SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/163/2019, SC/172/2020, SC/174/2020, SC/175/2020, SC/182/2020
Hearing Date: 6th October 2021
Date of Judgment: 19th October 2021

Before:

THE HONOURABLE MR JUSTICE JAY

Between:

SHAMIMA BEGUM, C8, C10, C11 & D4

APPELLANTS

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

JUDGMENT

Mr Dan Squires QC and Ms Jessica Jones (instructed by Birnberg Peirce Solicitors) appeared on behalf of the Appellants

Sir James Eadie QC, Jon Glasson QC and David Blundell QC (instructed by the Government Legal Department) appeared on behalf of the Secretary of State in SB's appeal

Mr Rory Dunlop QC and Jennifer Thelen (instructed by the Government Legal Department) appeared on behalf of the Secretary of State in the appeals of C8, C10 and D4

David Blundell QC and Andrew Byass (instructed by the Government Legal Department) appeared on behalf of the Secretary of State in the appeals of C11

Mr Tom Forster QC and Mr Adam Straw QC (instructed by Special Advocates Support Office) appeared as Special Advocates but made no submissions

Introduction

1. Since my first judgment was handed down on 20th July 2021 after the hearing conducted remotely on 18th June, the following events have occurred: (1) the SSHD has filed judicial review proceedings seeking to challenge aspects of it, (2) I sent a note to the parties on 23rd August 2021 raising a number of issues, one entirely new, (3) the parties have replied in detail to that note, and (4) a hearing took place on 6th October during the course of which the parties' submissions were developed. A transcript of the hearing will no doubt be obtained. It appeared to me to be common ground that I am not *functus* despite my first judgment, and that if so advised I am free to change my mind.

2. In any event, in SB's case the position has moved on because she has applied to remove the stay on her grounds 8 and 9.

3. On 20th July I made a series of case management decisions on the Appellants' applications to pursue certain grounds and stay others, and on SB's application to re-amend her grounds following the ruling of the Supreme Court. I believe that the first judgment speaks for itself and requires no gloss or amplification, save in one respect. Para 37 of that judgment might have been expressed more clearly and precisely. What I was saying, rightly or wrongly, was that if the SSHD's *Simplex* defence (by which I meant that defence in its fully-fledged version[1]) were to succeed, these appeals would be dismissed. Put even more explicitly, I was holding that if the SSHD were to persuade SIAC that the outcome would necessarily or inevitably have been the same assuming no public law error, not merely the unstayed but also the stayed grounds would be finally determined against the Appellants. I accept that the SSHD did not read para 37 in that way, hence the judicial review proceedings, but that was my analysis at that time. Para 37, and perhaps other parts of the first judgment, did not reflect the parties' submissions to me because, if I may say so, each adopted rather adamantine positions on 18th June and my post-hearing deliberations brought me to an area of partly untilled middle ground.

4. Mr Dan Squires QC for the Appellants strongly submitted that para 37 is wrong. Sir James Eadie QC strongly submitted with equal and opposite force that it is right. But, as I have said, I will need to revisit it. If I conclude that it is wrong, or goes too far, I will not hesitate to say so.

5. The SSHD has complained that in making the case management decisions I did I applied the wrong test. The correct test is not whether a future course of action would be an abuse of process but whether permitting the Appellants to advance certain grounds and not others was in the overall interests of justice. I believe that I applied that test although I did not spell it out: this was, and is, obvious. Whether the Appellants would be acting abusively is, of course, a relevant factor (and it could be a determinative factor), but it is one amongst several. I also need to reiterate that in permitting some grounds to proceed I was not carving out preliminary issues but exercising a broader case management function in the interests of justice.

[1] All subsequent references to the *Simplex* defence are to what I am calling the fully-fledged iteration of it.

