Appeal No: SN/6/2013
Hearing Date: 18-20 May 2015
Date of Judgment: 28th July 2015

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

SIR BRIAN KEITH
UPPER TRIBUNAL JUDGE CHALKLEY
MR PHILLIP NELSON

HABIB IGNAOUA

APPLICANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Applicant:	Ms A Weston and Ms L Hirst
Instructed by:	Birnberg Peirce and Partners
For the Respondent:	Mr R Phillips QC and Mr J Blake
Instructed by:	The Treasury Solicitor
Special Advocates:	Ms J Farbey QC and Mr M Goudie
Instructed by:	The Special Advocate's Support Office

JUDGMENT

Sir Brian Keith:

Introduction

1. Very few immigration decisions are made by the Home Secretary personally. They are invariably made by officials. But decisions to exclude from the UK a non-EEA national on the ground that their presence here would not be conducive to the public good are made by the Home Secretary personally, or exceptionally by another Secretary of State. This case relates to such a decision. The applicant is Habib Ignaoua, and he is challenging the Home Secretary's decision to exclude him from the UK by using the new procedure created by section 2C of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"), namely by making an application to the Special Immigration Appeals Commission ("SIAC") to set aside the decision to exclude him. The case has a long and tortuous history, and we trust that we shall be forgiven for going into it in some detail.

2. One important feature of the case should be noted at the outset. Section 2C of the 1997 Act only applies where the Home Secretary has certified that the decision to exclude the non-EEA national from the UK was made, in part at least, on the basis of information which the Home Secretary concluded should not be made public in the interests, among other things, of national security. This was such a case, and so with the help of special advocates instructed on Mr Ignaoua's behalf, we have considered not just the redacted assessment of the risk Mr Ignaoua posed which his lawyers have seen, but also the unredacted assessment of that risk on which the Home Secretary relied and the underlying documents which the Home Secretary did not see but which informed that assessment. Such a procedure – known as a closed materials procedure – is, of course, not uncommon in SIAC. That has meant that in addition to this open judgment, there is a closed one as well.

The nature of the new procedure

3. *Section 2C and its genesis*. This is the first time that SIAC's jurisdiction under section 2C of the 1997 Act has been invoked, and we therefore propose to say something about the jurisdiction. Section 2C provides, so far as is material, as follows:

"(1) Subsection (2) applies in relation to any direction about the exclusion of a non-EEA national from the United Kingdom which –

(a) is made by the Secretary of State wholly or partly on the ground that the exclusion from the United Kingdom of the non-EEA national is conducive to the public good,

(b) is not subject to a right of appeal, and

(c) is certified by the Secretary of State as a direction that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public … in the interests of national security …

(2) The non-EEA national to whom the direction relates may apply to the Special Immigration Appeals Commission to set aside the direction.

(3) In determining whether the direction should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings.

(4) If the Commission decides that the direction should be set aside, it may make such order, or give any such relief, as may be made or given in judicial review proceedings."

4. The background to the enactment of section 2C is illuminating. In the past, decisions made by the Home Secretary to exclude someone from the UK on national security grounds could only be challenged by judicial review. Consequently, when Mr Ignaoua challenged the decision to exclude him from the UK, he did so by a claim for judicial review. The problem which then arose was how the materials relied on by the Home Secretary could be considered by the Administrative Court, bearing in mind that the Home Secretary thought that the interests of national security meant that they could not be made public. In cases where the decision which is being challenged by judicial review was the Home Secretary's *refusal to grant someone British citizenship* on the ground that they are not of good character, it had been held that that there could not be a closed materials procedure even if the parties consented,

save for such a closed procedure as occurs when the court holds a hearing to decide whether public interest immunity should allow relevant materials being withheld by one party from the other. Did that apply to challenges by judicial review of decisions *to exclude a non-EEA national from the UK*?

5. That issue was never resolved by the courts because in the meantime the new procedure in section 2C of the 1997 Act had become available. It had been incorporated into the 1997 Act by section 15 of the Justice and Security Act 2013 which came into force on 25 June 2013. As is apparent from its terms, it enables someone in Mr Ignaoua's position to apply *to SIAC* for an order setting aside the direction that he be excluded from the UK. Since SIAC's rules of procedure permit a closed materials procedure, the problem of how the materials relied on by the Home Secretary should be considered was resolved. There was a flurry of litigation about the legal effect of the Home Secretary's certificate that the decision to exclude Mr Ignaoua from the UK was made, in part at least, on the basis of information which the Home Secretary concluded should not be made public in the interests of national security. The issue was whether that *automatically* terminated Mr Ignaoua's claim for judicial review. The Court of Appeal (in *R (on the application of Ignaoua) v Secretary of State for the Home Department* [2014] 1 WLR 651) decided that it did not, leaving it to the Administrative Court to decide whether the claim for judicial review should be stayed to allow the proceedings in SIAC to take their course. On 8 May 2014, the Divisional Court decided that it should be stayed. That is the route by which Mr Ignaoua's claim – originally a claim for judicial review – is now before SIAC.

6. *Disclosure in section 2C proceedings*. In the build-up to this hearing, an issue arose as to the extent of the disclosure which had to be made of relevant materials – both open disclosure to Mr Ignaoua's legal team and closed disclosure to the special advocates. That issue was addressed by SIAC in a judgment handed down on 31 July 2014, which drew on a previous decision it had made on 18 July 2014 in respect of cases where the challenge was to the refusal of British citizenship. The level of closed disclosure which SIAC thought appropriate proved to be contentious. On the one hand, there was the provision in section 2(3) which requires SIAC to "apply the principles which would be applied in judicial review proceedings". That rather suggested disclosure limited to

the underlying documents which informed the Home Secretary's assessment of the risk Mr Ignaoua posed. On the other hand, the disclosure had to be sufficient to enable rule 4(3) of SIAC's Rules of Procedure to be complied with. That requires SIAC to be "satisfied that the material available to it enables it properly to determine proceedings". SIAC thought that that required a greater degree of disclosure, and it ordered the Home Secretary to disclose to the special advocates, not merely the underlying documents which had informed the report to the Home Secretary on which the Home Secretary's decision to exclude Mr Ignaoua from the UK had been based, but also the documents which had been *available to* the authors of any relevant assessment on which the Home Secretary may have relied in reaching that decision.

7. The Home Secretary lodged a claim for judicial review challenging both SIAC's order of 31 July 2014 in Mr Ignaoua's case and its previous decision of 18 July 2014 about the extent of the closed disclosure to the special advocates. It was contended on her behalf that those orders went too far. On 18 March 2015, the Divisional Court held ([2015] EWHC 681 (Admin)) that SIAC had required the Home Secretary to give a greater degree of closed disclosure to the special advocates than had been warranted. It was sufficient for the special advocates to be provided with such material as was *used by* the authors of any relevant assessment on which the Home Secretary may have relied. The level of closed disclosure to the special advocates was therefore settled by that judgment, but we mention all this because Ms Amanda Weston for Mr Ignaoua contended before us that the level of *open* disclosure to his legal team had been insufficient. We shall return to that later on.

8. *The nature of the review*. SIAC's judgments of 18 and 31 July 2014, as well as the Divisional Court's judgment of 18 March 2015, also addressed the nature of the review which this new jurisdiction requires. As we have said, the procedure created by section 2(3) incorporates the principles which would apply in claims for judicial review. But as Lord Mance said in *Kennedy v Charity Commission* [2014] 2 WLR 808 at [51], "[t]he nature of judicial review in every case depends on its context", and the context here is that Mr Ignaoua and his legal team do not know all the material which informed the assessment on which the Home Secretary relied. Moreover, although that is known to the special advocates, they cannot take Mr Ignaoua's instructions on it. It was that

which led Sir Brian Leveson, when giving the judgment of the Divisional Court, to say at [28] and [29]:

> "What is required is a complete understanding of the issues involved and a recognition by SIAC that the inability on the part of the Special Advocates to take instructions from the interested parties on the material covered by the closed procedure heightens the obligation to review that material with care. In that regard, the possibility that other (potentially innocent) explanations might be available to rebut it (or the inferences drawn from it) has to be considered … It is the reason why it is not appropriate simply to look at the principles … which apply in other areas of judicial review where the claimant will be able to challenge in full the reasons advanced for the decision not only as to relevance but also accuracy and completeness."

