Neutral Citation Number: [2015] EWHC 681 (Admin)

Case No: CO/4806/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2015

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LADY JUSTICE MACUR DBE
and
MR JUSTICE OUSELEY

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Claimant**
- and -	
THE SPECIAL IMMIGRATION APPEALS COMMISSION	**Defendant**
- and -	
AHK, AS, FM, AM, SN/MA, and HABIB IGNAOUA	**Interested Parties**

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Steven Kovats Q.C. and **Julian Blake** (instructed by the Treasury Solicitor) for the Claimant
The Defendant did not appear and was not represented
Stephanie Harrison Q.C., **Amanda Weston** and **Edward Grieves**
variously for the 1st, 2nd, 4th and 6th Interested Parties (instructed by Birnberg Pierce & Partners, Wilsons Solicitors, Bates Wells Braithwaite and Fountain Solicitors)
Ramby de Mello (instructed by Broudie, Jackson & Cantor) for the 3rd Interested Party
Judith Farbey Q.C. and **Martin Goudie**
(instructed by the Special Advocates Support Office) as Special Advocates

Hearing date : 10th-11th February 2015

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Approved Judgment

Sir Brian Leveson P:

1. This application by the Secretary of State for the Home Department (SSHD) for judicial review of two preliminary decisions of the Special Immigration Appeals Commission (SIAC) is the most recent development in long running litigation brought by Habib Ignaoua in respect of a direction of the Secretary of State for the Home Department that he be excluded from the United Kingdom (first promulgated on 26 October 2009) and by the remaining interested third parties whose applications for naturalisation have been refused (the relevant decisions having been made between 2006 and 2014). These proceedings, brought with the leave of Ouseley J, concern the extent to which the SSHD must provide disclosure of CLOSED material to special advocates appointed to represent the interests of the interested parties.

2. The underlying proceedings which constitute the present litigation consist of statutory judicial review proceedings under ss.2C and 2D of the Special Immigration Appeals Commission Act 1997 in *Habib Ignaoua v Secretary of State for the Home Department* SN/6/2013 ('*Ignaoua*') and *AHK and ors v Secretary of State for the Home Department* SN/2-5/2014 ('*AHK*') respectively. These provisions grant SIAC jurisdiction to review a direction to exclude a non-EEA national, or a decision to refuse naturalisation, where SSHD certifies that the direction or decision was based on information which in her opinion should not be made public. They were inserted by s.15 of the Justice and Security Act 2013 in order to address the deficiency described by Richards LJ in *R (Ignaoua) v Secretary of State for the Home Department* [2013] EWCA Civ 1498, [2014] 1 WLR 651 [at 24] as:

> "...the impossibility or the improbability of a claimant succeeding in a judicial review of this kind in the absence of a closed material procedure."

3. In the circumstances, on application by SSHD under s.6(2) of the 2013 Act, Ouseley J granted a declaration that a closed material application may be made in these proceedings. As a result, submissions and argument have been received from the SSHD and the interested parties in OPEN and from the SSHD and special advocates in CLOSED. The latter have obviously informed our decision in the former and both OPEN and CLOSED judgments have been prepared.

Background

4. These cases have a significant history going back at least eight years; for the purposes of this application, however, the facts do not require detailed analysis. In summary, SSHD refused the applications of AHK, AS, FM, AM and MA for naturalisation as British citizens under s.6 of the British Nationality Act 1981, and directed that Mr Ignaoua be excluded from the United Kingdom. The common theme is that SSHD has concluded that it is not possible to give detailed reasons for her decisions or direction.

5. In some cases, information has been given that there is an association between the applicant and individuals who are connected with extremist action; in others, if reasons are given, there has been a general allegation of connection with groups considered as hostile to the United Kingdom. In all cases it is indicated that it is not in the public interest to provide further disclosure. In due course, the Interested Parties applied to SIAC for review of the SSHD's decisions and the argument has been

focused on the extent of the obligation of the SSHD to disclose material beyond that which formed what has been described as the summary (in *AHK* at [35]) and the assessment (*Ignaoua* [21]) or, more accurately, the report or submission which was provided to the relevant decision maker (the SSHD or an official on her behalf) for a decision.

The legal framework

6. The nature of the SIAC review is set out by statute and procedural rules. First and foremost, the legislation was specifically designed to resolve the problem identified in *AHK et al v Secretary of State for the Home Department* [2014] EWCA Civ 151, [2015] 1 WLR 125 and provide for a closed material procedure which did not carry a right of appeal. In that regard, s. 2C(3) and s. 2D(3) of the 1997 Act are identically worded:

> "In determining whether the decision should be set aside, the Commission must apply the principles which would be applied in judicial review proceedings."

