



Neutral Citation Number: [2023] EWHC 1156 (Admin)

Case No: CO/455/2022

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 19/05/2023

**Before :**

**MR JUSTICE LANE**

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**Between :**

**THE KING (on the application of M)**  
**- and -**  
**Secretary of State for the Home Department**

**Claimant**

**Defendant**

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**Mr H Southey KC, Mr Z Jafferji (instructed by Duncan Lewis Solicitors) for the Claimant**  
**Mr R Tam KC (instructed by the Government Legal Department) for the Defendant**

Hearing date: 27 April 2023  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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MR JUSTICE LANE

**Mr Justice Lane :**

**DECISION FOLLOWING DIRECTIONS HEARING**

1. The claimant challenges, by way of judicial review, the decision of the defendant on 27 November 2018 to cancel his indefinite leave to remain in the United Kingdom. The claimant also seeks to challenge what he categorises as a decision of the defendant on 11 November 2021 to refuse to reinstate the claimant’s indefinite leave to remain.
2. Permission for judicial review was granted by Mostyn J, on the papers, on 16 March 2022, when he also extended time to challenge the decision of 26 November 2018. Mostyn J specified that the case should be returned to him, if the parties were unable to agree directions for the progress of the judicial review. In the event, given that Mostyn J was unavailable, the matter came before Bourne J on 6 February 2023. Bourne J ordered that the matter should be listed for a directions hearing. In so doing, he referred to the need to decide whether the court should proceed with open issues; or whether it should give directions for both open and closed submissions.
3. In brief summary, the claimant is a citizen of Iraq. He was granted indefinite leave to remain under a legacy exercise on 23 March 2011.
4. On 26 November 2018, whilst the claimant was outside the United Kingdom, the defendant directed that the Claimant be excluded from the UK and cancelled his leave to remain. The exclusion direction was certified under section 2C of the Special Immigration Appeals Commission Act 1997.
5. The claimant subsequently attempted to return to the United Kingdom on a number of occasions. Eventually, he arrived clandestinely on 29 July 2020, claiming asylum in a false identity.
6. On 11 February 2021, the defendant made a decision to deport the claimant to Iraq. On 22 April 2021, the defendant made a decision that Article 33(2) of the Refugee Convention applied to the claimant because there were “reasonable grounds” for believing the claimant to be “a danger to the national security of the country”.
7. On 6 May 2021, the claimant lodged an appeal against the decision to exclude him from the Refugee Convention. The appeal was made to the Special Immigration Appeals Commission (“SIAC”).
8. On 28 October 2021, the Government Legal Department wrote to the solicitors acting for the claimant to say that, following a review of the claimant’s case, the defendant now intended to grant the claimant asylum and leave.
9. On 11 November 2021, the claimant’s solicitors were informed that the defendant would not withdraw her decision of 22 April 2021, on the basis that the decision was correct at the time it was issued.
10. On 17 November 2021, the defendant granted the claimant asylum and five years’ leave to remain in the United Kingdom.
11. On 19 January 2022, SIAC approved a consent order which had been agreed by the parties. Under that order, the claimant withdrew his asylum appeal on the basis, that,

amongst other things, it would not prejudice any right he might have to challenge the decision of the defendant to grant the claimant five years' leave to remain.

12. The parties have been unable at this stage to agree on a proposed set of directions regarding the progress of the case. At the hearing on 27 April 2023, I was much assisted by the written and oral submissions of Mr Tam KC and Mr Southey KC. I am grateful to them for these.
13. The nature of the present disagreement can be described broadly as follows. From what I have already said, it is apparent that this case involves matters of national security and that the defendant is, consequently, in possession (or otherwise aware of) material which she is likely to submit it would be contrary to the public interest to disclose to the claimant.
14. The defendant contends, however, that it is possible to identify preliminary issues which, if determined in the defendant's favour, would be dispositive of the judicial review. Mr Tam KC submits that, accordingly, the court can and should adjudicate upon those preliminary issues on an entirely OPEN basis. By proceeding in this way, the defendant submits that there is a realistic possibility that the proceedings can be concluded without the need to invoke the procedure sanctioned by the Justice and Security Act 2013. To invoke that procedure when, as the defendant contends, it would be possible to determine the judicial review purely on the basis of the OPEN materials would needlessly expend considerable time and, more particularly, a great deal of public money.
15. To that end, the defendant filed a set of draft directions. The draft attempts to identify the relevant preliminary issues as follows: -

“The issues of:

(a) Whether on 26 or 27 November 2018 the Defendant had material properly justifying her direction that the Claimant be excluded from the United Kingdom or her decision cancelling the Claimant's indefinite leave to remain;