We have borne that in mind throughout the case, and we have considered the issues which the case raises with the heightened level of scrutiny which the Divisional Court had in mind, bearing in mind that Parliament must be taken to have intended the new procedure provided for by section 2C to provide an effective forum for the determination of the lawfulness of a decision to exclude a non-EEA national from the UK.

The relevant facts

9. *Mr Ignaoua's background*. Mr Ignaoua is a Tunisian national. He is now 54 years old. He has two brothers who are settled in the UK with their families. He has been married three times, and has a child by each of his three wives. His second wife lives in this country with their son Mohammed who was born on 5 April 2005. They were divorced in 2006, and Mr Ignaoua is currently living with his third wife in Tunisia in the coastal city of Sousse.

10. *Mr Ignaoua's claims for asylum*. Mr Ignaoua first arrived in the UK on 9 February 2004. He did not, of course, have any right to enter the UK. He was neither a UK national nor a national of a member state of the European Union exercising his free movement rights. He arrived here on a British passport which was not his. He gave his name as Habib Gnaouy, which was a transliteration of his real name, and 26 December 1960 as his date of birth. He applied for asylum here. In accordance

with the usual practice in such cases, he was temporarily admitted to the UK pending the determination of his claim. However, he twice failed to attend appointments which had been made for him to be interviewed in connection with his claim for asylum, and unsurprisingly his claim was refused on the ground of his non-compliance with the terms of his temporary admission to the UK.

11. Mr Ignaoua then applied for asylum again. That was on 18 May 2004. This time he claimed that he had flown into the UK from Damascus the previous day on a false French passport which he was never to produce. On this occasion he gave his name as Alhabeeb Eknawah, which was a different transliteration of his real name, and this time he gave his date of birth as 11 January 1961. It may be that he wanted to conceal the fact that he had made a previous claim for asylum which had been refused. He was interviewed in connection with his new claim for asylum on 24 September 2004, having set out the basis of his new claim in a statement dated 24 June 2004 which was provided to the UK Borders Agency ("the UKBA"). In that statement, he claimed that he had become an active member of the El Nahdha movement in Tunisia, an Islamist movement whose political ideals, he claimed, included a fair distribution of Tunisia's wealth, respect for human rights and the eradication of corruption. The Ben Ali regime came to power in Tunisia in 1987, and following the *coup d'etat* which had seen the overthrow of Tunisia's previous government, action was taken against members of El Nahdha. Fearing for his life, Mr Ignaoua claimed to have left Tunisia for Libya in November 1991, moving to Sudan in March 1995, and then to Syria in 1998. He claimed to have arrived in the UK on 17 May 2004, in effect denying that his first claim for asylum had had anything to do with him. He said nothing in that statement about having spent time in Italy, the significance of which will emerge later. Documents subsequently supplied to the UKBA in support of his claim for asylum show that on 14 February 2002 he was sentenced by the Permanent Military Tribunal of Tunis in his absence to 10 years' imprisonment for his membership of a terrorist organisation.

12. *The issue of European Arrest Warrants*. Mr Ignaoua's second claim for asylum was not determined for some time. Indeed, it had not been determined by 4 June 2007 when a European Arrest Warrant was issued by a judge of the Court of Milan seeking his extradition to Italy so that he could face trial on charges relating to terrorism and participation in a

criminal organisation. The allegations made against him were accurately summarised in a subsequent assessment of him by the Security Service as follows:

> "[The warrant] cited his historic membership of a criminal group 'with terrorist aims'. The group had direct connections with other international extremist networks and was involved in counterfeiting, personal violence, handling stolen goods and illegal immigration. Ignaoua was a promoter and organiser. Between 1997 and 1999, he used speeches and propaganda to recruit volunteers to attend extremist training camps in Afghanistan … [and to be indoctrinated with the principles of the Islamic fundamentalist ideology]. He facilitated the necessary contacts with those who organised the trips."

The "volunteers" he was said to have tried to recruit were "North Africans in Milan", and the warrant was said to note further "that in the late 1990s the Milan group, of which Ignaoua was a member, conducted large-scale trafficking in false banknotes aimed at funding the organisation".

13. The issue of this warrant resulted in Mr Ignaoua's arrest on 7 June 2007. He was remanded in custody pending a hearing to determine whether he should be extradited to Italy. In the meantime, though, a second European Arrest Warrant was issued by another judge of the Court of Milan. That was on 13 November 2007. The charges were similar. The allegations made against him in that warrant were again accurately summarised by the Security Service as follows:

> "This Warrant related to Ignaoua's involvement in a '*criminal organisation … aimed at committing acts of violence both in Italy and abroad for terrorist purposes'*. Over an unspecified period, but with reference to specific evidence from 2004/2005, Ignaoua was said to have assisted this terrorist network in the procurement of false documents and the facilitation of illegal movement throughout the EU."

This criminal organisation was said to be

> "… another group of Islamic extremists based in Milan, Italy, led by an individual named Sabri Dridi. Dridi's group, of which Ignaoua was a member, belonged to a wider Islamic extremist network which was sub-divided into groups located through Italy and various European countries. The European network was dedicated to carrying out attacks in Italy, Afghanistan and Iraq for the purposes of international terrorism. Dridi's group was involved in the facilitation of illegal immigration, which allowed the group to collect funds, and send volunteers abroad (particularly to Iraq and Afghanistan) to engage in terrorist related activity."

14. *Mr Ignaoua's attempts to contest his extradition to Italy*. Mr Ignaoua contested his extradition to Italy primarily on the basis that if he was extradited to Italy, there was a real risk that he would be deported to Tunisia where he would be at risk of inhuman or degrading treatment contrary to Art 3 of the European Convention on Human Rights ("the Convention"). The District Judge concluded that he would be at risk of such treatment if he was returned to Tunisia, but on 20 May 2008 he ordered Mr Ignaoua's extradition to Italy because he did not believe that there was a real risk that the Italian authorities would deport him to Tunisia. An appeal to the Divisional Court from the order for his extradition was dismissed on 28 July 2008, and on 30 September 2008 the Divisional Court refused to certify that a point of general public importance was raised by the case.

15. Three other steps were taken by Mr Ignaoua to stop his extradition. First, he applied to the European Court of Human Rights for an interim measure under rule 39 of its Rules of Court prohibiting the UK from extraditing him to Italy for the time being. That application was refused on 7 October 2008, the court stating that it would be open to Mr Ignaoua to apply for an interim measure prohibiting Italy from removing him to Tunisia if it was apparent that the Italian authorities were going to deport him from Italy in breach of his human rights. Secondly, he applied to the Divisional Court for an order releasing him from detention on the basis that there was fresh evidence which undermined the previous finding that his extradition to Italy would not give rise to a real risk of the Italian authorities deporting him to Tunisia. That application was dismissed on 30 October 2008. Thirdly, Mr Ignaoua had previously applied to the House of Lords for leave to appeal against the judgment of the Divisional

Court of 28 July 2008. That application was refused on 31 October 2008, at which time an injunction prohibiting Mr Ignaoua's extradition to Italy for the time being (originally granted by the High Court and continued by the Divisional Court) was discharged. That left the way clear for Mr Ignaoua's extradition to Italy, and he was extradited there on the following day, 1 November 2008.

