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Case Nos: CO/1076/2008, CO/8559/2010,
CO/8598/2008 & CO/4391/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/06/2013

Before :

MR JUSTICE OUSELEY

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Between :

(1) AHK
(2) AM
(3) AS
(4) FM **Claimants**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

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(1) Ms Amanda Weston (instructed by **Bates Wells & Braithwaite Solicitors** for **AHK 1st Claimant**
(2) Mr Hugh Southey QC and Mr Barnabas Lams (instructed by **Scudamores Solicitors**) for **AM**
2nd Claimant
(3) Ms Stephanie Harrison QC and Mr Edward Grieves (instructed by **Fountain Solicitors**) for **AS 3rd Claimant**
(4) Mr R de Mello (instructed by **Jackson Canter Solicitors**) for **FM 4th Claimant**

Mr James Eadie QC, Mr Charles Bourne and Mr Paul Greatorex (instructed by **Treasury Solicitors)** for the **Defendant**

Miss Judith Farbey QC (instructed by **SASO**) **Special Advocate**

Hearing dates: 22 April 2013

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Approved Judgment

MR JUSTICE OUSELEY :

1. The background to this judgment is set out in a judgment I handed down on 2 May 2012, [2012] EWHC 1117 (Admin), the first paragraph of which is as follows:

> "There are over forty cases currently before the Administrative Court in which Claimants are seeking judicial review of decisions of the Secretary of State for the Home Department refusing to grant them naturalisation as British citizens under section 6 of the British Nationality Act 1981. The refusals have been on the grounds that the SSHD was not satisfied that the applicant was of good character. However, the common feature of the cases is that few or, occasionally, no reasons have been given as to why the Secretary of State was not so satisfied. She has explained that to give more reasons would be harmful to national security. Likewise, she is not willing to disclose documents upon which she relied in reaching her decisions. This judgment concerns a directions hearing which I held in four selected naturalisation cases which raised the question of whether and if so in what circumstances and with what consequences a Closed Material Procedure, CMP, could be held where issues of national security arose."

2. I said at paragraphs 23-24:

> "23. The essence of the various Claimants' grounds is that, before any adverse decision is made on an application for naturalisation, the applicant should be told of the SSHD's areas of concern so that they can be addressed as far as possible. After an adverse decision is made, the applicant should be told the reasons and basis for the refusal of naturalisation, or at least sufficient of them, so that he can respond effectively to them. The absence of sufficient information at either stage makes the refusal unfair. The essential and immediate purpose of the proceedings is to obtain a remedy in respect of the absence of sufficient notice of the areas of concern and of the reasons to enable them to be responded to effectively. That can be put as a claim for declarations that the refusals are unfair, in breach of natural justice and in other ways too, on the basis that fairness required greater disclosure. The cases are far more about the fairness of the procedure thus far adopted by the SSHD than about the substantive merits of a decision the basis for which the Claimant has not been told much about. Disclosure is effectively the substantive relief.
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> 24. One of the matters of concern to the Claimants is that they are not in a position to challenge the decisions on other traditional *Wednesbury* grounds since they do not know what the bases for the decisions were. They would not, normally, expect at this stage of the argument, when the grounds for

> refusal are known only in the most general terms, that they could succeed in obtaining an order quashing the refusals on their substantive merits, let alone an order that naturalisation be granted."

3. I concluded that a PII process should be the next step in the proceedings, since that was the means whereby the Court could satisfy itself that there was a proper basis for the claim to PII, before it considered whether disclosure should nonetheless be ordered. I set out the approach to be adopted in taking that decision. I also concluded that the PII process should be the means whereby evidence, inadmissible because it had been obtained by torture of a third party, should be excluded from the Court's consideration.

4. I considered and rejected an argument from Ms Harrison for AS, to which Mr de Mello for FM added a footnote, that the fact that human rights, Article 8 ECHR in particular, were or might be engaged, would be relevant to the way in which the PII balance was struck. I also rejected her argument that the upshot of the PII process had to be that the Claimants knew sufficient of the reasons or concerns so as to be able to answer them, and that the protected public interest could not prevail over that.

5. I rejected the argument of the SSHD that there should then be a closed material procedure, CMP, since I concluded that the decision of the Supreme Court in *Al Rawi and Others v Security Service* [2011] UKSC 34, precluded the judicial creation of such a procedure. Nor could such a procedure be undertaken if one or both parties were to consent. The absence of a CMP could have no effect on the way in which the PII process was undertaken or the balance struck.

6. I also considered what would be the state of proceedings after the conclusion of the PII process, and the disclosure of what had been ordered to be disclosed of the areas of concern before the naturalisation decision was taken, and of the reasons for the decision when actually taken. The issues over whether the duty of fairness implied into the British Nationality Act 1981 required more disclosure of the areas of concern or reasons would have largely been concluded. There might be an issue over whether the disclosure of material showed that there had been unfairness in the earlier decision, but the real issue would be over the effect on the substantive challenges to the decisions based on the material already disclosed or disclosed pursuant to the PII process. In paragraphs 55-56, I said this:

> "55. Before turning to the submissions about CMP, I add two observations. The ordinary principles of common law fairness, implied into the 1981 Act, cannot require the SSHD to ignore relevant material on the grounds that it could not be disclosed in Court and in consequence grant naturalisation despite being satisfied that the applicant was not a person of good character. That would first require the SSHD to act contrary to the public law duty, implicit in the Act, to have regard to all material considerations; see *A (No 2)* [2006] 2 AC 221. Second, it would require her to grant naturalisation when she was satisfied that a person was not of good character, contrary to what he express terms of the Act require.

> 56. The claim to PII is a Ministerial duty; see paragraphs 127 and 146 of *Al Rawi*; Lords Mance and Clarke respectively. Parliament cannot rationally be taken to have legislated by implication that the SSHD had to choose between breaching her duty to protect national security in order to defend her decision, or to grant naturalisation to applicants who she was satisfied were not of good character. It would require the clearest legislative language to impose so dire and dangerous a dilemma. It is idle to suppose that Parliament would be unaware that the SSHD might have to take into account information, sensitive on national security grounds, which was relevant to her judgment of whether an applicant for naturalisation was of good character. The Court would have already ruled that the interests of national security required that the undisclosed material should remain undisclosed. The lack of full disclosure of areas of concern would have been justified to and upheld by a judge. An absence of full or any reasons for the decision in those circumstances could not permit the inference that there were no or no satisfactory reasons. Article 6 does not require such a result."

7. There were three possibilities in relation to the substantive hearings. I rejected the notion that the Court could fairly review the substantive lawfulness of the decision, since it would not have all the material upon which the Secretary of State as decision-maker relied. The absence of the complete material would have been the result of a judicial decision in the PII process. I could not see how the Claimants could win if the SSHD confirmed that she had relied on material she had not been ordered to disclose. In paragraph 58, I said:

> "If the SSHD gives evidence that there were good reasons and a sound relevant basis for her decision, having considered the Claimant's representations, which she could not further disclose, it would be impossible for the Court fairly or reasonably to hold that she was wrong in saying that. The Claimant would have no prospect of persuading the Court to the contrary. It is not so much that the case is untriable; it can be tried. It is simply that the evidence means that the Claimant cannot win. So there is no point in it going to trial."

