of the licensing scheme at para 212:

> "Furthermore, it is of some relevance that the Appellant and his family are able to meet the costs of their needs through the system of licensing operated by OFSI at HM Treasury. If they have reason to complain about the way in which the licensing system is operated in practice in relation to them, they have a remedy available against HM Treasury but that would not be a reason to question the lawfulness of the designation of Mr Shvidler as such."

136. In the present appeal this Court has more evidence about the way in which the licensing scheme is operated and, as I have explained above, has also received more by way of submissions about this issue.

137. In principle I would be prepared to accept that, if the FCDO knew (or perhaps ought reasonably to have known) at the time when it makes the relevant decision, either to designate or to maintain a designation after reviewing it, that HM Treasury had no functioning (or perhaps no reasonably functioning) licensing system, that could vitiate the decision to designate or maintain designation. However, on the facts of the present case, the decision under challenge is that of 28 February 2023, when the FCDO maintained the decision to designate the Appellant and the evidence is that, certainly by that stage, it had been possible for appropriate licences to be applied for, and were obtained, by the Appellant from OFSI.

138. This is not so much a question of legal personality (it might be said that the Crown is one entity, although that itself is not a straightforward matter in law because the "Secretary of State" is a distinct legal concept, being a corporation sole) but rather concerns what is the relevant decision. Even if it were correct that there is a legal defect in the OFSI regime, I would not accept that that has a material bearing on the legality of the designation. It is the designation, or strictly speaking the decision to continue it after the administrative review, which is the target of the present proceedings and which must be shown to be unlawful. In the circumstances of this case, I am not persuaded that the relevant decision was unlawful.

Ground 4: right of access to a court

139. Ground 4, for which the Appellant requires the permission of this Court, is that the scheme of court review of Ministerial designation decisions, constrained by "judicial review principles", as provided for in section 38(2) of SAMLA, is incompatible with the right of access to the court, as guaranteed by Article 6 ECHR and/or the procedural obligations guaranteed by Article 8.

140. On behalf of the Appellant Ms Montgomery understandably places reliance on *Ahmed and Others v HM Treasury* [2010] UKSC 2; [2010] 2 AC 534. In that case Sedley LJ memorably described persons who had been designated under the sanctions regime there in issue as "effectively prisoners of the state": see page 580, para 125, cited with approval by Lord Hope at page 611, para 4. As Lord Hope said at para 38, the impact on normal family life is "remorseless and it can be devastating". As Lord Mance said at para 249, designation as an "associate", and the consequential freezing of assets, also has "radical consequences for personal and family life." It is, as Lord Mance went on to say, a matter which one would expect to be subject to judicial control, before or after the designation.

141. Ms Montgomery argues that the decision of Garnham J in *R (Youssef) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2021] EWHC 3188 (Admin); [2022] 1 WLR 2454, which distinguished *Ahmed* in the present context, was wrong and should be overruled by this Court. I disagree. I agree with Garnham J that the sanctions regime in SAMLA is distinguishable from that which was considered by the Supreme Court in *Ahmed*.

142. In particular the legal issues in *Ahmed* were different from the ones which arise in the present. The principal issue for the Supreme Court in *Ahmed* was whether the domestic legislation giving effect to United Nations Security Council resolutions which required the freezing of assets of individual suspected terrorists was *ultra vires* the enabling power in the United Nations Act 1946 ("the 1946 Act"). The Supreme Court held that, applying the familiar principle that fundamental rights can only be overridden by express language or necessary implication, the general wording of section 1 of the 1946 Act did not empower the executive to enact the legislation by means of secondary legislation. In particular, there was no fair procedure before the sanctions were imposed, because they had to be imposed by Member States so as to give effect to a designation on a list compiled by the UN Security Council and that body itself did not afford a fair process before a person's name was placed on the list. The Supreme Court also held that, in that context, there was no right of access to an effective judicial remedy

and for that reason the legislation was *ultra vires* the general power conferred by section 1 of the 1946 Act.