6. In the particular circumstances of this case, I consider that the factors relevant to the exercise of this case management function include, but are not necessarily limited to, the following (in no particular order): (1) fairness to the Appellants in permitting them access to the Commission in circumstances where they are being held in dire conditions on an indefinite basis, (2) an evaluation of the practical benefits that would accrue to the Appellants on the one hand and the SSHD on the other in the event that one or more of their public law grounds were to succeed, (3) fairness to the SSHD in permitting her to advance whatever defence to these appeals she sees fit, (4) an evaluation of the consequences to the parties if the SSHD's defence, in particular her *Simplex* defence, were successful, (5) the extent to which the Appellants' public law grounds will inevitably seep into the substance of the national security case, thereby increasing the risk of their having two metaphorical bites of the cherry, (6) the risk that the SSHD may have to carry out more than one exculpatory review, and (7) the chances of the Appellants successfully reopening any ruling adverse to them on the grounds that their lawyers were proceeding without instructions and not in their best interests, and/or (on the hypothesis that they were at some future date able to furnish full instructions to their lawyers on the merits of their cases) that the interests of justice should in any event permit them to advance a factual case that they were precluded from advancing in the current appeals.

7. It should be understood that some of these considerations are more conclusive than others. For example, a finding at this stage that the Appellants, if unsuccessful, would be highly likely to be able to set aside any adverse determination of this Commission on the grounds that their current solicitors have acted without instructions and/or not in their best interests would be a powerful, and probably determinative, reason for not permitting certain grounds to proceed at this stage. On the other hand, if the risk that the Appellants were able to reopen their appeals was no more than a possibility, that would be a consideration that weighed in the balance against them but could not be conclusive. Moreover, if para 37 of my first judgment were right, and a successful *Simplex* defence should mean that the appeals fail even on the currently stayed grounds, that would be a powerful reason for permitting the public law grounds to proceed.

8. Some of the factors I have itemised have already been fully addressed in the first judgment and do not require reconsideration. What does need reconsideration is made clear in this second judgment.

9. In the light of the parties' submissions, I have decided to address the issues that arise for my determination in the following order:

   (1) the extent to which the Appellants' public law grounds are interlaced with the merits of their challenge to national security and proportionality, and the consequences of that.

   (2) the ramifications of the SSHD's *Simplex* defence being run in these appeals.

   (3) whether Birnberg Peirce have their clients' instructions to prosecute these appeals as they have seen fit to do in their best interests, and the Appellants' prospects of successfully reopening or setting aside any adverse decision.

(4) SB's application to lift the stay on grounds 8 and 9, her renewed application to be permitted to reamend her Statement of Facts and Grounds to include grounds 1 and 2, and whether in the light of (1)-(3) above but also the factors listed at para 6 above the overall interests of justice favour permitting her to proceed.

(5) whether, in the light of (1)-(3) above and the factors listed at para 6 above, the overall interests of justice favour permitting the remaining Appellants to proceed with certain grounds and not others.

(6) C8's application for her appeal to be heard in July 2022 rather than November 2022.

10. The above sequence does not altogether reflect the order in which the parties chose to address me at the hearing, but the latter was no doubt dictated by my amended note dated 23rd August.

11. I have decided not to address point (4) in my note, namely the consequences of this being an appeal applying administrative law principles. There is common ground between the parties about this, save as to the extent to which in applying administrative law principles this Commission may take into account the evidence of an appellant that was not before the SSHD when the relevant decision was made. I will therefore need to cover this issue to the extent appropriate. It is also unnecessary to do other than touch on the SSHD's submission that the Commission should not at the substantive hearing take into account evidence that is not backed by a statement of truth. The Commission can make a case management decision at the appropriate time once it has seen the nature of the evidence sought to be adduced.

The Public Law Grounds

12. In my first judgment I stated that the boundary between some of the Appellants' public law grounds (these are not the same in all the cases) and the (stayed) merits grounds was imprecise. The problem was particularly acute in connection with the *Tameside* ground, and para 41.1 of the SSHD's Statement of Facts and Grounds in the judicial review proceedings has some force.

13. This problem will have disappeared in relation to SB, assuming that I grant her permission to lift the stay on her grounds 8 and 9. Furthermore, if the SSHD does pursue a *Simplex* defence, and it is her present intention to do so, this problem will become academic in the other cases too because the *Simplex* defence requires both a full exculpatory review and an examination of the merits of the national security and proportionality cases. Thus, although the public law grounds will still have to be considered independently, interlacing will no longer matter.

14. It follows, therefore, that the concern that the public law grounds will necessarily require an examination of the merits of the national security and proportionality cases only arises if the SSHD were to change her mind and refrain from running *Simplex* at this stage. It would also arise if the Commission were to rule, following further submissions, that the interests of justice require in the first instance an examination in all these appeals, including SB's, of the public law grounds, and a ruling limited to those grounds, leaving *Simplex* to be advanced only if the SSHD really needs it.