8. This was akin to the position in *Carnduff v Rock and Chief Constable of West Midlands Police* [2001] EWCA Civ 680, [2001] 1 WLR 1786.

9. It could not be right for the SSHD to lose for the reasons I gave in paragraph 60:

> "For the same reasons, there is really no second possibility that the SSHD must lose. The Court cannot require the SSHD either to disclose material harmful to national security in order to prove the lawfulness of her conclusion that the Claimant was not of good character, when the Court itself had decided against ordering disclosure, or to grant naturalisation in breach of her

> statutory duty, when she was not satisfied that he was of good character."

10. The Court could not accept a mismatch between the material which it had when reviewing the SSHD's decision and the material actually relied on by her. This was not comparable to the situation in *A v SSHD (No.2)* [2005] UKHC 71, [2006] 2 AC 221 concerning the exclusion of information obtained by torture of third parties.

11. Thirdly, the Court could not sensibly review the decision on what it knew was partial material, quash it and require it to be retaken, since that would simply be to require the whole process to be repeated over and over again. I concluded in paragraph 62 and 64:

> "62….The SSHD would still be required to have regard to all material factors. The Court would rule that the material should not be disclosed. The Court would then rule again in the same way. It is impossible to see that the decision could be held to be irrational by a court which knew it did not have all the evidence, or that the Court could then hold that only one decision, namely to grant naturalisation, was lawful. The inextricable circle would bring the law into disrepute, and advance neither side.
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> 64…In my judgment there are only two realistic options: either the Claimant loses, or loses in all realistic probability, or there is a CMP."

12. Since I concluded that there could be no CMP, the Claimants would lose. The substantive case would become untriable unless PII led to the disclosure of all the material on which the SSHD relied. I held a PII hearing on 25 October 2012 in relation to the certificates issued in these four cases. These certificates, available to each party, were all signed personally by the Secretary of State for the Home Department, in July 2012. She had read the documents herself, and set out the general nature of the claim and the legal approach she had been advised to adopt. No complaint was made about that approach. I had the advantage at the PII hearings of submissions from Ms Farbey as Specially Appointed Advocate. Save for minor agreed additional wording in FM's case, no further disclosure was ordered.

13. In each case, Mr Larkin, a deputy chief caseworker in the UK Border Agency confirmed in witness statements dated 11 April 2013, that the basis for the adverse decisions was that each Claimant failed the "good character" requirement, and that it would be contrary to the public interest to give reasons or further reasons. A claim for PII had been upheld and the material which the PII certificate covered provided the basis for the decisions.

14. The hearing to which this judgment relates dealt with what now is to happen to the four cases. Somewhat to my surprise, a variety of further submissions were raised by the Claimants as to why further disclosure was required in law, a topic which I had thought and expected to have been fully considered in the January 2012 hearing and May 2012 judgment, particularly as the Claimants regularly speak of the years which

their cases have taken, with arguments raised over disclosure, special advocates, and the effect of *Al Rawi*. Mr Eadie QC for the SSHD mentioned but did not press *Henderson v Henderson* [1843] 3 Hare 100, and so I have considered the arguments. The Claimants, save AHK, asserted that they were not trying to persuade me to recant anything in my earlier judgment, the application for permission to appeal which has been adjourned, with good reasons, until the outcome of the PII process and this hearing. If this tranche of argument failed, they all urged the grant of permission to appeal this and the May 2012 judgment.

The position of the parties

15. Ms Harrison QC for AS submitted that the SSHD's decision on naturalisation and the procedure for challenging the decisions were unlawful for reasons which at root all came down to further argument about disclosure duties: the BNA 1981 itself contained a duty to give reasons sufficient to enable the applicant to rebut the adverse decision; there was also a common law requirement that such minimum reasons be provided; such a duty could only be excluded by express words in the Act. The procedure for challenging such a decision, in the absence of disclosure, was an arbitrary interference with rights under Articles 8 and 10 ECHR, not prescribed by law and for which no effective remedy had been provided. The asserted incompatibility could be resolved by interpretation, and did not require, nor did she seek, a declaration of incompatibility of the BNA with the ECHR. This was all compounded by the delay in the conclusion of these proceedings which she attributed to the SSHD's decision to seek a CMP. Now was the time to look at the whole proceedings, as they have actually evolved; the refusal of any further disclosure after the PII was a critical new factor. Human rights obligations now intervened since, without them, the Claimant must lose.

16. Mr Southey QC for AM submitted that I should review my PII conclusions to see if they might be altered were I to contemplate disclosure to the Claimant's lawyers on the basis of a "ring of confidentiality" as was contemplated in *R(Mohammad) v SSHD* [2012] EWHC 3454 (Admin). Failing that, he submitted that AM's circumstances engaged Article 8 ECHR, and the refusal of naturalisation interfered with his family life, and damaged his reputation. Procedural protections were inherent in Article 8. The procedural protection available in this case did not permit a court, on the basis of my May 2012 judgment, to evaluate the merits of the refusal decision, and so it failed to comply with Article 8. I should declare as much. Again this is a disclosure argument in substance.

17. Ms Weston for AHK submitted that I should consider the provision of an open judgment on the PII process, dealing with "the precise nature of the balancing exercise I conducted", and whether weight was attached to natural justice and human rights issues, and the public interest in open justice. She adopted Mr Southey's and Ms Harrison's Article 8 submissions. She submitted that it was not open to me to conclude that the Claimants must fail on the material available to the Court. She contended that if the claim became untriable, or if the Claimant were denied an effective means of challenging the decision, his claim should succeed, at least to the extent of a declaration that the process violated Article 8, but not, it appeared, a declaration of incompatibility. This all revolves around disclosure.

18. Mr de Mello for FM also submitted that I should consider an open judgment on the PII issues. I should recuse myself if the case went to a hearing on the merits since I would be aware of factual material concerning FM, of which he would be unaware but which could affect my judgment. Articles 8, 9 and 10 EHCR were engaged in FM's case, and were interfered with by the refusal of naturalisation. I ought, or at least a judge ought, to determine the substantive judicial review claim or consider the merits of the claim on the available open material, and only on the open material, and provide FM with what he described as a "procedural and substantive remedy" under ss6 and 8 of the Human Rights Act 1998 on the basis that his ECHR rights had been breached by the decision refusing him naturalisation. This canvasses issues, not so much of disclosure directly, but relating to the consequences of non-disclosure of all the material relied on by the SSHD.