143. In the present context, by contrast, there is procedural fairness built in to the legislative scheme, both before and after the designation decision. That procedural framework includes the opportunity to have access to an effective judicial remedy, namely under section 38(2) of SAMLA, by taking proceedings in the High Court.

144. I would grant permission to advance Ground 4 but would reject that ground on this appeal. It founders for two fundamental reasons. The first is that, as this Court has held in *Dalston Projects*, the relevant judicial review principles to be applied by the court in this context include deciding for itself whether there has been a violation of the Convention rights or not, in other words whether there has been a breach of section 6 of the HRA. That guarantees sufficient access to an independent court's adjudication in this context.

145. Secondly, the submission is wrong insofar as it suggests that access to a court requires in all circumstances that the court should be able to substitute its own assessment of all matters, including matters of fact, for that of the decision-maker. Much depends on the particular context, as the European Court of Human Rights has held in cases such as *Bryan v UK* (1995) 21 EHRR 342 and the House of Lords made clear in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295.

146. In the present context the correct approach which the reviewing court must take under section 38(2) of SAMLA is as set out in *Dalston Projects* (summarised above). Applying that approach does not require a full merits review of the Respondent's decision to designate a person or maintain that designation, although it does require the court to assess the question of proportionality under the HRA for itself, giving due respect and weight to the views of the Respondent. That approach is not incompatible with the right of effective access to a court under the ECHR.

Conclusion

147. For the reasons I have given, I would dismiss this appeal.

Lord Justice Dingemans:

148. I agree that the appeal should be dismissed for the reasons given by Singh LJ. I wish to address the issue of ordinary living expenses for designated individuals such as the Appellant, after designation pursuant to the 2019 Regulations and before the Office of Financial Sanctions Implementation ("OFSI") has issued a specific licence for basic needs including the purchase of food. This is in circumstances where submissions were made on behalf of the Appellant complaining about the practical effect of the sanctions regime on her and her family and delays in the issue of licences to permit expenditure on basic needs.

149. It is apparent that, upon designation, the designated individual will commit a criminal offence if they deal with funds or economic resources to pay for ordinary living expenses. It will also be a criminal offence for another individual to make available funds or economic resources available directly or indirectly to that designated person: see para 15 above.

150. OFSI has power to grant licences to enable funds to be spent pursuant to Part 7 and regulation 64 of the 2019 Regulations, as described in paras 35 to 55 above. This includes a power to grant a licence for basic needs as set out in para 2 of Schedule 5 to the 2019 Regulations. The basic needs equate to ordinary living expenses and, as might be expected, include the need for food: see para 2(1)(b)(i) of Schedule 5.

151. It is apparent from the Respondent's Note referred to in para 37 above, that OFSI provides general licences to enable payments for matters such as gas, electricity and water to be made. These general licences were available to the Appellant. OFSI did not, however, provide a general licence to permit payments for food to be made. It appears (from para 11 of the Respondent's Note) that OFSI took the view that OFSI should scrutinise applications before issuing such a licence. As it was, there were delays before a specific licence was issued to the Appellant to enable her to buy food, and despite improvements in timeliness, there will inevitably be some delays caused by the application process in issuing a specific licence to cover basic needs. So far as the Appellant was concerned, this meant that she became liable to a criminal prosecution for purchasing food before the specific licence was issued. In the event no criminal proceedings were brought.

152. As appears from para 1 above, the challenge engaged on this appeal was to the Respondent's decision dated 28 February 2023 to maintain the designation after a review. By 28 February 2023 the issue of a specific licence to cover the Appellant's basic needs beyond those covered by the general licences for matters such as gas, electricity and water, had been addressed. This means that the failure to provide the specific licence for ordinary living expenses including food is not a basis for challenging the decision in this appeal. That does not mean, however, that the Respondent can continue to designate people without addressing the issue of ordinary living expenses as from the date of designation. It is apparent that OFSI uses a monthly allowance equivalent to the net median wage for designated persons when a specific licence is issued (see para 12 of the Respondent's Note), and it is apparent that OFSI would be able to issue such a specific licence to a person immediately on designation using such sums.