7. The way in which that review is to be conducted is also identified. Rule 9(1A)(a) of the Special Immigration Appeals Commission (Procedure) Rules 2003 (the 2003 Rules) provides that the notice of application for review must specify:

> "...by reference to the principles which would be applied in an application for judicial review, the grounds for applying for a review."

8. Rule 4 of the 2003 Rules sets out SIAC's duties in respect of disclosure and bears quotation in full:

> (1) When exercising its functions, the Commission shall secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.
>
> (2) Where these Rules require information not to be disclosed contrary to the public interest, that requirement is to be interpreted in accordance with paragraph (1).
>
> (3) Subject to paragraphs (1) and (2), the Commission must satisfy itself that the material available to it enables it properly to determine proceedings.

9. Rules 10 and 10A of the 2003 Rules, which impose on SSHD a duty to search for exculpatory material in appeals, do not apply to reviews: rules 10(A1) and 10A(A1). Rule 10B(1) provides that on review SSHD must file a statement of the evidence on which she relies in opposing the application; and material relevant to the issues. Rule 37(5) enables SSHD, with leave of SIAC or agreement of the special advocate, to

amend or supplement her closed evidence. Rule 39(5)(c)(i) enables SIAC to direct any disclosure that appears to be necessary to determine proceedings.

10. These provisions have been considered in an earlier round of the *Ignaoua* litigation by Ouseley J (with whom Irwin J agreed) when it was observed that "all relevant material would be disclosed to the Special Advocate and to the Commission": see [2014] EWHC 1382 (Admin) at [32]. Ouseley J went on (at [46]) that the closed material procedure was intended to be:

> "part of a process which enables issues which would not otherwise have been fairly triable to be reviewed by judges. This advances rather than restricts judicial oversight of the lawfulness of executive acts."

11. These provisions specific to SIAC exist alongside other duties of more general application. The Practice Direction to CPR Part 54 states (at §12) that "disclosure is not required unless the court orders otherwise." Thus CPR 31 (which sets out the rules applicable on standard disclosure) will not ordinarily apply on an application for judicial review. The corollary, however, is the well-established duty of candour on public authority defendants to judicial review claims. As explained for example by Lord Donaldson MR in *R (Huddleston) v Lancashire County Council* [1986] 2 All ER 941:

> "This development [judicial review] has created a new relationship between the courts and those who derive their authority from public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration … The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities."

12. The principle is expressed in the Treasury Solicitor's January 2010 *Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings*, as being "not … to win the litigation at all costs but to assist the court in reaching the correct result and thereby to improve standards in public administration". The nature and extent of the duty is also expressed in *R (Al Sweady and ors) v The Secretary of State for Defence* [2010] HRLR 2, per Scott Baker LJ, following Laws LJ in *R (Quark Fishing Limited) v Secretary of State for Foreign & Commonwealth Affairs* [2002] EWCA Civ 1409 [at 50] in terms that:

> "there is ... a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanation of all the facts relevant to the issue the court must decide. The real question here is whether in the evidence put forward on his behalf the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at."

The SIAC decisions

13. In the decisions now under review, the issue was what should be disclosed to enable SIAC to discharge its functions, in particular under ss. 2C(3) and 2D(3) of the 1997 Act and rule 4 of the 2003 Rules. In that regard, in both exclusion and naturalisation cases, the decision-maker is presented with what was described as a summary of relevant information but may, more accurately, be said to be a report. The question was whether this information, howsoever described, was sufficient disclosure to allow SIAC to review the decision-maker's decision and, if not, what should be provided.

14. Although at a practical level, the volume of underlying material in exclusion cases is usually greater than those concerned with naturalisation, the same principles were adopted in relation to both, with the proviso that exclusion decisions are taken personally by the Secretary of State, rather than by officials on behalf of the SSHD. In *AHK v SSHD*, Irwin J noted that that both types of decision are capable of having a significant impact on those pursuing applications; given that such applicants do not have access to the closed material, therefore, following *Secretary of State v Lord Alton and ors* [2008] 1 WLR 2341, he concluded that the factual basis for the judgment exercised by the SSHD "must be scrutinised very carefully or 'anxiously' by [SIAC]" (see [30]). He explained:

> "This is an appropriate safeguard as in conventional judicial review proceedings, given that much of the important factual information is withheld from the Claimant. The facts cannot be tested as easily as in conventional judicial review proceedings by either the Claimant, who does not have all the information, or the Special Advocates, who may not be able to get instructions in response to the CLOSED material. For that reason, we regard the responsibility on the Commission to review the facts with care as clear."