19. Mr Eadie submitted that the claims should be dismissed, in the application of the reasoning in my May 2012 judgment. There could then be permission to appeal, as to which he was neutral so long as any permission to appeal covered all issues. The Claimants could not argue that the procedure was in breach of the common law, since the PII process was what the common law provided for. The common law did not permit a CMP. As the Claimants had contended that no CMP could be imposed, the only route which it appeared they were arguing now would be fair or compatible with the ECHR was one in which the whole of the SSHD's evidence was disclosed, and disclosed regardless of the damage to protected interests. The ECHR issues could and should have been raised at the January 2012 hearing. However, so far as the ECHR rights were concerned, the decisions were all in accordance with the law; the SSHD was entitled, indeed bound, to take all relevant material into account, and she was not obliged by any provisions of the ECHR to disclose such material to the Claimants, damaging interests which Government protected in the public interest. Sufficient procedural protection was provided for those purposes by the procedures which had in fact been followed here.

The PII hearings

20. I start with the two issues raised about these hearings. First, there is no open judgment, and there is no scope for an open judgment on those issues, as was confirmed in a short closed session after the hearing. The principles which I endeavoured to apply are those set out in the May 2012 judgment in paragraphs 32–51. Their application is obviously affected by the nature of the material considered, and in relation to which the PII certificates were upheld. Ms Farbey, who was the Specially Appointed Advocate at the PII hearings, has written to the Claimants, with the permission of the Court, confirming that she was satisfied "after the most careful scrutiny of the underlying material" that the SSHD has complied in all seven cases, with *A(No.2)* and my May 2012 ruling in *AHK*, paragraph 42.

21. Second, I reject the suggestion from Mr Southey that I should review my PII decision in the light of *Mohammad*, and consider whether material could be released to the lawyers, subject to such undertakings about non-disclosure to others including the Claimant, as would create a "ring of confidentiality." *Mohammad* was decided in December 2012 by Moses LJ sitting as a single judge; he concluded, paragraph 27, that there was no principle which prohibited a court considering PII from ruling that the PII certificate should not be upheld, but that the documents should only be

disclosed within an identified ring on specific undertakings. The Claimant's consent would have to be obtained. In the event, no material was disclosed to such a ring.

22. There was no reason for Mr Southey to make his submission only after that decision; the point was available for him to take in January 2012. He ought to have raised it earlier, and I can see no justification for his raising it now. He was already aware of the point anyway, or ought to have been. I reminded him of *BB v SSHD* SC/39/2005, a SIAC case in which I was Chairman, and in which he represented BB. The Special Advocate, Mr Blake QC, argued in an open hearing in October 2006, that such a process could be adopted to mitigate the effect of the non-disclosure Rules in SIAC. SIAC ruled against such a "ring of confidentiality" in an open judgment, paragraphs 32-34, because a number of practical factors persuaded us that it was not compatible with those Rules, even though it was a practice mistakenly adopted by SIAC in one case at least, *Rehman v SSHD* [2001] UKHL 47, [2003] 1 AC 153. Those factors remain pertinent here. As I cannot agree with Moses LJ's view on such a ring, I set out the reasons SIAC gave in that judgment. There is nothing peculiar to the SIAC role in this.

23. First, there was the risk of inadvertent disclosure. This risk had been made manifest, we were told by Mr Tam QC for the SSHD at the SIAC hearing; there had been "repeated open discussion of restricted material by the open advocate", paragraph 31. (I add, in relation to my experience of inadvertent disclosure, that in camera material was referred to in open court, in a criminal case, by leading defence counsel, wholly inadvertently, on two occasions.) SIAC said at paragraph 32:

> "First, there is an obvious risk of inadvertent disclosure, by the representative eg in discussions with other representatives or clients, or to others, or in paper management. It is self-evident that the more who have the material, the greater the risk of inadvertent disclosure. The difficulties in managing the separation between open and closed material in terms of questions of witnesses, discussions with advocates in submissions, indeed judgment writing including technical support and publication, would all be greatly increased. All this increases the risk of accidental disclosure. It is easy to see why the experience when these suggestions were tried was an unhappy one. If cross-examination is proceeding on a topic which involves a restricted open document or point, it would have to stop while people left court; the point would be potentially highlighted and inferentially it could be revealed widely. It might give rise to very strong questions from a client to his representative as to why a point had not been pressed, leading to inadvertent disclosure. The answer to a judicial question raised in open submission might make avoidance of reference to such material very difficult, and asking questions in open is already inhibited enough by knowledge of the closed material. The ability to remember which different system applied to which material during a hearing would make for error on all sides. These might be very difficult to correct and could sell the pass for resistance to full disclosure, as we have

> already seen happen with inadvertent disclosure. If those risks do not matter in relation to any particular material, that is because it is in reality open."

24. Second, there was the risk, if disclosure took place, that the source would be unknown and suspicion would fall on the innocent.

25. Third, there was the problem of how the Commission, and here the Court, would decide who was safe to be in the "ring". We said:

> "34. Third, it would involve the Commission being asked to take a view about the willingness and ability of an advocate or representative, barrister or solicitor, to abide by the terms of his undertaking. The Commission does not accept that the mere fact that a representative has a professional qualification suffices to ensure that the undertaking would not be broken, and broken in circumstances which made the breach impossible to detect. Lord Woolf in Roberts pointed out that not all professionals could be trusted. Accordingly, such a process would put the Commission in a wholly invidious position of potentially distinguishing between representatives, or even between representatives from the same firm or chambers, on what might be impression or closed objection, or of having to raise such matters with a representative which could give an impression of bias. It would involve the Commission undertaking some distasteful, inadequate and primitive vetting for integrity and carefulness in substitution for the developed vetting process which special advocates undergo. It is not to be assumed that all open advocates would be acceptable as special advocates by the Attorney General or would pass the vetting process, although some open advocates have done so in other cases. The alternative of simply accepting all lawyers as equally trustworthy rather highlights the weakness of Mr Blake's point. Such an approach could only work if the material were in reality open. The prospect of a penalty is no substitute for not running the risk in the first place."

26. I add that I can see no real advantage in such a process in these cases. Disclosure is sought so that the Claimants can respond to the areas of concern and to the reasons for the decision. That could not occur for material withheld from them in a ring of confidentiality. The process would be self-defeating. To the extent that it would enable an advocate to submit that the material, without more from the Claimant, was so flimsy that it could not support the case, something that a CMP would also enable to happen, there might be an advantage. But I am puzzled by the very notion of material which is not subject to PII being restricted in that way, and of material which is subject to PII being made available to those whom the judge does not vet, yet concludes on some uncertain basis of his own devising can safely be trusted with national security material.

27. Mr Eadie's Skeleton Argument made powerful and to my mind unanswerable points about the intense problems which a lawyer-only ring would cause. He pointed out that this practice had been disapproved in strong terms in the House of Lords in *Somerville v Scottish Ministers* [2007] 1 WLR 2734 at paragraphs 152-3, Lord Rodger, and paragraphs 203-4, Lord Mance. The problems created between client and lawyer are very serious.