153. The Respondent suggests that it is unlikely to prosecute a designated person for buying food before a special licence has been issued. That is not an answer to the issue, because the designated person becomes dependent on the exercise of a prosecution discretion.

154. In my judgment the Respondent has not identified any good reason for the failure to make immediate provision for expenditure on ordinary living expenses including food by way of specific licence when designating an individual, and it is neither reasonable, nor fair to the designated person, to fail to make provision for basic living expenses, including food, on designation. This is because the designated person will either be liable to prosecution for a criminal offence or be unable to eat. Similar issues were confronted by the courts when dealing with the development of the protections for those subject to *Mareva* injunctions, now called freezing orders. The standard form of order

for freezing orders now makes provision for ordinary living expenses: see Practice Direction 25A of the Civil Procedure Rules and the form of standard order annexed to the Practice Direction, and the courts will not grant freezing orders without such protections.

155. I am pleased to note that, since the hearing of this appeal, OFSI has issued a new General Licence for 'Interim Basic Necessities for Designated Persons'. Details of this general licence are set out in para 37 of Singh LJ's judgment.

Lord Justice Underhill:

156. I agree that this appeal should be dismissed for the reasons given by Singh LJ. But I wish also strongly to endorse what both he and Dingemans LJ have said about the operation of the licensing regime.

157. Some people assume that sanctions under the 2019 Regulations are only imposed on non-British nationals for whom the UK is not their principal place of residence, and only on people who are directly associated with the Russian Government and/or in a position to influence its decisions. But, as the present case illustrates, that is not so. The Appellant and her children were and are British citizens, for whom this country is their only home; and she is designated not because she is herself associated with the Russian government or supports the invasion of Ukraine but because she is married to (though living largely separately from) Mr Khan, who has been involved in obtaining a benefit from or supporting the Government of Russia. The effect of designation is that she is not entitled to use any of her assets at all, even for the basic necessities of life for herself and her children, without first obtaining the permission of civil servants in the Treasury. At para 140 above Singh LJ refers to Sedley LJ's description in *Ahmed* of the persons designated under the sanctions regime there in issue as "effectively prisoners of the state", and the similar observations of Lord Hope and Lord Mance in the Supreme Court. The particular question in that case was different but what was said there is equally apt in the present case.

158. There is no doubt that in principle the Regulations authorise the designation of UK-resident British nationals, notwithstanding its potentially devastating impact on them and their families, for important reasons of policy which one can well understand. The payment made by Mr Khan to the Appellant shortly before his own designation (which was huge) illustrates the risk that principals may transfer assets to family members in order to avoid or mitigate the effect of sanctions on themselves. Of course, the effect of designation goes beyond particular assets or funds transferred for such a purpose and extends to the totality of the person's assets; but this could in principle be justified by the kinds of consideration identified at para 72 (a)-(c) of Mr Reed's witness statement quoted at para 34 above – which might, as Mr Blundell acknowledged, be rather less coyly summarised as making the principal's family suffer as a means of putting pressure on him or her to withdraw their support from the regime.

159. Against that background, it is in my view of fundamental importance that there should be in place a fair and efficient system of licensing, operating according to defensible and clearly-stated principles, which mitigates the potentially devastating impact of designation on UK-resident persons. The material before us does not suggest that the

Secretary of State, or the Treasury, has given proper attention to this aspect of the sanctions regime. In the evidence which Singh LJ summarises at paras 59-65 above the Appellant complains of serious delays by OFSI in responding to her requests to authorise particular necessary expenditures; and in the witness statement quoted at para 36 Mr Reed appears to acknowledge that those complaints are, at least to a considerable extent, justified. In particular, it is remarkable that there was not at the time of the hearing before us a system in place for making immediate provision for expenditure on ordinary living expenses from the moment of designation. I am bound to say that my concerns about the system are not wholly mitigated by the belated introduction of the Basic Needs Licence recorded by Singh LJ at para 37; but since there was in these proceedings no direct challenge to the principles of the system or its practical operation it would not be appropriate for me to say more.