15. I held in my first judgment, and I repeat, that the consequence of the Appellants (other than SB) wishing to run certain grounds and not others is that the SSHD's national security and proportionality assessment cannot be challenged by them in OPEN, or by the Special Advocates in CLOSED. This means that the national security case as described and presented to the Secretary of State in the ministerial briefing must be taken as read and cannot be undermined. I have baulked at the terminology, "taking the national security at its highest", but on reflection this is probably a distinction without a difference. Thus, if the public law grounds were being considered in isolation, it would be unnecessary to examine any underlying material bearing on the strength of the national security case although the SSHD would be entitled to file an explanatory or clarificatory witness statement, if so advised. The foregoing is subject to the one caveat, flowing as it does from the decision of the Divisional Court in *R (oao SSHD) v SIAC* [2015] 1 WLR 4799, that the SSHD should disclose such material as was expressly considered by the author of the ministerial briefing to found or justify the facts and conclusions expressed therein. That was a case on ss. 2C and 2D reviews, but I see no reason why it should not also apply to s. 2A appeals.

16. It follows, and I so direct, that no exculpatory review is required in connection with these public law grounds taken by themselves, and that the SSHD's duty of candour does not require trawling through additional material beyond that expressly mentioned in para 15 above. To the extent that the SSHD is concerned about what her obligations in connection with an exculpatory review are or should be, I have hereby defined these in the exercise of my case-management powers.

17. For the purposes of the *Tameside* ground, it is necessary to be clear as to the arguments the open representatives can raise. In my judgment, there are only three, namely:

    (1) Did the SSHD take into account the age, gender and potential vulnerability of the Appellants and the circumstances in which they left the UK?

    (2) Did the SSHD consider any material relating to whether those who had been in Syria/Iraq and aligned with ISIL and had since returned to the UK continued to represent a threat to national security?

    (3) In relation to those Appellants with children, did the SSHD consider their best interests, and (to the extent to which he or she did) was consideration given to the possibility that at some point in the future they would or might wish to return to the UK?

18. I must not be understood as holding that the SSHD was under any obligation to consider these matters and/or investigate them. I remain agnostic about that. My concern is to ensure that the Appellants are not permitted to treat *Tameside* as the eye in the needle through which to examine the national security case more generally, or to raise further arguments at some later stage. In the exercise of my case management powers, I am tying the Appellants down to the *Tameside* points that may properly be run in the light of their pleadings and the submissions made at the various hearings. They cannot argue anything else, and if the Special Advocates wish to pursue any additional CLOSED grounds my permission would be required.

19. In my judgment, these are three narrow arguments which do not necessarily require any additional disclosure (beyond para 15 above) or any exculpatory review, unless that is the SSHD chooses to put in further evidence. I express myself in these terms because it ought to be apparent from the ministerial briefing and any further material that was expressly considered by its author what matters were considered. In the event that it is not apparent, the SSHD may decide to file a witness statement, or she may decide to give limited further disclosure. That would be a matter for her.

20. I have focused on *Tameside* because my first judgment deals with the remaining public law grounds and these do not require further analysis.

21. Accordingly, the Appellants' public law grounds as case managed by me do not travel into the merits and proportionality of the national security case in such a way as to be unworkable, unfair to the SSHD, or to require an exculpatory review. It follows that, in the event that the SSHD decides not to run *Simplex* at this stage, there can be no unfairness to her in allowing the Appellants to pursue these public law grounds. Indeed, were the SSHD to defeat the public law challenges, that would be the end of the unstayed grounds as far as the Appellants are concerned, excepting SB. If it should become feasible for the Appellants, other than SB, to run their irrationality and proportionality grounds at some future date, assuming that they need to, and the Commission were to decide that the stay should be lifted, there would have to be an exculpatory review at that point but there will not already have been one. Furthermore, there will not have been two bites of the cherry on effectively the same issues.

Simplex

22. This section of my judgment assumes that the SSHD adheres to her current litigation strategy, which is to run the *Simplex* defence at this stage. I have already explained that the need for an exculpatory review in the context of that defence, with its attendant burdens and costs, will have ensued from the SSHD's forensic decision to take that course.