28. Besides, such a ring, in national security cases, would bypass the protections against the disclosure of protected material. Mr Eadie set out the levels of vetting, and the fact that PII protected material is only disclosed to those who have undergone developed vetting, the highest level of vetting. Those who receive it are trained in its handling. Safeguards exist to prevent inadvertent disclosure. I agree with his observations.

Common law duty of fairness

29. There is nothing in this argument which was not considered in my earlier judgment, in paragraphs 13-31. The duty not to grant naturalisation unless the SSHD is satisfied, among other matters, that the applicant is of good character, requires her to refuse naturalisation if the material she has leaves her unsatisfied on that point. That duty is not subject to any express disclosure duty, either of areas of concern or reasons, or of evidence for the areas of concern or reasons. Such duty as is implied cannot conflict with the express duty to reach a decision on that issue, a decision which clearly requires to be taken on all relevant material. The duty cannot require the decision to be taken only on the basis of material which she has to or is willing to disclose. The former would require her to put national security at risk when the Act requires her to refuse naturalisation for that very reason. The latter would require her to ignore relevant material, contrary to her duty to refuse naturalisation if she is not satisfied as to good character. She would have to see what she would not disclose, and then put it out of her mind. There is no scope for some duty to disclose the gist or sufficient to enable a response to be made, where PII has required that material not to be disclosed. That would conflict with *R v SSHD ex parte Fayed (No 1)* [1998]1 WLR 763. In any event, it remains impossible to see how the substantive merits of the decision could be reviewed if there is evidence relied on by the SSHD, which remains protected by PII, whatever opportunities it afforded an applicant to make further representations. I rejected Ms Harrison's allied submission that this should affect the approach to PII.

Procedural protection for Article 8, 9 and 10 rights.

30. In paragraph 39 of the May 2012 judgment, I rejected Ms Harrison's submission that the way the PII exercise was undertaken should be affected by the actual or potential engagement of these Articles, and Article 8 in particular. What is now submitted by the Claimants is a variant on that. It is this. Quite outside the PII process, there is an obligation on the Court to ensure that the procedural protections inherent in Article 8 are observed, and that may require an interpretation of the BNA, which requires the disclosure of such material as will enable those rights to be protected. Where Article 8 is engaged, the refusal of naturalisation is an interference which requires to be justified as being "in accordance with the law and necessary in a democratic society in the interest of national security…"; Article 8(2). An effective remedy is required to

challenge the lawfulness of the interference represented by the refusal of naturalisation. All four Claimants rely on Article 8, and pursue this argument.

31. Restrictions on the right to freedom of religion and to manifest religious belief in teaching and observance are permitted "subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order….or for the protection of the rights or freedoms of other…"; Article 9(2). This is part of FM's case. Restrictions on the right to freedom of expression, to hold opinions and to impart information and ideas without interference by public authority and regardless of frontiers "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interest of national security…public safety, for the prevention of disorder or crime…for the protection of the reputation or the rights of others..."; Article 10(2). AS and FM raise this Article.

32. AS, a refugee with indefinite leave to remain, had provided a very recent witness statement in which he said that his application for naturalisation had originally been approved in 2008 but there had been a change of mind shortly after, which had led him to be viewed with suspicion in the small and close-knit Libyan community, and to him being "totally shocked". He became depressed and suffered other symptoms such as fear, worry, anxiety and nausea. He and his wife separated for a period of 18 months. He was fearful of police raids. He feels that he is treated more harshly than Libyans now naturalised. He fears that his ILR will be revoked; he feels different from the rest of his family who are British citizens. He never feels secure travelling on his UN refugee travel document, and he says that it is "difficult" to travel to certain countries on it with his family. With a British passport, life would be much easier, and he would have peace of mind when travelling with his family. He is more likely than they are to be searched at the airport. This is all compounded by the fact that he cannot address the SSHD's concerns. The reasons for refusal include that he has made "statements of an Islamist extremist nature". On that basis, it is submitted that Articles 8 and 10 are engaged.

33. The generalised evidence from AS' solicitor about his and a number of other cases did not, in my judgment, advance the Article 8 case; what may apply to one may not apply or apply equally to another, and the decision requires a case specific judgment.

34. FM is married to a British citizen, with two children, and no criminal convictions. The reason given why FM was refused naturalisation was that he "has openly preached anti-western views and voiced sympathy with Usama Bin Laden (UBL) at the Hatherley Street Mosque in Liverpool". FM's application for naturalisation and references state that he is an Imam, well-respected as a scholar, who delivers his sermons openly in a mosque; he does not accept that he has preached in the manner alleged. It is said that the refusal of naturalisation affects his reputation and may affect his relations with his congregation. The SSHD's case did not explicitly say that FM incited violence or that what he preached was offensive to what should be inferred to be a small congregation. He did not preach to the public at large but to people who could change mosques if they disliked what they heard. He was not to blame if others reacted violently to what he calls "peacefully preaching extreme Muslim views".

35. FM had been "unable to support his denials in any comprehensive manner because he has not been provided detailed information to allow him to do so". FM's characterisations of his preachings are not supported however by specific evidence from FM of what he actually does preach, which it has always been open to him to provide.

36. Mr de Mello submitted that the reason on its face showed that Articles 9 and 10 are engaged; he also relied on Article 8. He submitted that these rights were interfered with, for which there was no proportionate justification in accordance with the law, nor one which could be tested in Court.

37. AM, who has been told nothing of the reason for the refusal of naturalisation beyond that the SSHD is not satisfied that he meets the "good character " requirements, is a Pakistani national granted indefinite leave to remain in 2008. He is married with two children; they and his wife are British citizens. He works for a security firm, which required him to have police checks, and an SIA licence. He studied for a PhD at a UK University. He has been a part-time lecturer there. He has strong bond with the local community in Ilford, Essex. He too fears the damage to his reputation which would flow were the refusal to become known to his friends and neighbours, and to his referees. He has no criminal convictions. The refusal has caused fear to himself and to his wife. There is, contends Mr Southey, the potential for separation from his family. It was also impossible to know, though not impossible in fact, that other rights as well as Article 8 were engaged.

38. He had agreed to a CMP by consent, though contending that a CMP could not be imposed. That would have enabled Article 8 to be addressed.

39. AHK is an Iraqi Kurd, who has had indefinite leave to remain as a refugee since 1999. His wife and sister in law were granted naturalisation in 2007. The reason for the "good character" refusal concerns his association with Iranian elements hostile to British national interests. The refusal is likely to affect his reputation since he has a high international profile, his freedom to travel, his career, and his standing in his community and internationally. He wants to rebut the allegations which underlie the refusal, so as to receive a fresh decision. His was not a rationality challenge. He relies on Article 8 alone.

40. Mr Eadie did not concede or seek to take issue with the potential engagement of Article 8 in a decision refusing naturalisation.