16. *The "lapsing" of Mr Ignaoua's second claim for asylum*. There is no evidence why Mr Ignaoua's second claim for asylum had not been considered by the time the first of the arrest warrants was issued. The delay was unfortunate, especially as Art 10.1(d) of Council Directive 2005/85/EC ("the Procedures Directive") requires member states to reach decisions on claims for asylum "in reasonable time". But it is well known that the Home Office was inundated with claims for asylum at that time, and lengthy delays in assessing claims were not unusual. Moreover, there is no evidence that Mr Ignaoua did anything to prompt the Home Office to deal with his claim, and he may have been content for it not to be considered speedily, as he was entitled to remain in the UK for as long as his claim was awaiting determination. It is not without significance that the only evidence we have is that it was not until his extradition was imminent in September 2008 that his solicitors began to press for his claim for asylum to be considered.

17. Again, there is no evidence why Mr Ignaoua's second claim for asylum was not determined in the 18 months or so between the issue of the first arrest warrant and his eventual extradition to Italy. It may be that the Home Office was waiting to see if he would be extradited, because if he was, his claim for asylum would be treated as having lapsed. That is because the Home Office's policy was to treat a claim for asylum as having lapsed if the asylum-seeker left the UK before a decision was made on their claim. There is no statutory basis for treating a claim for asylum as having lapsed in those circumstances, but that is how Mr Ignaoua's second claim for asylum came to be treated as having lapsed.

18. *The direction for Mr Ignaoua to be excluded from the UK*. While Mr Ignaoua was awaiting trial in Italy, the Security Service assessed the risk which he posed to national security. It was the redacted version of that assessment of 29 May 2009 which summarised the contents of the arrest warrants and his membership of the group of Islamic extremists

based in Milan. The Security Service acknowledged that Mr Ignaoua's involvement in the procurement and facilitation of false documents may have been sporadic and on occasions linked to personal gain and criminality as opposed to extremism. But he was nevertheless assessed to have been engaged in recruiting volunteers for training camps between 1997 and 1999, and to have been involved in the procurement of false documents to further terrorist-related activity on behalf of Dridi's network. He was assessed as holding extremist views himself, as someone who supported "those who went abroad to train and/or fight in extremist jihad", and as someone who may have attempted to influence others towards extremism.

19. This assessment was made available to the Home Secretary on 16 October 2009 with a recommendation that Mr Ignaoua be excluded from the UK on the ground that his presence here would not be conducive to the public good. Excluding a non-EEA national from the UK on this ground is a personal power which the Home Secretary enjoys. The Home Office guidance at the time said that there were no specific limitations on the power, provided that the Home Secretary acted reasonably, proportionately and consistently, and the question whether someone's presence here is or is not conducive to the public good was described by Lord Sumption in *R (on the application of Lord Carlile of Berriew and others) v Secretary of State for the Home Department* [2014] 3 WLR 1404 at [14] as "one of judgment, informed by fact".

20. The fact that Mr Ignaoua had made a claim for asylum was drawn to the Home Secretary's attention, as well as the fact that it had been treated as having lapsed as a result of his extradition to Italy. The memorandum to the Home Secretary recommending Mr Ignaoua's exclusion from the UK continued as follows:

> "You (Home Secretary) should be alerted to the fact that should Ignaoua be released from custody, it is possible that he will express a fear of return to Tunisia. If this should occur the Italian authorities may decide to invoke the relevant articles of the Dublin Regulation and seek his return to the UK in anticipation of his lapsed asylum claim being resumed. A decision to return Ignaoua to the UK under the Dublin Regulation is likely to override any decision you (Home Secretary) may make to exclude him. Ignaoua's fate in respect of the charges against him is

> currently unresolved as is the situation regarding his eventual removal from Italy. However, whilst we would robustly challenge any request for him to be returned to the UK, this may not be possible to sustain and in the event of his return, his asylum claim would need to be addressed with a view to refusal and, appeal rights permitting, eventual deportation.
>
> However, despite the above concerns surrounding his potential return to the UK under the provisions of the Dublin Regulation, the Security Service have recommended Ignaoua's exclusion on the basis of his involvement in facilitation and radicalisation activities for terrorist purposes …"

We shall explain the reference to the Dublin Regulation shortly.

21. On 26 October 2009 the Home Secretary (Mr Alan Johnson) personally decided to exclude Mr Ignaoua from the UK on that basis. That decision was not communicated to Mr Ignaoua there and then as he was in custody in Italy. That was in accordance with what the Home Office claims to be its ordinary practice of not communicating such a decision to someone who is in custody, as the Home Office cannot guarantee that the letter communicating the decision "would not be screened and that the exclusion direction would not be disclosed into the public domain". Ms Weston made the point that that should not have prevented the Home Office from notifying Mr Ignaoua's solicitors of the decision to exclude Mr Ignaoua from the UK, but either that did not occur to anyone, or the Home Office decided for one reason or another not to do that. The effect of not communicating the decision to Mr Ignaoua or his solicitors at the time meant that for the time being it did not have "the character of a determination with legal effect" (see Lord Steyn in *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604 at [26]).

22. *The trials in Italy*. The documents we have been provided with about the criminal proceedings in Italy relate to only one criminal trial. They show that on 8 July 2010 Mr Ignaoua was acquitted by the First Division of the Assize Court of Milan on the charges he was facing. However, the evidence filed on behalf of the Home Secretary asserts that that there was a second trial for further offences, and that he was acquitted of those on 20 March 2012. We proceed on the assumption

that that is correct, because (a) it was unchallenged by Mr Ignaoua's legal team, (b) Ms Weston's written submissions accepted that following his acquittal on 8 July 2010, Mr Ignaoua was "acquitted of further, similar charges", and (c) in the final judgment of the Fourth Section of the European Court of Human Rights in the case which Mr Ignaoua had brought against the UK to stop his extradition to Italy on the basis that his extradition to Italy would be unlawful because there was a real risk that he would be deported from there to Tunisia (Application No 46706/08), the Court referred to Mr Ignaoua having had to face a second trial in Italy.

23. *Mr Ignaoua's claim for asylum in Italy*. Immediately following Mr Ignaoua's acquittal on the first set of charges on 8 July 2010, the local prefecture ordered that he be expelled from Italy on the ground that he had entered Italy without a visa, that he did not have a valid identity document, that he had avoided border controls and that he had no right to remain in Italy. That order was rescinded later that day, but only because it was thought that the lack of a valid identity document prevented Mr Ignaoua's removal from Italy. Indeed, on 9 July 2010 the magistrates' court in Milan ordered his expulsion from Italy. That appears in the narrative of events in the final judgment of the European Court of Human Rights in his case. It was presumably those developments which prompted Mr Ignaoua to apply to the Italian authorities for asylum on the day of his acquittal. No doubt he feared that his deportation to Tunisia was imminent.

24. At the same time, Mr Ignaoua asked the European Court of Human Rights to prohibit his deportation to Tunisia, and on 21 July 2010 the Court ordered that Mr Ignaoua should not be returned to Tunisia while a final decision "on the merits of the matter" was still pending. We assume that this "matter" was his original claim that his extradition to Italy had been unlawful because the Italian authorities could not be trusted not to deport him to Tunisia in due course, though by then he would have had to remain in Italy in any event because of his fresh claim for asylum. Moreover, he was facing a second trial, and in any event the prosecution either had lodged, or were about to lodge, an appeal against his acquittal. The Italian authorities presumably required him to remain in Italy until that appeal had been determined and his second trial was over. Mr Ignaoua was held in detention for the time being.

25. Before Mr Ignaoua's fresh claim for asylum had been considered by the Italian authorities, Mr Ignaoua was informed of the decision which the Home Secretary had made to exclude him from the UK. The letter communicating that decision to him was dated 29 July 2010. That was when the decision had legal effect. No explanation has been given for why Mr Ignaoua was informed of the decision then, but the evidence is that Mr Ignaoua's solicitors were in touch with the Home Office following Mr Ignaoua's acquittal, and maybe it was thought that following his acquittal he might try to return to the UK.