15. As regards disclosure, in a Note to Counsel circulated prior to the hearing, Irwin J identified the provisional approach of SIAC:

> "The real substance is: is the content of the summary rational, based on the material available to the writer of the summary? If SIAC is to review the substance of the SSHD decision, then our provisional view is this can only be done if the Commission reviews the material available to the writer of this summary. We bear closely in mind R4(3) where because of the unusual procedures in SIAC, there is placed a positive duty on SIAC to satisfy itself that the material available to it enables it properly to determine the proceedings."

16. That provisional view was confirmed in terms that SIAC must see in CLOSED "all of the relevant material bearing on the facts" (see [35]). Irwin J made it clear:

> "36. … It will not be sufficient for the Commission and Special Advocates to be shown only a summary prepared for the Home Office official, plus any other documents not before the summary writer but taken into account by the Home Office official taking the decision in the name of the Minister.

> 37. We indicate that the same principle will apply in respect of decisions reviewed by SIAC which have been taken by a Minister. Anxious scrutiny of the facts is only possible where the Commission is possessed of the evidence."

17. The same approach was adopted in *Ignaoua v SSHD*. First, Irwin J identified that the decision of SSHD was heavily dependant on the assessment and recommendations provided to her such that it would be proper to conclude that these were "decisive". He went on (at [13]):

> "Moreover, without access to the material available to the writer of the assessment and recommendations, the rationality of the assessment and recommendation is untestable. This is not a case where information which happened to be held elsewhere in a government department might have altered the view taken, or arguably should have been taken into account. Here the information which was available and underpinned the critical advice to the Secretary of State is not provided to the Commission."

18. Analysing the decision in *Tweed v Parades Commission of Northern Ireland* [2007] 1 AC 650, SIAC found that Rule 4(3) of the 2003 Rules was determinative. Irwin J made it clear (at [20]):

> "Even in the context of a statutory review, applying conventional judicial review principles, a closed procedure is justifiable only where the Commission has all the evidence needed to test the rationality and legality of the decisions under review. Anything less would be, in our judgment, wrong in principle and open to challenge. We would regard it as a breach of Rule 4(3)."

19. Putting the matter beyond doubt and elevating the decision to an issue of guiding principle, he went on (at [21]):

> "Accordingly, … we direct that all relevant material available to the summary writer, author of any relevant assessment upon which the Secretary of State relied at the time of the decisions in this case, must be disclosed within the closed material procedure in SIAC. We indicate that, absent some particular reason for a variation of that approach, it must be followed in other cases of statutory review of exclusion decisions under s. 2C of the SIAC Act 1997."

20. Given the concordance of approach between exclusion and naturalisation, it is not difficult to see that this principle applies equally to both. It is the principle that the SSHD has sought to challenge.

The challenge

21. Mr Steven Kovats Q.C., on behalf of the SSHD, advances four grounds to justify a review of the principle enunciated in these cases. First, he submits that the disclosure required by SIAC is excessively broad, given that this is a review rather than an appeal. The summary, together with the duty of candour, is sufficient disclosure to enable SIAC to discharge its statutory duties. Second, SIAC placed excessive weight on the unusual 'bifurcated' nature of the closed material procedure in placing this disclosure obligation on the SSHD. Third, the "anxious scrutiny" standard is not a legal standard, and is unsupported. Fourth, this level of disclosure places a disproportionate burden on the SSHD.

22. In opposing permission, the Miss Stephanie Harrison Q.C., and Mr Ramby de Mello first submitted that this application did not satisfy the high standard of a "gross and florid" error of law in interlocutory decisions, as required by *R (Cart) v Upper Tribunal* [2010] 2 WLR 1012 [at 85]. The application at this stage was therefore inappropriate, given the availability of appeal after a final decision. As for the merits, it was argued that each of the propositions advanced by Mr Kovats was "clearly wrong". SIAC was right for the reasons it expressed. Furthermore, SIAC was an expert tribunal of three, with a judicial lead and expertise in immigration and security whose collective judgment required appropriate deference; it was in a better position than this court to determine what was both appropriate and proportionate.