41. The engagement of Article 8 has already received some consideration in these cases. In *MH and Others v SSHD* [2008] EWHC 25, the first instance directions decision which was under appeal in *AHK v SSHD* [2009] EWHC Civ 287, [2009] 1WLR 2049, Blake J held that in the cases before him, (which included the four individuals in this hearing):

> "grounds for refusing naturalisation that the Claimants would otherwise qualify for, do have an adverse impact on social reputation, render it more difficult to travel, and leave the Claimants in a vulnerable state of either statelessness as

> refugees, or unable to obtain future security as to their continued residence here."

42. Cumulatively those factors might be said, he thought, to engage the enjoyment of private and possibly family life in the UK. Article 8 was therefore engaged, interference required justification, and that required a measure of procedural fairness in accordance with Convention norms. And it was to that point that the discussion about Article 8 was ultimately directed.

43. The Court of Appeal was more concerned with the general seriousness of the effects which a refusal of naturalisation could have, and therefore with what common law fairness might require, than with whether or not the ECHR was engaged. However, it did not take issue with what Blake J said in principle, and indeed it does not appear that this was a specific issue debated before the Court. It observed only, in paragraph 34:

> "In other cases, the Convention may apply, and substantive issues of proportionality may have to be resolved. Different considerations may arise in such cases. These are factors which must be taken into account when the judge decides whether to request the appointment of a special advocate. It appears to us that the judge's conclusion that the Convention is engaged was not made on a sufficiently case-specific basis."

44. The ECtHR decision in *Genovese v Malta* [2012] FLR 10, concerned the refusal of Maltese citizenship to a child born out of wedlock to the British mother but with a Maltese father. A child born out of wedlock could only be granted Maltese citizenship if born to a Maltese mother. The Court repeated what it had often said before to the effect that Article 8, and indeed the ECHR as a whole, did not guarantee a right to acquire a particular nationality, but "an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8". There was no family life in that case with the father and there was no breach of Article 8 in its refusal. But the decision proceeds on the basis that a breach of Article 8 can arise in the context of the refusal of naturalisation where there was an arbitrary or, as in that case, a discriminatory refusal. It does not support any broader potential for a refusal of naturalisation to interfere with Article 8.

45. A submission that the mere nature or degree of effect of a refusal of naturalisation, without some further quality of arbitrariness or discrimination, suffices to engage Article 8 seems to me ill-founded on this ECtHR jurisprudence. It has not actually held, so far as I am aware, that where the refusal of naturalisation impacts sufficiently seriously on any of the aspects of life covered by the full width of Article 8, it is then for the state to prove why it should not be granted. That would mean in effect that there would be a right to naturalisation, notwithstanding that the ECtHR has accepted that there is no such right, and notwithstanding the entitlement of a state to set the terms for and apply its tests to any application for naturalisation. To hold that a refusal of naturalisation, in the absence of an arbitrary or discriminatory decision, interferes with Article 8 rights would be to advance beyond what the ECtHR has held. That is not for the domestic Courts. That is very different from holding that interference can arise where naturalisation is refused on an arbitrary or objectionably discriminatory basis, as in *Genovese*.

46. The provisions of the BNA are not in those categories. The "good character" test may be very broad, guidance notwithstanding, but it cannot be regarded as intrinsically arbitrary or discriminatory. The absence of any reason in AM's case, beyond the failure of the "good character" test, cannot demonstrate that the decision was arbitrary or discriminatory. The SSHD's evidence is that AM failed the "good character" test, because she was not satisfied, on the basis of material she cannot disclose, that he was of good character. The reasons given in the claims of AS, FM and AHK, brief though they are, do not support any suggestion that the statutory test was applied in an arbitrary or discriminatory manner. If sound on the facts, the reasons are within the scope of the statutory test, and the contrary has not been suggested.

47. If the correct approach is broader and does not depend on the arbitrary or discriminatory nature of the decision, I conclude that the evidence of interference with Article 8 rights is exiguous and not made out in FM's case. He merely states that he has a wife and children who are British nationals. There has to be a greater interference than the mere continuation of the lawful status which the applicant successfully sought for the purpose of remaining in the UK.

48. I am not persuaded that the Article 8 rights of AM, AS or AHK are interfered with either. In no case has it led to any threat to their existing status or ability to live with their family, or any reduction in their ability to travel. They continue to be subject to the uncertainties and problems which apply to those who do not have UK passports when they return to the UK or travel abroad with family members who are British citizens. They may feel less secure in their future. That means no more than that the status quo continues, a state of affairs which does not of itself involve any interference with Article 8 rights. The apprehension of reputational damage from the risk or fact that the refusal has or will become generally known or known to friends, community and others, allied to the problems of putting forward evidence to refute them, cannot add much to the more direct effects of the refusal of the benefits of naturalisation. I find it very difficult to see that the reasons for a decision can of themselves constitute an interference with Article 8 rights, if the decision does not. All in all, these factors do not seem to be of any real significance such as to amount to an interference with Article 8 rights. If there is interference, it is of a quite modest kind.

49. The relevant ECtHR jurisprudence in relation to Article 10 has been reviewed recently by the Court of Appeal in *R (Naik) v SSHD* [2011] EWCA Civ 1546. This was an immigration case, concerned with whether the SSHD acted lawfully in refusing an alien leave to enter the UK on the grounds that his exclusion was conducive to the public good, because of the views that he expressed at times which were, put broadly, justifying terrorism and fostering hatred. Her decision was upheld, Gross and Jackson LJJ approaching Article 10 on the assumption that it was engaged for the benefit of an alien overseas, while Carnwath LJ approached it on the basis of the Article 10 rights of Naik's supporters. But importantly, the decision proceeds on the basis that indirectly or directly Article 10 rights were interfered with by that refusal. The Court of Appeal accepted that views which offended, shocked or disturbed were covered by the rights in Article 10, and exceptions and restrictions needed to be construed strictly. At paragraph 48 in *Naik* above, Carnwath LJ summed up the role of the Court in a national security case involving Article 10 in this way:

> "Ministers, accountable to Parliament, are responsible for national security; judges are not. However, even in that context, judges have a duty, also entrusted by Parliament, to examine Ministerial decisions or actions in accordance with the ordinary tests of rationality, legality, and procedural regularity, and, where convention rights are in play, proportionality. In this exercise great weight will be given to the assessment of the responsible Minister. However, where rights under Article 10 are engaged, given the special importance of the right to free speech, it is for the court, looking at the interference complained of "in the light of the case as a whole", to determine whether the reasons given to justify the interference were "relevant and sufficient". This will involve a judgment whether the measure taken was proportionate to the legitimate aims pursued, based on "an acceptable assessment of the relevant facts", and in conformity with the principles embodied in Article 10 (see *Cox*) above). A range of factors may be relevant, including whether the speaker occupies "a position of influence in society of a sort likely to amplify the impact of his words" (par 42 above). The supervision must be "strict", because of the importance of the rights in question, and the necessity for restricting them must be "convincingly established"."