26. On 22 November 2010, the Home Office received a formal request from the Italian authorities for the UK to take Mr Ignaoua back so that the fresh claim for asylum which he had made in Italy could be determined here pursuant to Art 16.1(e) of Council Regulation (EC) No. 343/2003 ("the Dublin II Regulation"). The Dublin II Regulation has now been replaced by Council Regulation (EC) No. 604/2013, but the Dublin II Regulation was the one in force at the time. As is well known, the various Dublin Regulations laid down a comprehensive code for determining which country is responsible for deciding an asylum-seeker's claim for asylum. At its core is the need to prevent asylum-seekers from having what Lord Kerr in *R (EM (Eritrea)) v Secretary of State for the Home Department* [2014] AC 1321 called at [40] "the opportunity to move about various member states, applying successively in each of them for refugee status, in the hope of finding a more benevolent approach to their claims". It is based on the presumption that "members of an alliance of states such as those which comprise the European Union will comply with their international obligations" and apply an equally rigorous approach to such claims.

27. It will be necessary to consider the provisions of Art 16 with some care later in this judgment, but for the present it is sufficient to state that the UKBA did not accept that the UK was the member state responsible for considering the claim for asylum which Mr Ignaoua had made in Italy. Italy's Ministry of the Interior was informed of that on 30 November 2010, and on 2 December 2010 the Italian authorities accepted that Italy was the member state responsible for considering it. Mr Ignaoua was released from immigration detention shortly after that, but he remained in Italy, of course, pending the determination by the Italian authorities of his fresh claim for asylum, as well as the prosecution's appeal against his acquittal and his second trial.

28. *The Home Secretary's reconsideration of the decision to exclude Mr Ignaoua from the UK*. Mr Ignaoua's claim for judicial review challenging the decision to exclude him from the UK was lodged on 28 October 2010. That fact, together with Mr Ignaoua's acquittal, caused the Security Service to provide an update to the Home Secretary on 3 February 2011 to enable the Home Secretary to decide whether the exclusion of Mr Ignaoua from the UK should be maintained. That assessment was made available to the Home Secretary on 1 March 2011 with a recommendation that Mr Ignaoua's exclusion from the UK be confirmed as he "still presents a case for exclusion on the grounds of ensuring the highest possible protection level to the UK". On 22 March 2011, the Home Secretary (Mrs Theresa May) personally decided to maintain the previous decision to exclude Mr Ignaoua from the UK. That decision was communicated to Mr Ignaoua's solicitors on 31 March 2011. That prompted Mr Ignaoua to amend his claim for judicial review to challenge that decision as well.

29. *The prosecution's appeal and its aftermath*. On 14 July 2011, the Second Division of the Assize Court of Appeal of Milan dismissed the prosecution's appeal against Mr Ignaoua's acquittal. Mr Ignaoua remained in Italy awaiting his second trial and the outcome of his fresh claim for asylum. As we have said, he was acquitted on the second set of charges on 20 March 2012. His fresh claim for asylum was refused on 23 May 2013 but Mr Ignaoua had already been deported to Tunisia on 8 April 2013, presumably because it was known that his fresh claim for asylum was about to be formally refused. So far as we know, he has remained in Tunisia ever since.

30. Mr Ignaoua's fear of persecution in Tunisia has proved to be largely unfounded. He was not required to serve the sentence which had been passed on him by the Permanent Military Tribunal in Tunis. He attributes that to the collapse of the Ben Ali regime in 2011, which heralded the Arab spring, but he claims that he still faces a measure of intimidation and ill-treatment. Ms Weston accepted that the level of what he claims to be his current ill-treatment would not be such as to warrant the granting of asylum now, though that did not prevent her from arguing that Mr Ignaoua's inability to pursue in the UK his claim for asylum at a time when he would have been subjected to persecution on his return to Tunisia made his exclusion from the UK unlawful.

31. The final event of significance in the chronology is the outcome of Mr Ignaoua's case in the European Court of Human Rights. His complaint was that his surrender to Italy had exposed him to a real risk of being sent from there to Tunisia where the courts in the UK had accepted that he would be at risk of inhuman or degrading treatment. In its judgment of 18 March 2014, the Court concluded that Mr Ignaoua had failed to provide evidence rebutting the assumption that, at the time of his surrender to Italy, the Italian authorities would comply with their Convention obligations by not deporting him to Tunisia while people with his political profile were at risk of persecution. It declared his application manifestly ill-founded.

The grounds of challenge

32. The decisions to exclude Mr Ignaoua from the UK and to maintain that despite his acquittal were originally challenged on six grounds. One of them was that his exclusion from the UK infringed his rights under Arts 9, 10 and 11 of the Convention to freedom of religion, freedom of speech and freedom of association. That ground is no longer pursued, and we say nothing more about it. Some of the other grounds of challenge overlap with each other, but it is necessary to address each of them separately.

Ground (1): The refusal to take Mr Ignaoua back

33. Mr Ignaoua's case is that at the time of the original decision to exclude him from the UK, as well as at the time when that decision was communicated to him, he still had an outstanding claim for asylum in the UK which had not been considered. The same was true of the decision to maintain the decision to exclude him from the UK. In the circumstances, it was incumbent on the UK to take him back for his outstanding claim for asylum to be considered once the criminal proceedings in Italy were over. That was said to be required by Art 7 of the Procedures Directive and Art 16 of the Dublin II Regulation. The argument therefore is that since the UK was obliged to take him back for his outstanding claim for asylum here to be considered, it was inconsistent with that for him to be excluded from the UK even in the interests of national security.

34. We observe that even if Mr Ignaoua had not been excluded from the UK and had been able to pursue his claim for asylum in the UK, it would not have succeeded. By the time it would have been considered in the UK following his acquittal at his second trial, the Ben Ali regime had collapsed, and the basis of Mr Ignaoua's fear of persecution had gone. Moreover, his claim for asylum was eventually refused by the Italian authorities, and we therefore have to proceed on the assumption that it would have been refused here as well. To do otherwise would be to deny the respect which one member state should accord to the process of determining claims for asylum in another member state. As Sir Richard Buxton said in *R (on the application of AR (Iran)) v Secretary of State for the Home Department* [2013] EWCA 778 (Civ) at [29]: "The whole point of the Dublin II arrangements is that they assume that it will not matter to the outcome where in the Community an asylum application is heard." Having said that, we have considered the arguments advanced on Mr Ignaoua's behalf on their merits.

35. *Art 7 of the Procedures Directive*. The Procedures Directive identifies the minimum standards which member states should adopt for granting and withdrawing refugee status. Art 7 deals with someone's right to remain in the member state in which they applied for asylum while their claim is being considered. It provides, so far as is material:

> "1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III [ie the procedures which Member States should adopt when considering claims for asylum]. This right to remain shall not constitute an entitlement to a residence permit.
>
> 2. Member States can make an exception only where … they will … extradite … a person … to another Member State pursuant to obligations in accordance with a European arrest warrant …"

36. Ms Weston accepted that Art 7.2 had been engaged in Mr Ignaoua's case thereby releasing the UK from its obligation under Art 7.1 to allow Mr Ignaoua to remain in the UK while the claim for asylum which he had made in the UK was being considered. But she contended that once Mr Ignaoua had been acquitted in Italy on all the charges he faced, the

UK was bound by Art 7.1 to re-admit him to the UK. She acknowledged that no such obligation had been spelled out in Art 7 in so many words, but she argued that this was the only way to give effect to what lay behind Art 7, which was to ensure that an asylum-seeker was in the country in which his claim for asylum was being considered.