(b) Whether on 11 November 2021 the Defendant had material that undermined the evidence or material that she had on 26 or 27 November 2018;

(c) Whether the Court should make a declaration under section 6 of the Justice and Security Act 2013 permitting a closed material application to be made to the Court;

are stayed pending the determination of the legal issues raised by the Claimant and the Defendant that can be heard and determined by the Court in OPEN proceedings without the resolution of the issues set out at I(a) and (b) above ("the OPEN-only issues")

2. The OPEN-only issues relating to the cancellation decision include (but are not necessarily limited to) the following, namely:

(a) In the light of the existence at that time of an extant exclusion direction, which had been given on the basis of the material then before the Defendant, and which was the basis for the cancellation decision, whether the cancellation decision itself can be impugned by a challenge to the adequacy of that material;

(b) Whether the cancellation decision can be impugned by a challenge to the adequacy of that material when the exclusion direction is not challenged and is not challengeable in the present proceedings;

(c) Whether any challenge to the adequacy of that material should have been brought by an application to the Special Immigration Appeals Commission for a review of the exclusion direction pursuant to section 2C of the SIAC Act 1997;

(d) Whether the challenge to the cancellation decision should be dismissed or whether any remedy should be withheld because of the Claimant's failure to avail himself of that alternative remedy, which has been provided by Parliament for challenging the adequacy of that material:

(e) Whether the challenge to the cancellation decision should be dismissed or whether any remedy should be withheld because of the Claimant's delay in bringing that challenge since the cancellation decision was made.

3. The OPEN-only issues relating to the reinstatement refusal include (but are not necessarily limited to) the following, namely:

(a) Whether the 11 November 2021 email from the Government Legal Department constituted, contained or communicated any judicially reviewable decision by the Defendant relating to indefinite leave to remain;

(b) Whether the challenge to the reinstatement refusal should be dismissed because the Claimant has not challenged any judicially reviewable decision;

(c) In any event, whether the Claimant was at that time lawfully treated by the Defendant for the purposes of granting leave to remain as a refugee as a person who did not then hold indefinite leave to remain because it had already been terminated:

(i) Either by the cancellation decision;

(ii) Alternatively, even if the cancellation decision is to be treated as having been ineffective (whether by quashing or any other reason), by the Defendant's revocation of that indefinite

leave to remain on 22 April 2021, which is not challenged and is not challengeable in the present proceedings;

(d) Whether the challenge to the reinstatement refusal should be dismissed because on 17 November 2021 the Claimant was granted leave to remain in accordance with the provisions of the Immigration Rules concerning the granting of leave to remain as a refugee to a person who does not then hold indefinite leave to remain.”

16. Mr Tam told me that the above provisions had been set out in non-exhaustive form because it had been anticipated that the claimant might identify additional issues to be determined in the way proposed by the defendant. In the event, that did not transpire.
17. For the claimant, Mr Southey submitted that the defendant’s proposals should not be adopted. There was no suggestion that the defendant would comply with her duty of candour, despite the grant of permission. The defendant should not be able to circumvent a CLOSED procedure because this would potentially result in unfairness to the claimant. Furthermore, it would be difficult in practice to determine what issues could be determined without such a procedure.
18. In oral submissions, Mr Southey expanded upon both of these objections. Relying upon R v Barnsley Metropolitan Borough Council, ex parte Hook [1976] WLR 1052, Mr Southey submitted that, when filing an application for judicial review, a claimant may not have the full details concerning the impugned decision. Once in possession of those details, provided by the defendant pursuant to her duty of candour, it is open to a claimant to seek to amend their grounds of claim. In the present case, material may come to light as a result of the CLOSED procedure under the 2013 Act (involving the use of a special advocate), which may result in the claimant concluding one or both of the impugned decisions to be unlawful for reasons currently unknown to him.
19. So far as the second point is concerned, Mr Southey submitted that it could not be categorically stated at this stage that the preliminary issues identified by the defendant would not involve CLOSED material.
20. I raised with counsel the possibility of fashioning directions, whereby the defendant would undertake a review of the material held by her, or of which she was aware, which was relevant to any of the proposed preliminary issues. In the event that any such identified material could not, in the view of the defendant, be disclosed without harm to the public interest, she would so inform the court. In that event, the court would be likely to proceed with a view to making a declaration under section 6 of the 2013 Act. Otherwise, a hearing of the preliminary issues would be arranged.
21. Neither Mr Tam nor Mr Southey was attracted by this course. Although without formal instructions, Mr Tam opined that it was highly likely that any such review would necessarily involve a significant proportion of the time and expense which the defendant was seeking to avoid. For his part, Mr Southey submitted that, whilst “better than nothing”, the claimant would be left without the potential protection that the procedure under the 2013 Act affords; in particular, by allowing the special advocate to identify new reasons for challenging the defendant’s decisions.