23. Mr Squires submitted that a successful *Simplex* defence would only defeat the unstayed grounds, and would have no impact on the stayed grounds. Sir James's contrary submission, which reflected the *sub silentio* reasoning of para 37 of my first judgment, was that a successful *Simplex* defence would also operate to defeat the stayed grounds, not least because the Appellants have taken the forensic decision to proceed without advancing any evidence in opposition to the national security case. I have already held that the SSHD is fully entitled to run a *Simplex* defence, and the submission is that the Appellants must be taken to accept all that flows from this.

24. In my view, the issue is somewhat more complex than I had previously thought.

25. It is true that in deciding that, absent public law error, the outcome would inevitably have been the same, the Commission would have decided that the Appellants had no answer to the national security and proportionality case in CLOSED. That case would have presupposed a full exculpatory review, and it would also have been subjected to extremely thorough and rigorous assault by the Special Advocates, who have a general remit to act in the best interests of the Appellants even without specific

instructions from them. Thus, the Commission will have undertaken an extremely detailed examination of these cases, including the issues identified under para 17 above.

26. The only missing piece of the evidential jigsaw will have been the evidence of the individual Appellants backed by a signed statement of truth. As I have said, whether any of the Appellants might already have adduced evidence in their appeals by some other means as to the national security threat they constituted at the time these decisions were made can neither be predicted nor properly be determined at this stage.

27. So, the Commission will have decided the *Simplex* case against the Appellants without having received or heard evidence from them backed by a signed statement of truth and/or under oath or affirmation. Is the consequence that the Commission, having accepted the *Simplex* defence, must hold that the currently stayed grounds must also fail?

28. I no longer consider that it must be the logical consequence of the Appellants' forensic choice to proceed without adducing evidence that, in the event that *Simplex* succeeds, the stayed grounds should necessarily fail. Although the SSHD is fully entitled to run *Simplex*, that is her forensic choice and not the Appellants'. However foreseeable *Simplex* might be does not alter the position. Para 37 of my first judgment assumed that, no matter what the Appellants had to say, it was logically incapable of having any possible impact.

29. In my judgment, the answer to the question I have posed at the end of para 27 above turns not on any forensic choices made by the Appellants but on a proper analysis of two related issues. The first is whether the SSHD was required to seek representations from the individual before depriving her of citizenship (a submission advanced by SB alone); the second is whether evidence from an Appellant adduced for the purposes of her appeal and not available before is logically capable of bearing on the SSHD's decision to deprive, given that the Commission is effectively applying administrative law principles to this appeal rather than a full merits assessment. The application of a traditional approach to administrative law principles might suggest that the focus should be on the material that was, or ought to have been, before the decision-maker and nothing else.

30. There is authority bearing on the first of these related issues, and on my understanding it does not avail SB. It is unnecessary to say more about it at this stage. As for the second related issue, the Supreme Court in *Begum* clearly thought that SB could contribute to the appellate process, although I understand from Sir James that the nature of that contribution was not debated in oral argument. On the other hand, I do not read the Supreme Court as holding that because SB cannot participate in the light of her current circumstances, the only just course would be to stay the entire appeal. The Supreme Court was not addressing the submissions that are now being advanced. In judicial review proceedings generally, a claimant almost always files a witness statement to set out her case, and SB would no doubt wish to explain to the Commission the circumstances in which she left the UK and her experiences in Syria. The extent to which such a statement could be taken into account would naturally depend on what it says, and further legal argument.

31. It would not be right for the Commission to prejudge issues which would be developed more fully in these substantive appeals. It follows that I should express myself in less than definitive terms. The contention that the SSHD should have sought representations from an individual whom s/he was minded to deprive may be difficult to square with principle and authority. Although the general rule is that the gist of an adverse case must be put (see *In Re HK* [1967] 2 QB 617), this cannot apply if the interests of national security militate to the contrary. The ordinary rule in proceedings governed by administrative law principles is that the focus is limited to the material that either was or ought to have been before the decision-maker. However, these cannot be said *at this stage* to represent insuperable barriers to an Appellant's evidence being admitted; rather, the correct analysis is that there are high hurdles in place. It follows, in my judgment, that it would not be right to rule at this juncture that a successful *Simplex* defence must, without more, defeat the currently stayed grounds.