37. This argument assumes that Mr Ignaoua's claim for asylum in the UK would still have been in the course of being considered in the UK when the criminal proceedings in Italy were concluded. As we have said, the Home Office treated his claim as having lapsed when he was extradited to Italy, but we are sceptical about that. It may well be that if an asylum-seeker leaves the UK *voluntarily* before their claim for asylum has been considered, there is nothing wrong with treating their claim as having lapsed on the basis that they should be treated as having withdrawn their claim. As Ms Weston said, different considerations have to apply to an asylum-seeker like Mr Ignaoua who did not leave the UK voluntarily. But even if his claim for asylum here could still be said to have been extant following his acquittal on the second set of charges, we do not see how Art 7 can be read as impliedly requiring the UK to take him back. Art 7 is all about asylum-seekers being allowed to *remain* in the country where their claim for asylum is being considered. It does not address at all the question whether an asylum-seeker should be entitled to *return* to that country after they had been lawfully removed from that country, for example by a lawful extradition process. That question was addressed by Art 16 of the Dublin II Regulation, to which we shall come in a moment. That is not to say that Art 7 gave no rights to Mr Ignaoua. Once he had applied *in Italy* for asylum, Art 7.1 required the Italian authorities to allow him to remain *in Italy* while his fresh claim for asylum was being considered (unless, of course, Art 16 of the Dublin II Regulation required the UK to take him back). What Art 7.1 did was to prevent him from being deported to Tunisia in the meantime.

38. *Art 16 of the Dublin II Regulation*. The relevant provisions in Art 16 of the Dublin II Regulation relating to a member state's obligations to take back an asylum seeker are Arts 16.1(c)-(e). They provide:

> "1. The Member State responsible for examining an application for asylum shall be obliged to:
>
> …

> (c) take back, under the conditions laid down in Article 20, an applicant whose application is under examination and who is in the territory of another Member State without permission;
>
> (d) take back, under the conditions laid down in Article 20, an applicant who has withdrawn the application under examination and made an application in another Member State;
>
> (e) take back, under the conditions laid down in Article 20, a third-country national whose application it has rejected and who is in the territory of another Member State without permission."

Art 20 deals with things like the information which the member state which is being asked to take back the asylum-seeker must be provided with.

39. It was Art 16.1(e) which the Italian authorities relied on when they asked the UK to take Mr Ignaoua back. That was not the appropriate provision, and Ms Weston did not suggest otherwise. Even if Mr Ignaoua's claim for asylum in the UK could not be said to have lapsed, the one thing which could not be said about it was that it had been rejected. That was why the Home Office considered whether the UK was obliged to take Mr Ignaoua back under Art 16.1(c). In its letter to Italy's Ministry of the Interior of 30 November 2010, it did not suggest that Mr Ignaoua's claim for asylum in the UK was not "under examination", even though such a contention might have been consistent with its policy to treat the claim as having lapsed on Mr Ignaoua's extradition to Italy. Instead, it maintained that Mr Ignaoua was not in Italy "without permission".

40. Plainly Mr Ignaoua had been in Italy with the permission of the Italian authorities prior to his acquittal: he had been there at the request of the Italian authorities pursuant to a lawful extradition process. But what about after his acquittal? Would he have been in Italy then without permission? Ms Weston argued that he would have been. She pointed to the order made by the local prefecture immediately after his acquittal on

the first set of charges. How could he have been in Italy with permission at the time of the request to take him back on 2 November 2010, she asked, if he had been ordered to leave Italy on the basis that he had arrived in Italy bypassing the usual immigration controls and had no right to remain in Italy?

41. There are a number of difficulties with this argument. First, the local prefecture's order had overlooked that Mr Ignaoua had arrived in Italy pursuant to a lawful extradition process. Secondly, the order had immediately been rescinded, albeit not on the basis that he had arrived in Italy lawfully, but on the basis that his removal from Italy could not as a matter of practicality be effected. Thirdly, although his removal from Italy had been ordered by the magistrates' court in Milan, the European Court of Human Rights had then ordered that he be not removed from Italy for the time being. Mr Ignaoua therefore remained in Italy on the basis that the Italian authorities permitted him to do so, even if their acceptance that he could remain in Italy for the time being was as a result of the European Court's order. But most important of all, he still faced trial on the further set of charges. Having been extradited to Italy so that he could be tried on those charges (as well as the charges on which he had been acquitted), he must be treated as having remained in Italy at the request of the Italian authorities, and therefore with their permission.

42. But what about after his acquittal on the second set of charges? The end of his second trial brought the criminal proceedings to an end. Could he not be said to have been in Italy without permission then? We think not. We assume that the European Court's order prohibiting Mr Ignaoua's deportation to Tunisia was still in place, though it must have been lifted by 8 April 2013 when he was returned to Tunisia. But even if it had been lifted earlier, he had had to remain in Italy while his fresh claim for asylum was still being considered. In any event, the critical question is whether he was still in Italy with the permission of the Italian authorities when the new Home Secretary confirmed his exclusion from the UK. There is no doubt that he was because he was still awaiting trial on the second set of charges he faced.

43. The Home Office gave the Italian authorities another reason why the UK was not obliged to take Mr Ignaoua back under Art 16.1(c). Reliance was placed on Art 16.2, which provides:

> "Where a Member State issues a residence document to the applicant, the obligations specified in paragraph 1 shall be transferred to that Member State."

The Home Office argued that since Mr Ignaoua had been sent to Italy at the request of the Italian authorities, that was tantamount to the Italian authorities authorising him to be in Italy, and that such authorisation amounted to the issue of a residence document to him.

44. That may have been correct at some stage during his time in Italy, but not once he had been acquitted on the second set of charges. A "residence document" is defined in Art 2(j) as meaning

> "… any authorisation issued by the authorities of a Member State authorising a third-country national to stay in its territory, including the documents substantiating the authorisation to remain in the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply, with the exception of visas and residence authorisations issued during the period required to determine the responsible Member State as established in this Regulation or during an examination of an application for asylum or an application for a residence permit …"

Once Mr Ignaoua had been acquitted on the second set of charges, the circumstances which had required his presence in Italy no longer applied, and such authorisation to stay in Italy as the request for his extradition might have entailed had lapsed. Nor could his presence in Italy after his acquittal on the second set of charges while Italy was considering his claim for asylum there have amounted to his authorisation to stay there because his presence in Italy for that purpose was expressly excluded as amounting to such authorisation.

45. As with Art 16.1(c), the critical question is whether Mr Ignaoua should be regarded, by the time the new Home Secretary confirmed his exclusion from the UK, as having been issued with a residence document within the meaning of Art 2(j). We have some difficulty in regarding someone as having a residence document in a country they do not want to be in and in which they are being held in custody awaiting trial on charges on which they were extradited. But the fact is that there came a

time when he was released on bail and required to live at an address which had been given to the Italian authorities. We were not given the precise date for that, but it was some time in December 2010, and therefore while he was still waiting for his second trial to take place. That was some months before the new Home Secretary confirmed his exclusion from the UK. Whatever the position before then might have been, he must be regarded as having been authorised to be in Italy from then on until he was acquitted on the remaining charges he faced at the end of the second trial. It is on that ground that we think it strongly arguable that the Italian authorities must be treated as having issued Mr Ignaoua with a residence document within the meaning of Art 2(j). However, we do not have to reach a final view on whether Art 16.2 applies in the light of our conclusion that neither Art 16.1(c) nor Art 16.1(e) obliged the UK to take Mr Ignaoua back.

46. *Italy's acceptance of responsibility for considering Mr Ignaoua's claim for asylum*. There is another important point here. On 2 December 2010 Italy accepted responsibility for considering Mr Ignaoua's claim for asylum. That was long before the criminal proceedings against him in Italy had come to an end. The legal effect of that was provided for by Art 3.2 of the Dublin II Regulation, which provides, so far as is material:

> " … each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility."