50. I accept that on the evidence the refusals of naturalisation can, and here did, interfere with the rights of FM under Articles 9 and 10, and AS under Article 10. They have been excluded from a potential benefit because of what they said. They have not been prevented by the refusals, however, from speaking to people or practising their religion in the way they were; they have merely not been accorded a benefit, for which the SSHD was not satisfied they qualified. *Naik* is an illustration of that. The degree of interference is however markedly less than in *Naik*.

51. It cannot be excluded either that rights under one or both of those Articles were engaged in the cases of AM and AHK.

52. I find it hard to suppose, although Mr Larkin's evidence states that there is further material which the SSHD relied on which is not before me, that that further material could show that any of the three Articles were not engaged, as opposed to providing the SSHD's justification for her decision.

53. I now consider the issue of procedural protection on the assumption however that the factors to which I have referred do mean that the refusals of naturalisation interfered with Article 8 rights, as well as with the Article 9 and 10 rights of those Claimants who asserted them.

54. Although a number of ECtHR decisions were cited to me on the scope of procedural protection for Article 8 rights, those decisions have been considered in recent Court of Appeal cases to which it is most convenient to turn. The nature and degree of the interference with ECHR rights is very relevant to the form of procedural protection required.

55. In *IR (Sri Lanka) and Others v SSHD* [2011] EWCA Civ 704, [2012] 1 WLR 232, the Court of Appeal considered the appeals from SIAC of two individuals who were excluded from, and two who were refused further leave to remain, in the UK on the grounds of national security. This case was decided before the January 2012 hearing in these cases. The application of the SIAC Rules on disclosure meant that the SIAC Appellants had not been able to give instructions to the special advocates about the essential features of the SSHD's cases, which were wholly or largely in the closed material.

56. The Court considered the general application of the procedural protection in Article 8 cases; there was no issue but that they were not Article 5(4) or Article 6 cases. Maurice Kay LJ, with whom Thomas and Black LJJ agreed, pointed out that there was a clear and consistent approach in the ECtHR decisions:

> "11. In *Al-Nashif v Bulgaria* (2002) 36 EHRR 655, paras 119 and 123 the court said:"
>
> > "119…there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention…
> >
> > 123. Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information."
>
> 12. In *Turek v Slovakia* (2006) 44 EHRR 861, para 113 the court was concerned to ensure that procedural protection is "practical and effective"."
>
> 13. These concepts of "effectiveness" and "guarantees against arbitrariness", coupled with "the benefit of adversarial proceedings" were reiterated in *Lupsa v Romania* (2006) 46 EHRR 810, paras 34-38; *Liu v Russia* (2007) 47 EHRR 751, paras 59-62 and *CG v Bulgaria* (2008) 47 EHRR 1117, para 40. Equally, they all acknowledge that, in cases concerned with national security there may need to be "appropriate procedural limitations on the use of classified information.""

57. Maurice Kay LJ rejected the submission that the recent domestic jurisprudence on Articles 5(4) and 6 changed that position. The SIAC procedure complied with the ECtHR lines of authority. In paragraph 19 he held that what was required was "independent scrutiny of the claim", as a sine qua non of protection against arbitrariness. The need for some form of adversarial proceedings was met by the

proceedings in SIAC. The use of special advocates from the independent Bar reduced the risk of unfairness. National security, in deportation and exclusion cases, permitted "appropriate procedural limitations on the use of classified information". Even in a case in which Article 13, the right to an effective remedy, applied, and although not been incorporated into English law it may inform the procedural aspects of Article 8, an "effective remedy" is that which is "as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance". The same applied to other forms of intelligence. The procedural protection required by Article 8 did not equiparate to that required for Articles 5(4) and 6.

58. I observe, in passing, that the SIAC procedure permitted it to form a view about the merits of the cases against the Appellants on the closed material, albeit that there were limitations on the ability of the Appellants to respond specifically to it. The proceedings before SIAC were also appeals and not judicial reviews.

59. Next, and after the May 2012 judgment in these proceedings, the Court of Appeal, in *R (BB) v SIAC* [2012] EWCA Civ 1499, rejected the submission that bail proceedings before SIAC were subject to Article 6, but it was agreed that they were subject to Article 8. Lord Dyson MR summarised the position in this way in paragraph 36:

> "36. The ECtHR has held in a number of cases that, even where national security is at stake, the concept of the rule of law in a democratic society requires that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body, competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information; and the individual "must be able to challenge the executive's assertion that national security is at stake": see *Al-Nashif v Bulgaria* (2003) 36 EHRR 37 paras 123-124."

60. Mr Southey, for BB in that case, submitted that the disclosure of the gist of the national security allegations relied on by the SSHD in support of the bail conditions was an essential aspect of the procedural guarantees required by Article 8. He argued that the *Al-Nashif* line of authority had to be reviewed in the light of the more recent ECtHR decision in *Liu v Russia (No 2),* (application 29157/09, 26 July 2011, Final 8 March 2012). This submission was rejected. There was no shift in ECtHR thinking. It would surely have said that the requirements of Article 6 were imported into the procedural protections in Article 8, if that were the true position, short of a deprivation of liberty.

61. The Court had not spelt out what was required to enable an effective challenge to be made in the context of national security. What that required was dependant on the facts of the case. Lord Dyson, with whom Hallett and McFarlane LJJ agreed, specifically agreed with what Maurice Kay LJ said in paragraph 19 of *IR (Sri Lanka),* which I have set out above. Lord Dyson continued, in paragraph 52:

> "…I should add that what should be taken into account in determining the procedural protections that are required in this

> context is (i) the extent of the interference with the art 8 and (ii) the nature of the national security interests at stake. Thus, for example, what is required where bail conditions involve only a modest interference with an individual's art 8 right rights may differ from what is required where the interference is substantial."

62. I should also refer to the comment of Toulson LJ in *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 2091 (Admin), at paragraph 70, where, without commenting one way or the other on the rightness of what I said in the May 2012 judgment in *AHK*, he rejected the notion that:

> "by a bare statement that matters withheld on PII grounds would have been fundamental to a public office holder's decision, that decision becomes automatically proof against being judicially reviewed".

63. Mr Eadie pointed also to the dismissal of the admissibility application in *Carnduff v UK*, (application 18905/02); see paragraph 59 of the May 2012 judgment. The dismissal, dated 10 February 2004, postdates the decision in *Al-Nashif*, which the Court of Appeal decided was unchanged by subsequent decisions. It must be assumed that that admissibility decision was taken with knowledge of the thinking in *Al-Nashif*, and it was Article 6 rights which were engaged in *Carnduff*. The claim was struck out because it could not be tried without injury to the public interest. Restrictions or limitations should not impair the very essence of the right, and a striking out process was not of itself offensive to the principle of access to the courts. The public interest in maintaining the effectiveness of the police service and thus in preventing disorder or crime was a legitimate basis for restricting the right of the applicant to proceed with civil proceedings. The applicant had been able to issue proceedings; the strike out followed a contested hearing at which he was legally represented; no absolute rule was being laid down about contractual claims by informers against the police; the strike out decision was taken by independent judges after careful consideration of the issues. The right of access to the court had not been replaced by an executive "ipse dixit". The judgments involved a careful balancing of the rights of the applicant and the public interest. Parker LJ had expressly concluded that since it was plain on the pleadings that the resolution of the issues would involve disclosure contrary to the public interest, it would be pointless to allow the action to proceed since that would be merely to delay the inevitable premature end.