32. Even so, it would be open to the SSHD at the appropriate time, having succeeded on *Simplex*, to submit to the Commission that the currently stayed grounds should also fail. This issue of principle could then be resolved on fuller submission and citation of authority. In any event, if the Commission should in due course be faced by an application to lift the stay on the national security and proportionality grounds, there would be a very high hurdle for any Appellant to surmount. Aside from the difficulties I have already outlined, the Appellant would have to put forward a compelling account which would be capable of persuading the Commission that its already thorough examination of the merits of national security and proportionality required reconsideration.

33. It follows, in my judgment, that although para 37 of my first judgment goes one step too far, an Appellant's prospects of lifting the stays in the light of further evidence from them are slim.

34. In any case, what would be required from the SSHD in the unlikely event that the Commission did lift these stays, or in SB's case did decide to reopen her appeal for some other reason? Mr Squires submitted that there would be "minor inconvenience". Sir James submitted that this significantly underplayed the problems. In his powerful oral argument on this topic, he submitted that the problems are not restricted to having to carry out a further exculpatory review. If the door were left ajar, and factual instructions given, there could be a "whole bunch of stuff" not previously considered, and a significant risk of the case being presented on a wholly new basis. Furthermore, the Commission would have to revisit both *Simplex* and the public law grounds.

35. Sir James made it clear in answer to my question that these concerns arose only if his primary case that the Appellants could not lift these stays were wrong. In observing that the Appellants are confronted by a high hurdle, I am not accepting the apogee of Sir James' primary case (i.e. I have held that para 37 of my first judgment goes too far), but I am travelling a long way towards it. Accordingly, para 34 above summarises his alternative submission inasmuch as it predicates that my high hurdle will have been transcended.

36. With respect, I think that both "minimal inconvenience" and Sir James' alternative submission go too far. It is true that no one can predict with certainty what an

Appellant might say in evidence given the proper opportunity to do so, but the essence of their cases can be anticipated with a reasonable degree of confidence in the light of what is in the public domain. There is a limit to what the Appellants could reasonably contend, and although there is no crystal ball the Commission is entitled to use its experience and common sense. It should be emphasised that the limited CLOSED material I have seen in one of these cases gives me no additional insights. I have identified three key areas that should be explored (see para 17 above), and the SSHD's *Simplex* defence will have necessitated a full exculpatory review which would cover everything within the knowledge of the relevant agencies. It is unlikely that evidence from the Appellants would raise matters which had not already been considered in some way; it is far more likely that their evidence would provide additional information bearing on the self-same matters. Accordingly, the exculpatory review carried out for the purposes of the SSHD's *Simplex* defence would not have to be redone. The Commission's case-management powers would ensure that any subsequent exculpatory review, if in fact required, would be conducted within narrow, defined parameters. The subsequent appeal hearings would be much shorter than those presently listed. In short, leaving the door ajar does not mean that it would be burst open.

The Appellants' Instructions

37. Mr Squires took me to the available evidence. It is unnecessary for me to refer to it.

38. I am satisfied that:

    (1) SB has instructed her lawyers to pursue as many grounds as she can, including in particular grounds 8 and 9, in her best interests. I have been informed that SB is aware of Birnberg Peirce's current litigation strategy. I infer that she has expressly instructed them to proceed as they are proposing to do and that Birnberg Peirce have decided that they are acting in her best interests.

    (2) The remaining Appellants have instructed their lawyers to pursue their appeals in their best interests notwithstanding that they cannot give detailed, confidential instructions to them as to the facts. I infer that they are unaware of the strategic decisions that have been taken on their behalf but that Birnberg Peirce have decided that they are acting in their best interests.

39. SB is in a different position from the remaining Appellants. Given that SB is inviting the Commission to lift the stay on grounds 8 and 9, and assuming that her application is successful, her appeal would be determined on all issues. If unsuccessful on her appeal, her sole remaining option at some future date would be to apply to set aside the Commission's adverse decision on the basis that she now has a factual case that she can properly put forward and in her particular circumstances should be permitted to do. Plainly, she would need to find some route to persuade the Commission that the instructions she had given to her lawyers were not an insurmountable obstacle.