So even if the UK would have been obliged to consider Mr Ignaoua's claim for asylum under Art 16 once the criminal proceedings in Italy had concluded, it was relieved of that responsibility once the Italian authorities had decided to consider his claim for themselves. In those circumstances, it had no obligation to take him back.

47. *The justiciability point*. Mr Rory Phillips QC for the Home Secretary took an even more fundamental point about the relevance of the Dublin II Regulation. He contended that it was no more than a

convenient mechanism by which member states could identify which member state was responsible for dealing with a particular claim for asylum. In other words, it was never intended to confer on individual asylum-seekers the right to insist on which member state should consider their claims. It could therefore not be used by Mr Ignaoua to challenge his exclusion from the UK on the basis that it gave him the right to have his claim for asylum considered in the UK. Mr Phillips referred to this as the justiciability point.

48. This is a topic which the courts have already considered a number of times. They have all spoken with one voice, and it is unnecessary for us to contribute any further learning to the debate. The authorities were comprehensively reviewed by Stadlen J in *R (on the application of Kheirollahi-Ahmadroghani) v Secretary of State for the Home Department* [2013] EWHC 1314 (Admin). Those authorities included cases in the Court of Appeal by which he was bound, as we are. Having read his judgment with care, we agree with his conclusion at [166], which was:

> " … as a matter of construction of the Dublin II Regulation and in the light of the *travaux preparatoires*, the Regulation does not confer on individuals a right to require Member States to allocate responsibility for examining their asylum application in accordance with the provisions of the Regulation and alleged breaches of those provisions are not actionable at the suit of an individual."

49. Ms Weston's response to this line of cases was to rely on a couple of paragraphs in the judgment of the European Court of Justice in *Abdullahi v Bundesasylamt* [2014] 1 WLR 1895. The Court said at [47] that the question it had to decide concerned the interpretation of one of the provisions in the Dublin II Regulation and the rights which applicants for asylum derive from that Regulation. It went on to say at [48]:

> "It should be recalled in that connection that … [EU] Regulations are of general application, they are binding in their entirety and they are directly applicable in all member states. Accordingly, owing to their very nature and their place in the system of sources of EU law, *Regulations operate to confer rights on individuals*

which the national courts have a duty to protect …" (Emphasis supplied)

However, it is necessary to understand the context in which the Court made that observation. The asylum-seeker in that case was challenging the decision of the Austrian authorities under Art 19.1 of the Dublin II Regulation to transfer her to Hungary which was where it was believed she had first entered the territory of a member state. In fact she had first gone to Greece, and since she wished to argue that the Greek authorities would not be observing her rights under the Refugee Convention, she contended that it was in Austria that her claim for asylum should be considered. Accordingly, she was appealing against the decision to transfer her to Hungary pursuant to Art 19.2 of the Dublin II Regulation, which provided that a decision under Art 19.1 "may be subject to an appeal or a review". So when the Court was talking about rights being conferred on individuals which national courts have a duty to protect, it was referring to the kind of rights - like the one in Art 19.2 - which expressly or by necessary implication confers rights on individuals. There is no such provision in Art 16. It follows that there is nothing in *Abdullahi* which permits Mr Ignaoua to rely on Art 16 of the Dublin II Regulation to challenge his exclusion from the UK.

50. *Unfairness*. Ms Weston argued that those acting in the name of the Home Secretary "deliberately wrong-footed the Italian authorities as to the appropriate country of asylum at a point when [Mr Ignaoua's] claim remained extant (and had not 'lapsed' by operation of law)". When that was coupled with the failure to take Mr Ignaoua back under Art 16 of the Dublin II Regulation, the conduct of the authorities in the UK was said to have amounted to a cynical manipulation of his rights. That had had lasting consequences of the kind from which the Home Secretary was not entitled to profit. It was said that this case was akin to the abuse of power cases like *R (on the application of Rashid) v Secretary of State for the Home Department* [2005] EWCA 744 (Civ) and *KA (Afghanistan) v Secretary of State for the Home Department* [2013] 1 WLR 615, and the Home Secretary should be required to put Mr Ignaoua into the position in which he would have been but for that unfairness.

51. We found it a little difficult to pin Ms Weston down on how she put that assertion, but going on the memorandum to the Home Secretary

recommending Mr Ignaoua's exclusion from the UK, we think that her argument was along these lines. Those advising the Home Secretary were aware that if Mr Ignaoua was acquitted, the Italian authorities might invoke the Dublin II Regulation and request the UK to take him back so that his claim for asylum could be considered here. It might not be possible to resist such a request, but by its letter of 30 November 2010 the UKBA managed to hoodwink the Italian authorities into thinking that Italy was the member state responsible for examining his claim for asylum, by advancing a spurious argument based on Art 16 which they knew could well be flawed.

52. There are, we think, a number of difficulties with this argument. First, the UKBA never asserted to the Italian authorities that Mr Ignaoua's claim for asylum had lapsed. They only said that no decision had been made on his claim. Secondly, they correctly explained to the Italian authorities why the provision in Art 16 pursuant to which the request had been made - Art 16.1(e) - was inappropriate, and they even pointed out what the relevant provision in Art 16 was. Most important of all, we have concluded that the contention that Mr Ignaoua was not in Italy without permission for the purpose of Art 16.1(c) was correct. The fact that those advising the Home Secretary thought that that argument might be unsustainable is beside the point now that we have considered that it *was* right. In any event, this case is a very far from involving the "serious errors of administration" and "flagrant and prolonged incompetence" which Pill LJ and Dyson LJ (as he then was) identified in *Rashid* at [34] and [53] respectively, or the "systematic breach" of duty which Maurice Kay LJ identified in *KA* at [17].

53. *Legitimate expectation*. In his witness statement, Mr Ignaoua said that he "had fully expected to be returned [to the UK] if [he] was acquitted". He did not say why, but presumably it was because he expected the UK to revive his claim for asylum, which he thought had been on hold while he had been in Italy. That expectation was thwarted, and although Ms Weston did not initially advance a case based on the doctrine of legitimate expectation at the hearing before us, it was referred to in her written submissions, and she told us that she was not abandoning it.

54. For our part, we do not think that any expectation which Mr Ignaoua may have had that he would be returned to the UK once he was

acquitted so that his claim for asylum could be considered was a legitimate one. His expectation has to be looked at from the standpoint of someone who was familiar with the law. In the light of our conclusions about the effect of Art 16 of the Dublin II Regulation, someone in Mr Ignaoua's position familiar with the law would have realised that the UK had no obligation to take Mr Ignaoua back in order to consider his claim for asylum, even if his claim had not been treated as having lapsed.

55. Ms Weston modified her position when responding orally to Mr Phillips' submissions. She said that the expectation which Mr Ignaoua had had was that he would be treated fairly and in accordance with the law. We do not doubt that such an expectation would have been legitimate, but we do not think that it gets Mr Ignaoua anywhere. If the case which he was advancing were to be rejected by us, and if he had therefore been treated fairly and in accordance with the law, his expectation would not have been thwarted. But if he had not been treated fairly or in accordance with the law, the case he was advancing would have been accepted without the need for him to rely on what his expectation had been. When we asked Ms Weston how reliance on the doctrine of legitimate expectation in those circumstances advanced Mr Ignaoua's case, she said that it did not.