64. This was much the same as the conclusion reached by Blake J in *MH*, above. He concluded that Article 8 was engaged, and that procedural protections applied to it referring to *Al-Nashif*. He said at paragraph 64:

> "64. The analogy with a PII application under CPR 31 is not exact. However these applications for judicial review do raise the first question, namely whether greater disclosure could be made without damaging a vital public interest. If the answer is yes, the claimants are likely to succeed in setting aside the present decision refusing their applications, because if greater disclosure is made to them they may be able to make more informed representations

> than they have previously been able to do. If the answer is no, the applications are likely to fail because the proceedings have been as fair as can be without damaging a vital public interest."

65. The Claimants point out that there was no equivalent to the SIAC procedure in this case. There was no means whereby the Court could examine the material, disclosure of which had been refused, in the PII process or later, so as to judge whether the SSHD's case on it was well–founded. The strength of the public interest in its non-disclosure bears no necessary relationship to the strength of its contents as proving the SSHD's case on the merits. I accept that. And, they submit, applying paragraph 58 of the May 2012 judgment, that even if more were disclosed, unless all was disclosed there would always be some which was not disclosed. This would in effect prevent a challenge to the rationality of the SSHD's refusal of naturalisation. *Tariq v Home Office* [2011] UKSC 35, [2011] 3 WLR 322 did not legitimate a process without safeguards. There would be no effective remedy were the case to be dismissed because of the absence of a CMP. Even in a national security case, there had to be some way of testing the case. Parliament had struck no express balance here.

66. The Court then went on to examine in considerable detail the policy being applied, the statements said to contravene it and the justification for the SSHD's decision, before concluding that it fell within the legitimate scope of the discretion available to her.

67. By contrast here, submitted Ms Harrison and Mr de Mello, the Court is disabled from reviewing the facts alleged, and the justification for and proportionality of the interference with Article 10 rights which the refusal of naturalisation entailed. In the absence of such protection, the decision of the SSHD is arbitrary and not prescribed by law. Even in a national security case, there had to be an adversarial process. *Al-Nashif* was not concerned just with serious deportation cases but had been applied in lesser contexts, as here by Blake J in *MH*. A declaration should ensue to the effect that the decisions were incompatible with Article 10. The SSHD had to find disclosable evidence, as in a Control Order case, or grant nationality. The very essence of the right would otherwise be impaired.

68. Mr Eadie submitted that the decisions had been taken in accordance with the law in the British Nationality Act, and in accordance with the common law, as the May 2012 judgment held. The factors engaged by Article 8 were considered in relation to the common law arguments in that judgment, because they were factors that went to the fairness of the procedures adopted. Protection against arbitrary decision-making was provided because there was a legal test in the BNA; the decision was subject to judicial review, since that was the very task on which the Court was engaged. The constraints to the evidential basis for the challenge arose from the PII process, which was the way in which the national security interest in non-disclosure was considered. PII removes evidence from both sides, for better or worse for either party, because of the interests which require to be protected. It operates as a limit on what fairness requires, and as a limit on arbitrary decision-making. Articles 6 and 8 cases have had to grapple with this issue. If the circumstances in *Carnduff*, an Article 6 case, permitted the claim to be struck out, then the limitations of which the Claimants complain on the protection available for Article 8 or other rights cannot be greater, and Article 8 is inherently more flexible. *Al Rawi* applied PII, with Article 6 and open justice as part of the balance, even though the Supreme Court knew that it had led one

party to lose because it could not deploy its case. *Al-Nashif*, a deportation case, was very different since there was no means of challenging the national security status of the material, nor any process of review.

69. A declaration that the Court was acting incompatibly with Article 8 could not be granted. If further procedural protection were required it would be provided by the Justice and Security Bill which, as at the date of this hearing, is expected imminently to receive the Royal Assent, the only outstanding step before enactment. I do not need to go through its provision; the upshot of cl 15 inserting a new section (2D) into the SIAC Act 1997 is to make challenges to refusals of naturalisation subject to review by SIAC, applying judicial review principles, and deploying a CMP. This is subject to commencement orders, but they and transitional provisions would permit these claims to be transferred to SIAC. If not so transferred, fresh decisions could be sought which would be subject to review by SIAC. Mr Eadie expected these provisions to be "in play" by the end of this summer, solving, if it existed, any deficiency in procedures, applying *Al-Nashif*.

70. The decision in *CG and C v Commissioner of the Metropolitan Police* [2011] 1 WLR 1230, [2011] UKSC 21, concerning the unlawful retention of biometric data pursuant to unlawful ACPO guidelines, pointed in paragraphs 45-49, to one way in which relief could be granted in respect of a failure in the present law to comply with ECHR obligations.

71. I turn to my conclusions. The Claimants have been able to bring judicial review proceedings in respect of the decisions. They have been able to test the position by reference to the evidence which is admissible by the application of the PII test, which they said should be applied. The evidence relied on by the SSHD has been tested to see if the PII claim was made out. The Court then has to consider the claim in the light of what emerges from that process. The evidence of Mr Larkin is that the material relied on by the SSHD is more extensive than has been disclosed. The Court has held this further material not to be admissible. The ECtHR recognises that specific considerations apply to the disclosure of national security related material. Additionally, the reason assigned, in the three cases where a reason has been given, is not such as on its face to show that the decision was without merit in the statutory context of "good character". AM still knows that he failed that statutory test for reasons which cannot be disclosed.

72. What the Claimants have not been able to do is to test the merits of that undisclosed material. But in the context of the degree of interference with Article 8, or the other Articles engaged, that does not show that the decisions were not subject to what for these purposes is an effective challenge. The challenge has gone as far as it can, having regard to the recognised need to protect the material subject to the PII claim.

73. The situation with which the Claimants are faced is very similar to that which was faced in *Carnduff*, was foreshadowed by Blake J in *MH* and dealt with by me in the May judgment. The outcome of the application to the ECtHR in *Carnduff* is instructive. Although Article 6 applied to the action, the fact that it had to be struck out without consideration of the evidence, because of the nature of the evidence which would have had to be called, involved no breach of Article 6. This was a judicial decision arrived at after consideration of the pleadings, and not because of a general

requirement to strike out contractual actions by informers against the police. But the effect was that, consistently with Article 6, the action could not proceed.