40. For the remaining Appellants, the position would be different inasmuch as it would in theory at least be open to them to apply to lift the stays to run a challenge to the national security and proportionality cases on their detailed evidence. That issue would not be *res judicata*. My ruling on the effect of *Simplex* means that there is no

absolute bar to them making such an application, but I have also held that the chances of such an application succeeding are slim. Assuming that such an application fails, these Appellants' next option would be to apply to set aside the Commission's adverse ruling on *Simplex*; and, possibly, its ruling on the public law grounds. At that point, the remaining Appellants would need to find some route to persuade the Commission that the instructions they gave their lawyers did not preclude such an application.

41. In practical terms, therefore, there may be little or no difference between SB and the remaining Appellants within the circumference of this particular issue.

42. It is also entirely obvious that, in the event that all or any of these appeals were to fail, the Appellants through different solicitors would apply to the Commission to set aside the adverse decisions on the basis that Birnberg Peirce did not in fact act in their best interests, and/or the appeals have proceeded without their being heard on the facts, and/or (in SB's case) she did not appreciate that her appeal would be determined either without her being heard at all or on the basis of evidence (including media interviews) to which the Commission had decided to attach little or no weight. Of course, turning this last matter fully onto its head, if the Commission did attach full weight to SB's evidence given informally in this way, it would be harder for her set-aside application to succeed.

43. What are the chances of such an application succeeding? The higher the chances, the slower I should be to permit these appeals to proceed (for the remaining Appellants) on various public law grounds, and (in SB's case) at all.

44. In my August note I suggested that the Commission would have to be satisfied that there was no possibility of such an application succeeding. That was putting the matter too high, not least because the Commission is not equipped to make that judgment. The Commission does not have the full facts, it cannot prejudge the issue, and this is a highly unusual case where the authorities do not provide a definitive answer. Birnberg Peirce have their clients' actual authority to proceed generally in their best interests and in all bar SB's case are doing so without their clients' express instructions to prosecute their appeals in this specific manner. Birnberg Peirce will have made that judgment before the hearing in May 2021 without knowing the Commission's assessment of the various contingencies, in particular those I have addressed in this second judgment. Some of their assessment may have been coloured by the desperate position of their clients and complete uncertainty as to when, if at all, it might improve. Of course, it does need to be emphasised that Birnberg Peirce are extremely experienced, competent and diligent solicitors, and the same applies to the counsel they have instructed. A judgment made by them that they have acted in a client's best interests demands great respect.

45. However, it will now be clear to Birnberg Peirce on reading this second judgment that the SSHD is likely to run a *Simplex* defence which, if successful, would make it difficult to lift the stay on the national security and proportionality grounds (para 33 above), and that their clients' evidence would be unlikely to make any difference to the outcome (para 30 above and para 49 below). In my view, it cannot be assumed

that in assessing where the best interests of their clients lay Birnberg Peirce took these matters into account. In fact, the inference is to the contrary.

46. Although in these unusual circumstances the Commission would, I think, be entitled to express the view that a particular course of action was not in an Appellant's best interests if that indeed were its clear and firm opinion, it is not for the Commission otherwise to say what is or might be in her best interests, or to do other than come to a broad-brush assessment as to how a different judge at some point in the future might decide any set-aside application.

47. Given that this judgment will have an inevitable impact on Birnberg Peirce's best interests assessment, I have considered whether I should ask them formally to confirm that, having read this second judgment, they remain of the view that pursuing these appeals in this way remains in the best interests of their clients. On reflection, that is unnecessary. Unless Birnberg Peirce change course, it will be irresistibly to be inferred that they remain of that view.

48. On the assumption that these appeals do proceed on the same tracks, I have to make a predictive assessment of the likelihood of the Commission setting aside a judgment adverse to an Appellant on the grounds I am currently examining.

49. As a starting point, an Appellant would have to satisfy the Commission that her evidence warranted further consideration in the sense that it was capable of altering the factual evaluation of national security and proportionality that had already occurred under the rubric of *Simplex*. Furthermore, the general tenor of the authorities is that clients are bound by decisions taken by their solicitors within the scope of their authority. In my view, it would be difficult to argue that Birnberg Peirce did not in fact act in the Appellants' best interests or, in SB's case, that her failure to appreciate how her appeal would be determined might avail her. Conducting the exercise in this broad-brush, impressionistic manner with one eye on the authorities drawn to my attention, as well as on the tools Mr Squires submitted that the Commission would have at its disposal, I would evaluate any Appellant's prospects of overturning an adverse decision of the Commission in these circumstances as being, at best, low.