56. *The connection between Mr Ignaoua's exclusion from the UK and his claim for asylum*. This ground of challenge could have raised the interesting question about the extent to which the interests of national security could be said to trump any obligation which the UK may have to consider someone's claim for asylum. That was not a topic on which we were addressed from the point of view of principle. Mr Phillips was content merely to argue that on the facts it was not clear how Mr Ignaoua's claim to be entitled to return to this country to pursue his claim for asylum here "concern[ed] his exclusion challenge at all". It was said that Mr Ignaoua had "not provided any evidence to suggest that his exclusion was motivated by a desire to frustrate any claim for asylum", and any contention to that effect was "not borne out by the clear and conscientious Ministerial submissions" on which the Home Secretary had based his decision. We agree with that. The redacted version of the assessments which the Home Secretary was provided with show that Mr Ignaoua's exclusion came about for reasons of national security. It was accepted that a direction excluding him from the UK

might not prevent him from returning to this country to pursue his claim for asylum, but to prevent him from pursuing that claim was not the reason for his exclusion.

57. For these reasons, the first ground of challenge fails.

Ground (2): Family life

58. In this ground of challenge, it is claimed that Mr Ignaoua's exclusion from the UK infringed his right to family life under Art 8 of the Convention. The focus is on his relationship with his son Mohammed. As we have said, Mr Ignaoua and his second wife divorced in 2006. She and their son Mohammed continued to live in this country. The evidence about Mr Ignaoua's relationship with Mohammed comes from Mr Ignaoua's witness statement. Mr Ignaoua was living with his wife in the UK when Mohammed was born in 2005. He moved out of the family home following their divorce, but he claims that he maintained regular contact with Mohammed, seeing him "perhaps" twice a week. Mohammed was still too young to spend much time away from his mother, but Mr Ignaoua claims that Mohammed loved spending time with him. When he arrived to pick Mohammed up, Mohammed would smile and call out. When he dropped Mohammed back home, Mohammed would cling to him and cry.

59. This account of Mr Ignaoua's relationship with Mohammed is not accepted by the Home Secretary. There is, we imagine, the suggestion of exaggeration here to bolster Mr Ignaoua's claim that his exclusion from the UK infringed his Art 8 rights. But the Home Secretary is not in a position to challenge what Mr Ignaoua asserted, and we have to proceed on the basis that what he has said is true.

60. Mr Ignaoua did not say whether he had been able to see Mohammed once he had been arrested on the first of the warrants on 7 June 2007. Even if he had been, he could not have had quality time with Mohammed then, and we assume that he has not seen Mohammed since he was extradited to Italy on 1 November 2008. Mr Ignaoua's exclusion from the UK has naturally prevented him from making any attempts to see Mohammed unless Mohammed was to visit him overseas. That, he claims, is not going to happen because Mohammed's mother refuses to have anything to do with him. He is worried about Mohammed, he says,

because Mohammed has developed a speech impediment since he last saw the boy. He expressed his concern about all that in his witness statement as follows:

> " … it is vitally important to me to try to rebuild a relationship with my son. I want him to know that my absence from his life is not because of anything I have done. It was not my decision, and I did nothing to deserve it. I did not leave him; I was taken from him. It is important that my son knows that, and while I am realistic about my chances of settling in the UK after all that has happened, I do believe I should be allowed to at least visit my son to re-establish contact and my relationship with him. I think that is the least both of us deserve."

61. This concern reflects the fact that Art 8 focuses not merely on Mr Ignaoua's right to have a relationship with his son, but Mohammed's right to have a relationship with his father, and that a hiatus in their relationship does not necessarily result in their family life ceasing to exist. But as Ms Weston accepted, even if the decision to exclude Mr Ignaoua from the UK is set aside, Mr Ignaoua would still have to apply for and obtain entry clearance if he is to re-establish contact with Mohammed. That may be difficult bearing in mind (a) the limited time Mr Ignaoua was in this country, (b) that the family life he claims with Mohammed was created at a time when his status in this country was precarious, as he must himself have realised, (c) that in view of his former wife's unwillingness to allow him to see Mohammed, he would have to persuade the Family Court to give him contact, and (d) the national security issues which his presence in the UK raises.

62. Ms Weston reminded us of the law in this area. It derives from Art 3.1 of the Convention on the Rights of the Child ("the UNCRC") which provides:

> "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."

Its effect was described by Lady Hale in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166 at [23] as follows:

> "This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law. Section 11 of the Children Act 2004 places a duty upon a wide range of public bodies to carry out their functions having regard to the need to safeguard and promote the welfare of children. The immigration authorities were at first excused from this duty, because the United Kingdom had entered a general reservation to the UNCRC concerning immigration matters. But that reservation was lifted in 2008 and, as a result, section 55 of the Borders, Citizenship and Immigration Act 2009 now provides that, in relation among other things to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions 'are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'."

At [24] Lady Hale accepted the concession made by counsel for the Home Secretary that

> " … this duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children will not be 'in accordance with the law' for the purpose of article 8.2."

63. The fact that "a primacy of importance" had to be accorded to the child's best interests led Lord Kerr to say at [46] that it was not

> " … a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic

terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."

64. When considering whether to exclude Mr Ignaoua from the UK, the Home Secretary did not take into account the effect which it would have on Mohammed or on Mr Ignaoua's relationship with Mohammed. That was because he was not briefed on Mr Ignaoua's domestic circumstances. The Home Secretary therefore knew nothing about Mohammed at all. The same thing happened when the new Home Secretary confirmed Mr Ignaoua's exclusion from the UK. We acknowledge, of course, that Mr Ignaoua could not have been expected to make any representations himself to the Home Secretary about his family since he was not aware of what the Home Secretary was considering doing.

65. We make two observations on all that. The first is that this is not a case in which someone with a lawful right either to enter or to remain in this country has had that right removed. As we have said, Mr Ignaoua had no right to enter the UK, let alone remain here. His position is no different from that of the Brazilian mother in ***Rodrigues da Silva and Hoogkamer v The Netherlands*** (Application No 50435/99) who claimed in the European Court of Human Rights that the refusal to grant her a residence permit in the Netherlands infringed her right to family life with her daughter who had been born in the Netherlands. At [38] the Court observed that

" … the present case concerns the refusal of the domestic authorities to allow the first applicant to reside in the Netherlands; although she has been living in that country since 1994, her stay there has at no time been lawful. Therefore, the impugned decision did not constitute interference with the applicants' exercise of the right to respect for their family life on account of the withdrawal of a residence status entitling the first applicant to remain in the Netherlands. Rather, the question to be examined in the present case is whether the Netherlands authorities were under a duty to allow the first applicant to reside in the Netherlands, thus enabling the applicants to maintain and develop family life in their territory. For this reason the Court

> agrees with the parties that this case is to be seen as one involving an allegation of failure on the part of the respondent State to comply with a positive obligation …"

It follows that Mr Ignaoua's exclusion from the UK should only be set aside under this ground of challenge if the Home Secretary was under a positive duty to allow him to return to the UK to enable him to exercise such rights as he had under Art 8. Bearing in mind the difficulties he may encounter in overcoming the national security considerations which would be raised against him when he applied for entry clearance, and then in persuading the Family Court to let him see his son after all this time when he has not seen the boy since he was 2, the basis for asserting that the Home Secretary was under a positive duty to allow him to return to this country is rather tenuous.

66. Secondly, Mr Ignaoua's lack of contact with Mohammed was not the consequence of his exclusion from the UK. It was the result of his extradition to Italy and the criminal proceedings there. It was only when they were over in March 2012 that he might have been able to return to the UK, provided that the claim for asylum which he had made in Italy did not prevent him from leaving Italy until it was determined or he chose to abandon it.

67. Having said all that, the fact remains that the Home Secretary did not consider Mr Ignaoua's domestic circumstances, and on the assumption (which admittedly Mr Phillips did not accept) that Art 8 had been engaged, we have considered whether, had the Home Secretary taken Mr Ignaoua's relationship with his son into account, he would still have decided to exclude Mr Ignaoua from the UK. That approach reflects the principle in judicial review which permits the court to uphold a decision which it would otherwise have had to quash for an error of some kind if it is satisfied that the decision-maker would have reached the same decision but for that error. In Mr Ignaoua's case the Home Secretary would have been required to balance two competing interests: the demands of national security against giving Mr Ignaoua the opportunity to re-establish his relationship with his son. So on the footing that excluding Mr Ignaoua from the UK would have interfered with such rights as Mr Ignaoua may have had under Art 8, the question would have been whether denying Mr Ignaoua the opportunity to re-

establish his relationship with his son would have been a proportionate response to what national security required.