23. I can deal with the preliminary argument shortly. When granting permission to apply, Ouseley J observed that the case:

> "… will affect not just these but all the other naturalisation cases. It makes sense … for the issue of disclosure to SIAC to be dealt with before rather than after the appealable decision in view of the amount of disclosure to SIAC which would be involved, the use which SIAC expects to make of it in its judgments and the possibility of argument over the test to be applied by SIAC to onward disclosure to the Claimants in the SIAC proceedings of that material."

24. I agree with each of these reasons but, in my judgment, it goes further. Although the test of "gross and florid error of law" is entirely appropriate in the type of case envisaged in *Cart* and generally in relation to interlocutory decisions, this particular application is different because, in truth, there can be no effective appeal in relation to the issue of principle involved in this procedural decision.

25. The premise of the case advanced against the SSHD is that more information will improve the understanding of SIAC and the fact basis for the decision; thus, more is better. The contention in reply is that it is not necessary or appropriate to go beyond that which was before the decision maker which should contain a fair and balanced view, reflecting the underlying material on which the report or submission was based, modified and enhanced (when there is material which assists) by the duty of candour. If, at the end of the case, the claimants fail, the SSHD will have prevailed and there will be no adverse decision to justify an appeal. If the claimants succeed, it will not be open to the SSHD to argue that had there been less disclosure of material, she might have prevailed. Thus, in my judgment, the issues involved in this application are entirely appropriate for definitive resolution in advance of the main hearing.

26. If it is necessary to go further, the need for such resolution is even clearer as Irwin J went on to observe that "absent some particular reason for a variation to that approach, it must be followed in other cases of statutory review of exclusion decisions under Section 2C of the SIAC Act 1997". Thus, the effect of the preliminary decision is not limited to these cases but intended to have far wider application.

Nature of review and disclosure

27. In order to determine what disclosure is required, it is necessary, as SIAC found, first to establish the nature of the exercise. Based upon ss. 2C(3) and 2D(3) of the 1997 Act, it is clear that the exercise is a review on the usual principles which cannot itself be affected by Rule 4(3) of the 2003 Rules. What is at issue is whether the nature and intensity of the review is changed by the existence of a closed material procedure; what, if any, impact that this has on the use which can be made of a summary (or, as I prefer to call it, a report) which collects together that which the writer seeks to put before the decision maker without also including the underlying material; and, of great significance, the consequences of the duty of candour. Like Irwin J, I would approach this issue on a pragmatic basis with utility in mind and avoiding what he described as "a parade of learning".

28. Having said that, I find it less than helpful to characterise the nature of the scrutiny by reference to the anxiety with which it is conducted. 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.

29. This limitation on the ability to have a complete understanding of the position from the perspective of the interested parties to contrast with the arguments advanced by the SSHD is equally of importance when it comes to the issue of the material which should be available. It is the reason why it is not appropriate simply to look at the principles (in decisions such as *R(A) v Chief Constable of Kent Constabulary* [2013] EWCA Civ 1706, *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 and *R v Lord Carlile of Berriew et al v Secretary of State for the Home Department* [2014] UKSC 60, [2014] 3 WLR 1404) 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.

30. Mr Kovats argues that as the court in judicial review does not act as the finder of primary fact, but rather determines whether the decision maker acted rationally on the material before him, the relevant material is that which was before the decision maker. The only modification to the generality of that principle is that the rational decision maker must also take reasonable steps to acquaint himself with the relevant information: see *R v Secretary of State for Education ex parte Tameside MBC* [1977] AC 1014 per Lord Diplock at 1065a-b. On the other hand, he recognises that where the material is materially incomplete, inaccurate or misleading, this will vitiate the decision because the decision maker will either have failed to take account of relevant considerations or will have taken account of irrelevant considerations, thereby acting

irrationally: see *Secretary of State for the Home Department v. (1) AT (2) AW* [2009] EWHC 512 (Admin) at [17]-[20].

31. The difficulty facing Mr Kovats, however, is that the second of these principles impacts on the first. How can the court decide whether material is incomplete, inaccurate or misleading when, by reason of the circumstances, the persons most affected by it (i.e. in these cases, the interested parties) are not fully informed about that material and able to provide instructions? It is inevitable that, however able, the alternative provided by the Special Advocates cannot completely take the place of such fully informed instructions but in order to comply with the requirements of the legislation, they must do the best they can and the court must be mindful of the consequent limitations. Without access at least to the material relied on by the writer of the assessment, its rationality and the basis of the recommendation are untestable. In the circumstances, we reject the very strict approach advanced by Mr Kovats.