50. Additionally, were that risk to eventuate, the SSHD would not be starting from scratch. For the reasons I have already provided, the exculpatory review would not have to be begun afresh. On the assumption that the *Simplex* defence is run, the exculpatory review in these proceedings would have to cover the Appellants' "best" case, including, where applicable, the issues I have expressly identified at para 17 above. I accept that were that risk to mature there would have to be a second appeal hearing, and issues might arise as to the status of the Commission's findings at the first appeal. Even so, I cannot accept that such an appeal would be anything like as lengthy and complex as the first. It follows that the eventuation of this low risk would have an important consequence, but it would not be as serious as the SSHD has described. I take that into account in my overall assessment of the balance of the public interest.

SB

51. As I have already indicated, in SB's case there are three questions. First, should she be permitted to lift the stay on grounds 8 and 9? Secondly, should she be permitted to reamend her grounds to include what would now be ground 1 (the *Tameside* argument that the SSHD failed to consider the possibility that she had been trafficked) and ground 2 (positive obligation on the SSHD under the ECHR and international law to investigate the trafficking issue and take appropriate protective steps). Thirdly, do the overall interests of justice militate in favour of permitting her to proceed in the light, in particular, of my rulings on issues (1)-(3). In that context, I should also be taking into account all the factors I have outlined (see para 6 above), although these have been largely subsumed within the specific issues I have identified.

52. There is a considerable measure of overlap between the first and third questions I have enumerated; there is no need to consider them separately.

53. The only real objection to SB being permitted to lift the stay, and allowing her to run her appeal on a number of grounds including grounds 8 and 9, is the risk that any adverse finding of the Commission could be reopened at some point in the future on the basis that SB will say that she did not apprehend how these proceedings would be determined. I have assessed that risk to be low. I am not saying that it is so low that it can be ignored; and, in particular, I cannot prejudge what attitude this Commission (differently constituted as it would have to be) might have to any apparently compelling evidence that might come from SB in that context.

54. If anything, SB is in a stronger position than are the other Appellants on the overall interests of justice issue because she is no longer inviting me to partition her case. The entirety of her case will be considered, and the only missing ingredient is likely to be a witness statement from her backed by a signed statement of truth. The Commission's determination on her appeal will be *res judicata* on all issues, subject to any further appeal in the usual way, and her further options would be severely circumscribed in the manner I have already explained.

55. In all the circumstances, I have concluded that the overall interests of justice militate in favour of permitting her to proceed. A decision that her appeal should be stayed indefinitely would leave her without a legal remedy for the foreseeable future. In coming to this conclusion I have taken into account the various risks and contingencies previously identified and described.

56. This leaves the renewed application for permission to reamend to plead grounds 1 and 2. At the time I was preparing my first judgment, SB's intention was to stay grounds 8 and 9. My conclusion that it would not be proportionate for her to advance these grounds was, in part, based on that state of affairs. I also considered that the substance of grounds 1 and 2 would be embraced by SB's merits arguments that might be run in due course under the umbrella of grounds 8 and 9.

57. The lifting of the stay on grounds 8 and 9 has altered the dynamic of the case in relation to this issue. Further, Mr Squires introduced a further consideration which I believe I overlooked in July. If the trafficking issue were run only under the rubric of grounds 8 and 9, SB would have to show that the SSHD's decision on all matters relevant to national security and proportionality was irrational. If, on the other hand,

SB succeeded on grounds 1 and/or 2, the SSHD would then have to show under *Simplex* that the outcome would inevitably have been the same had the trafficking issue been taken into account. It is obvious that SB would be in a much better position were she able to run grounds 1 and 2.

58. Moreover, the factual substratum for much of grounds 1 and 2 was pleaded in para 12e of the original grounds of appeal, although the term "trafficking" was not used.

59. I am not ignoring the SSHD's submission that the proposed pleading does no more than refer to the possibility of trafficking, but that is a submission that can be deployed when the substance is considered.