68. That formulation of the issue which the Home Secretary would have had to address is based, of course, on the need for the Home Secretary's decision to have satisfied the requirement of proportionality – in other words, on the assumption that Art 8 had been engaged, was Mr Ignaoua's exclusion from the UK a justifiable interference under Art 8.2 with his right to family life? That involves striking a fair balance between his right to family life and the interests of the community. Ms Weston contended that Council Directive 2004/83/EC ("the Qualification Directive") also required the Commission to address the question of proportionality, though that is not something we need to consider in view of Ms Weston's concession that it added nothing to what Art 8.2 required in terms of proportionality.

69. In our view, the argument here is all one way. We have identified some of the hurdles in Mr Ignaoua's path in re-establishing a relationship with his son if the decision to exclude him from the UK were to be set aside. In addition, the national security case against him is a strong one. We cannot set out in this open judgment what it is, but it is not limited to the allegations made against him by the Italian authorities. We have concluded that had the Home Secretary been informed of what we know of Mr Ignaoua's domestic circumstances, and had he been properly advised of their relevance, he would still have decided to exclude Mr Ignaoua from the UK. The same applies to the new Home Secretary's decision to maintain that exclusion.

70. For these reasons, the second ground of challenge fails.

Ground (3): Lack of an effective remedy

71. This ground of challenge questions the procedure by which it is said that Mr Ignaoua was excluded from the UK and then denied an effective remedy for his exclusion. Ms Weston's written submissions did not spell out her complaints, but it transpired that they related only to the latter, and even then only to the level of open disclosure to Mr Ignaoua's legal team. In effect, two points were taken. First, the documents which were disclosed were not sufficient to enable Mr Ignaoua's legal team to respond to the national security case which Mr Ignaoua had to meet.

Naturally, there may well have been matters which could only have been disclosed to the special advocates, but the complaint nevertheless was that his legal team had no way of telling what had provoked the Security Service to recommend Mr Ignaoua's exclusion from the UK, or why that recommendation had been made when it had been. Secondly, it took far too long to get even the limited open disclosure which has been given. The documents which contained the Security Service's assessment of the risk Mr Ignaoua posed to national security and the recommendations made to the Home Secretary were not disclosed until the Home Secretary's evidence was filed, and even then they were heavily redacted.

72. Ms Weston expressly disavowed any suggestion which may have been made in her written submissions that EU law – in particular, Art 47 of the EU's Charter of Fundamental Rights – entitled Mr Ignaoua's legal team to an enhanced degree of disclosure. It is therefore unnecessary for us to increase the length of this judgment by summarising the parties' contentions on the topic. We understand the difficulties which Mr Ignaoua's legal team faced, but in cases involving national security the level of disclosure is bound to be guarded. That is the nature of the beast, and it is to ensure that the maximum degree of open disclosure is given consistent with the needs of national security that rule 38 hearings, ie hearings held under rule 38 of the Special Immigration Appeals Commission (Procedure) Rules 2003, take place. Having said that, it is not difficult in this case to infer that what caused the Security Service to consider recommending Mr Ignaoua's exclusion from the UK included the allegations against him in the arrest warrants on which his extradition to Italy was sought.

73. As it was, the Home Secretary's evidence was filed in September 2014, and Mr Ignaoua's legal team had plenty of time to take his instructions on it. It is true that it was filed some years after his claim for judicial review had been lodged, but disclosure was given only a few months after the Divisional Court stayed Mr Ignaoua's claim for judicial review. When properly analysed, the criticism about delay is not so much about delay in disclosure, but rather about the delay in Mr Ignaoua's challenge to his exclusion from the UK being adjudicated. However, that was in reality the consequence of the uncertainty of (a) the degree of disclosure required in a claim for judicial review of a decision to exclude a non-EEA national from the UK, and (b) whether Mr

Ignaoua's claim for judicial review would be stayed in favour of the application to SIAC.

74. We do not think that these factors denied Mr Ignaoua an effective remedy for his exclusion from the UK, and this ground of challenge fails.

Ground (4): Misapprehension of the facts

75. Mr Ignaoua's witness statement is dated 26 March 2015. In it he set out his response to what he believed was the basis of the national security case against him. He denied that he held extremist views or supported terrorism or had sought to radicalise others. He asserted that he was merely an observant and traditional Muslim. He claimed that he had been wrongly targeted by the Security Service, and that the flawed claim that he espoused violent jihad had been exposed by his acquittal in the Italian courts. In this ground of challenge, it is contended that for the Home Secretary to have thought otherwise, the Home Secretary must have come to a conclusion which he could not reasonably have reached.

76. Ms Weston did not develop this submission orally. If this was a conventional claim for judicial review, what Mr Ignaoua said in his witness statement could not have been taken into account, because what would have been relevant would have been the material before the decision-maker when the decisions under challenge had been made. However, we have considered with care what Mr Ignaoua had to say in his witness statement about the national security case against him for the reasons given by Sir Brian Leveson in the Divisional Court. Having said that, we repeat what we said at [67]. Although we cannot say why in this open judgment, the national security case against him was a strong one, and was not limited to the allegations made against him by the Italian authorities. On the material we have read, we do not think that the Home Secretary was under a misapprehension about the risk which Mr Ignaoua posed, and this ground of challenge must therefore fail.

Ground (5): Mr Ignaoua's exclusion was not justified

77. This ground of challenge has two features. We can dispose of the first relatively quickly. The contention is that the risk to national security which Mr Ignaoua was supposed to pose was not sufficiently great to justify his exclusion from the UK. Again, this is not something

which we can elaborate on in this open judgment. We think that it was open to the Home Secretary reasonably to conclude from the assessments he had that the threat to national security which Mr Ignaoua posed justified excluding him from the UK.

78. The second feature of the argument has two elements. The first is that following Mr Ignaoua's acquittal on 8 July 2010 at the end of his first trial, the Home Secretary should (a) have been informed of that and (b) should have been advised what impact his acquittal had on the risk to national security which he had been assessed as posing. That was because the decision to exclude him from the UK had not yet taken legal effect. In fact, there was no re-assessment of that risk in the light of his acquittal by the time the decision to exclude him from the UK was communicated to him by the letter of 29 July 2010. The second element of the argument was that although there had eventually been a re-assessment of the risk he posed in the light of his acquittal by the time the new Home Secretary decided to maintain her predecessor's decision, the material relied on as establishing that risk was limited to the allegations made against Mr Ignaoua by the Italian authorities on which he had been acquitted.

79. There is, we think, some force in the first element of this argument. To the extent that the allegations made against Mr Ignaoua by the Italian authorities had formed part of the national security case he had to meet, the fact of his acquittal would have affected the assessment of the risk he posed. Before the decision had legal effect, the Home Secretary should have been asked to look at the assessment again. But that failure to bring the Home Secretary up to date did not have any downside at all. The new Home Secretary *did* reconsider the assessment in the light of Mr Ignaoua's acquittal, and that reconsideration took place before Mr Ignaoua could have returned to the UK if the decision to exclude him had not been made. But the second element of the argument is without foundation. As we have said before, the case relating to the risk which Mr Ignaoua posed to national security was not limited to the allegations made against him by the Italian authorities on which he was acquitted. It follows that this ground of challenge fails as well.

Conclusion

80. For these reasons, this application to set aside the direction to exclude Mr Ignaoua from the UK and the decision to confirm his exclusion must be dismissed.