74. In my judgement, that is the position here, and the fact that the outcome in that case was consistent with Article 6 with the comparative lack of flexibility it contains, shows that the outcome here in relation to the protection of rights under Articles 8, 9 and 10 is equally consistent with them. I also note the limited extent of interference. These are not Control Order or TPIM cases. The state is not seeking, through these decisions, to impose any restrictions on the family or private life of the Claimants, or of their families, nor to restrict what they say or do. All that is unchanged by the refusal of a benefit for which the SSHD is not satisfied they qualify.

75. The ECtHR jurisprudence does not require the SSHD to put national security at risk by forcing her to make a choice between granting naturalisation and disclosing material which a judge has concluded should be protected by PII.

76. The Claimants have still not persuasively grappled, now with more elaborate ECtHR jurisprudence, with the problem of how any further protection could be afforded. This goes back to the consideration which led me to reach the conclusions which I did in the May 2012 judgment. Even if there had been some further disclosure, after PII, of areas of concern so that the Claimants could address them, that would not have led to disclosure in a case in which material remained protected by PII, of all the material upon which the SSHD relied. The refusal decision could not be reviewed on the basis that the material disclosed was the only material relied on by the SSHD, and certainly not in the teeth of the statements of Mr Larkin to the contrary. The Court could not hold that the decision was irrational or that the SSHD had ignored material considerations when it did not know what that other material amounted to. The Court could not quash the decision on some such basis, since it would be retaken on the same basis, and the same issues would be repeated again, and then again. The Court could not require naturalisation to be granted, as was one of Ms Harrison's suggestions, since that is not for the Court, and it could not require the SSHD to breach her duty by granting naturalisation when she was not satisfied of the statutory precondition. The Court could not require more to be disclosed since it has already been satisfied that the SSHD has disclosed all that she is required to disclose, and it is not for the Court to require her to breach national security in order to defend decisions taken in reliance on such material, which she is obliged to take into account. The Claimants may not like the *Carnduff* outcome but no alternative practical solution has been suggested.

77. The Claimants have specifically chosen not to seek a declaration of incompatibility between the disclosure requirement implied into the BNA, and the ECtHR. Of course, the obvious remedy for that would not be the ordering of disclosure but giving Parliament time to come up with a legislative solution, as in *CG and C*, above. A legislative solution in the form of a CMP, as in the Justice and Security Bill, might have been chosen with the creation of a CMP, which the Claimants opposed in judicial review. I note that the Supreme Court did not suggest that the absence of a CMP in judicial review would create a breach of the ECHR rights, though it was well aware of the problems which the absence of disclosure could create, as illustrated by *Carnduff*.

78. The contention that I should declare that the SSHD had acted unlawfully in not disclosing more, e.g. a gist, or sufficient to respond to the adverse factors, based on *AF(No 3)* is untenable, in the light of the PII decision, *Al-Fayed (No 1),* and the very nature of the implied duty of fairness in this context. Nor does the ECtHR jurisprudence require that. The suggestion that I should declare that the process involved a breach of the Articles in question is either a declaration of incompatibility, which has not been sought, or a declaration that the SSHD has acted unlawfully.

79. The reality, as I pointed out in May 2012, is that in the absence of full disclosure after PII, or a CMP, the Claimants in effect are bound to lose. I am not persuaded by this more elaborate argument on disclosure and the ECtHR decisions that anything different in substance has been raised.

FM: the substantive decision

80. FM is the only Claimant who now seeks a determination of the substantive application on its merits. I deal first with Mr de Mello's request that I recuse myself if the case were to depend on an examination of the merits, since I might be affected by what I had read in the PII hearings. I cannot actually remember anything about FM which I can attribute to FM from the PII hearing. But, if this case were to proceed in such a way that I did have to consider the substantive merits of the challenge while some evidence remained undisclosed after a PII hearing which I had held, I would recuse myself to avoid both the possibility that I might be influenced by what I had heard in such a hearing, of which the Claimant would obviously be unaware, and more probably the risk that it might be thought to have happened, even if it had not. This is a problem with PII hearings generally where the same judge is the subsequent fact-finder. There may be circumstances where recusal should not happen, and any ongoing duty could also prove problematic were there to be a recusal. I therefore make no general ruling for all naturalisation cases, let alone for other cases outside that area. But by the very nature of the conclusions I have reached about how the case has to proceed, the concern which lies behind the request cannot eventuate. The fact that there is such undisclosed evidence prevents FM succeeding.

81. I have set out earlier the material on which Mr de Mello relies because it serves to illustrate the problems to which the May 2012 judgment referred. The submission that the Court can review and quash the decision refusing naturalisation would require the Court to treat the SSHD's disclosed material as being the sole material on which her decision was based, and to treat it as unfounded since it was expressed at a very general level without further express support. The Court however does not make the decision for itself as to whether FM should be naturalised; it is exercising a review jurisdiction. The question is whether the SSHD ought in law to have been satisfied that, on all the material before her, the applicant was of good character. More accurately, it is: has the Claimant shown that the SSHD's conclusion on all the material she had, that she was not satisfied that the Claimant was of good character, was not lawfully open to her? The Court does not try that issue simply on part of the evidence before it, ignoring the evidence from Mr Larkin that the decision was based on material which for good and lawful reasons it does not have.

82. Mr de Mello invited the Court to conclude that the evidence of the nature and effect of the preachings was not shown to involve violence or offensiveness. This illustrates

the problem: the briefly expressed reason could be seen as containing such an allegation. Indeed, it could be of legitimate concern if extremist sermons were not found offensive. The Court knows there is further material but does not know what it is. It is therefore impossible to hold that the decision is wrong on *Wednesbury* principles, when for sound and lawful reasons it does not have the full basis for the SSHD's lack of satisfaction.

83. Even if the Court were to quash the decision, it could not order the grant of naturalisation: that power belongs to the SSHD; it cannot say that the only possible answer to the application for naturalisation would be a grant. The SSHD is obliged to have regard to all relevant matters; the Court does not have sight of those for reasons which it has found to be soundly based in accordance with the BNA and PII. If the Court were merely to quash the decision, the whole process would be repeated, PII would be claimed, and would still be resolved in the same way.

84. For the reasons which I gave in the May 2012 judgment, and which the submissions here amply justify, this substantive application is dismissed. FM simply cannot show that the decision was flawed.

Form of Order

85. I will hear Counsel on the form of order. But the options are either that the actions are dismissed, or that they are adjourned to await what may happen on the commencement and transitional provisions of the soon to be enacted Justice and Security Bill. The SSHD may be able to give further information about Governmental intentions and timetable.

86. I would have granted permission to appeal both this and the May 2012 judgment in the normal run of events since the arguments are of some importance. My reservation is this: should the Court of Appeal itself be asked for permission to appeal, if there is a strong likelihood that the arguments will be made redundant at least in this context by transfer of the claims to SIAC? I would like to hear Counsel on that point.