60. The reamended pleading also set out a factual narrative that was not put forward previously. I did not understand Sir James to take issue with this. That narrative is relevant both to SB's case on the merits and to grounds 1 and 2. That narrative will presumably be supported by evidence, and the SSHD will have sufficient time and opportunity to address it. In my view, it would be artificial for me to hold that SB can run the factual case she wants but not all facets of her legal case on the same facts.

61. Moreover, ground 1 is little different from the first of the general *Tameside* points I have set out under para 17 above.

62. Overall, I have concluded that SB should have permission to reamend to plead what will become grounds 1 and 2.

The Remaining Appellants

63. Here, I can draw together the various strands.

64. I consider that it is reasonable to assume for present purposes that the SSHD will be running her *Simplex* defence. For completeness, however, in the event that the SSHD decides not to run the *Simplex* defence, their appeals would proceed on the public law grounds on the narrow basis I have described. Frankly, I see no reason why these appeals should not then be heard, subject to the Commission's diary, within the next three months. If the appeals fail, the remaining grounds will remain stayed; if the appeals succeed, the SSHD would have to reconsider the deprivation decision. The prospects of these Appellants successfully applying to set aside an adverse decision of the Commission confined to the public law grounds are close to nugatory because, absent *Simplex*, these public law grounds do not require client instructions and the national security and proportionality grounds could still be pursued at a later date (my assessment that the prospects of a successful set aside application were low rather than nugatory was on the premise that the SSHD was running *Simplex*). Overall, and on that assumption, it would be in the interests of justice for these appeals to proceed.

65. In the event that the SSHD does run her *Simplex* defence, what should be factored into the balance is the various imponderables I have already considered: in particular, an Appellant's prospects of successfully lifting the stay at some point in the future, the practical and legal consequences were she to be successful, and an Appellant's prospects of successfully applying to set aside an adverse judgment of the Commission on the ground that Birnberg Peirce did not act in her best interests.

66. I have evaluated these prospects, or risks, and have also considered what would or might happen were an Appellant to be successful. It is unnecessary to repeat what I have held.

67. Viewing the matter compendiously, a successful *Simplex* defence would probably bring an end to these appeals one way or another, and the Appellants would probably be unable to reopen them at some indeterminate future date. The degree of probability has been expressed in slightly different ways across this judgment dependent on the nature of the prospect, or risk, under direct consideration.

68. In these circumstances, in the light of my para 6 factors and the matters I have already addressed in my first judgment, the overall balance of justice comes down in favour of permitting the remaining Appellants to proceed on their public law grounds in the knowledge that the *Simplex* defence will be maintained.

C8 and Other Case Management Issues

69. My ruling that the appeals of C10 and D4 should be heard in July 2022, leaving C8's appeal to be heard with SB's in November 2022, was dictated principally by practical considerations. Ideally, of course, C8's case should be heard alongside D4's. However, these appeals are placing substantial burdens on both the SSHD and the Commission, and my view in July this year was that there would not be time to hear three appeals in July 2022.

70. The position now is that SB's appeal may take longer than previously predicted because she may now be calling evidence to vouch the factual narrative that has been pleaded. Furthermore, I am slightly concerned that listing C8's appeal with SB's in these circumstances might lead to insufficient attention being given to her case.

71. Mr Rory Dunlop QC submitted that a final decision about C8 should be made in December this year. If at that stage it should be reasonably clear that hearing C8's appeal in July 2022 would not make much difference to the scope of the exculpatory review (which I would hope would be already considerably advanced by then) and the issues arising in these individual appeals, and that the 10-day time estimate would be sufficient to accommodate three appeals rather than two, I would accede to C8's application for her case to be brought forward. It may well be that it will have become apparent by December that the factual differences between the cases of C10, D4 and C8 in terms of the national security threat are not significant.

72. SB also seeks to bring her appeal hearing forward from November 2022. If anything, lifting the stay has made her appeal more complex rather than less, and I refuse that application.

73. I now invite the parties to finalise the case management directions in all these appeals (other than C11, in whose appeal case management directions have already been made), and I will approve their draft, or resolve any remaining differences, over the next two weeks.

74. I would also invite the parties to file brief written submissions addressed to the suggestion I made during the hearing that the public law grounds could be decided by the Commission in advance of any *Simplex* defence. They should do so within the

next two weeks, having first ascertained from the other party whether the matter is capable of being agreed. If the parties were to be *ad idem* that my suggestion is unmeritorious, that would be the end of it.