32. At the other end of the spectrum, Mr Kovats submits that the conclusion expressed in the OPEN judgments of Irwin J that SIAC must have "all the evidence needed to test the rationality and legality of the decisions under review" and "all relevant material available to the summary writer, author of any relevant assessment upon which the Secretary of State relied" on any showing goes too far and cannot be justified. It is beyond doubt that whoever wrote the summary or the assessment will have had available whatever information from whatever source he or she wished to access and may, indeed, have had personal or direct knowledge or information. Taking the words of Irwin J at face value would require a trawl through all possible sources of information whether or not it constituted material from which the summary or assessment was, in fact, derived. It was in this context that he relies on the disproportionate impact of the work on the SSHD to identify, assess, redact and edit material for disclosure to the Special Advocates which could only be for the purpose of their checking for compliance with the duty of candour.

33. Miss Harrison submits that the duty of candour is one of "full and fair disclosure" with "all cards face up on the table" (see *R v Lancashire County Council ex parte Huddleston* [1986] 2 All ER 941 at 945g cited at [11] above). She also referred to *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 at [63] as including "all material documents contained in the files of government departments". This last observation, however, was in the context of a challenge to the lawfulness of the Ordinance and policy by which the civilian population of the Chagos Archipelago was compulsorily removed to Mauritius and prohibited from returning: by this observation, Laws LJ (who subsequently described the principle in *Quark Fishing* identified in [12] above) was not seeking to characterise the usual requirements or operation of the duty of candour.

34. At one level, the way in which Irwin J expressed the decision of SIAC is open to the interpretation that it was intended to encompass all the material which the summary or report writer could have accessed, that is to say, everything known about the relevant interested party but, in my judgment, if that is correct, he was in error. To require disclosure at that level takes the investigation far beyond a review which is an analysis of the facts and the basis for the facts which led to the recommendation or conclusion together with the decision and its reasoning. It must be sufficient to permit challenge, if it is appropriate, to the underlying rationality of any part of it. Recognising that the Special Advocates cannot obtain instructions on the material, in

the context of this type of review, it is also right that the SSHD should disclose the underlying material upon which the summary or report writer actually relied to identify facts or reach the conclusion: needless to say that material must be sufficient to justify the contents of the report or summary but it need not be exhaustive of all that is known. That is consistent with the obligations to ensure that the material available to it enables a proper determination of the proceedings as required under Rule 4(3) of the 2003 Rules; it was not suggested that a different approach was required by the European Convention on Human Rights.

35. This level of disclosure is informed by the material to which reference has been made in the CLOSED judgment but has been reached independently of the arguments there advanced. It is in addition to (and must be distinguished from) the duty of candour which is the obligation on the part of SSHD to disclose any material which might undermine the evidence on which reliance is placed or otherwise assist the case advanced by the interested parties. In the circumstances, as a matter of practice, the SSHD should require the material which has been used to establish the facts to be annexed to or identified by the summary or report (which could also be described as the pertinent material selected to underpin the assessment) so that appropriate disclosure to the Special Advocates can proceed without difficulty.

36. In relation to these very old cases, it may well be that this exercise is now being conducted again, retrospectively. In that event, the SSHD must disclose material which is sufficient (in the view of the summary or report writer) to support what is alleged and the conclusions reached whether or not it was the material on which reliance was, in fact, placed when the document was prepared so long as that material was in existence at that time. If it is not sufficient, the SSHD will lose the review; if it is, then the fact that there might be more or different material than that revealed is not to the point.

37. I appreciate that this approach for these cases leads to the criticism of retrospective justification but it is important to appreciate that the only realistic outcome of a successful challenge to any of these decisions, so many years later, will be to require the SSHD to make them afresh. In that event, this material (together with any material postdating the decision) would be available to be deployed to justify any new decision. Thus, ultimately, the interested parties are not prejudiced by this course and continued further litigation can be avoided.

Conclusion

38. I agree with SIAC that it is not sufficient for CLOSED disclosure to be limited to the summary prepared for the Home Office official (or Secretary of State) plus any other documents not before the summary writer but taken into account by the official or the Secretary of State). On the other hand, if SIAC intended to require the SSHD to disclose everything that the report or summary writer might have been able to access in the preparation of advice for officials or the Minister, in my judgment, it was in error. I would require disclosure of such material as was used by the author of any relevant assessment to found or justify the facts or conclusions expressed; or if subsequently re-analysed disclosure should be of such material as is considered sufficient to justify those facts and conclusions and which was in existence at the date of decision. An appropriate declaration should be agreed by the parties accordingly.

Lady Justice Macur :

39. I agree.

Mr Justice Ouseley :

40. I also agree.