22. Mr Tam suggested that the matters contained in paragraph 2(d) and (e) of the defendant's draft directions might, on reflection, be omitted. This would ensure that the issues identified in paragraph 2(a) to (c) were pure matters of law, not raising any issue concerning CLOSED material. Mr Southey, however, submitted that the issues in paragraph 2(c) and (d) were, in fact, linked.
23. Mr Tam accepted that if the defendant were to succeed on the preliminary issues set out in paragraph 2 of the draft order, the claimant could still seek to advance his challenge to what is currently articulated as a decision of 11 November 2021 not to reinstate the claimant's indefinite leave to remain in the United Kingdom. That issue, was however, encompassed by the proposed preliminary issue in paragraph 3 of the draft directions whereby, in essence, the defendant contends that no judicially reviewable decision has been made in that regard. This too was "a pure" matter of law. By contrast, Mr Southey said that, however one articulated it, there had been a decision in 2021 not to grant the claimant indefinite leave to remain but only five years limited leave. If that decision was founded on a "historic injustice", it would be unlawful. It was quite possible that such an injustice was identifiable from the CLOSED material.

### **DISCUSSION**

24. It is entirely legitimate of the defendant to seek to avoid what may turn out to be unnecessary public expenditure occasioned by the CLOSED procedure contained in the 2013 Act. It is accordingly to her credit that the defendant has sought to identify a means of doing this, involving the identification of preliminary issues which have a realistic prospect of enabling the court to determine the judicial review, without reference to any material that may not be disclosable to the claimant on public interest grounds.
25. It is, however, the case that, in this area in particular, both this court and SIAC must take particular care to ensure that preliminary issues are correctly identified and articulated: see in this regard the judgment of Elizabeth Laing LJ in Secretary of State for the Home Department v Smith [2023] EWCA Civ 376. Otherwise, there is a risk that time spent on the preliminary issue becomes time wasted.
26. This is not to say that, in the present case, the defendant should not be permitted to advance submissions along the line of paragraphs 2 and 3 of the draft directions. Rather, the issue is about timing and, in particular, about what procedural steps ought to have been taken before the court is required to adjudicate upon the issues.
27. Having carefully considered the matter and not without a degree of hesitation, I have come to the conclusion that the issue of whether to make a declaration under section 6 of the 2013 Act cannot be postponed to await the outcome of a preliminary decision or decisions by the court.
28. In my view, fairness demands that the defendant should be specifically directed by the court to confirm that there is no potentially CLOSED material relevant to the eventual preliminary issues. Having acknowledged Mr Tam's view (based on his great experience) that any such review is itself likely to involve considerable time and expense, I would need to be satisfied that the proposed preliminary issues are entirely "legal" in nature such as to render it fanciful that any CLOSED material could conceivably have any material bearing on them.

29. I do not consider that I am in a position to make such a finding. This is because I accept Mr Southey's submission that even if paragraph 2(a) to (c) of the draft order are entirely of this nature, there is a possibility (which cannot be dismissed at this stage) that any 2021 decision not to grant or re-instate the claimant's indefinite leave to remain may need to be examined by reference to what is likely to be CLOSED material concerning the basis upon which the defendant decided to cancel the claimant's indefinite leave to remain. Mr Southey is wrong to categorise this as a "historic injustice": see Rahaman and another v Secretary of State for the Home Department [2022] EWCA Civ 310, citing Patel v Secretary of State for the Home Department (historic injustice) NIAA Part 5A [2020] UKUT 00351 (IAC). Any such injustice, were it to have arisen, would be "historical" in nature. Regardless of terminology, however, the basic point is that the proposed preliminary issue described in paragraph 3 of the draft directions cannot, at this stage, be said with the requisite confidence to be purely "legal" in nature.
30. Were the position to have been otherwise, I would not have regarded Mr Southey's submission, recorded at paragraph 18 above, as constituting a reason why the preliminary issue should not be adjudicated in the absence of a CLOSED procedure. If the result of the preliminary issue being decided in the defendant's favour would be that the judicial review had in law to be rejected, regardless of its grounds, it would be immaterial whether the claimant might have discerned additional grounds of challenge. But that is not the position here.
31. I accordingly propose to make a direction that the parties should seek to cooperate with a view to bringing forward timetabled proposals with respect to an application under section 6 of the 2013 Act.
32. Following receipt of this judgment in embargoed form, the parties shall put forward a draft order to reflect the above.