Appeal No: SC/66/2008
Hearing Dates: Monday 19th – Friday 23rd January 2009 and Friday 20th March 2009
Date of Judgment: 7th April 2009

IN THE SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE LANE
MR E J MITCHELL

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HILAL ABDUL—RAZZAQ ALI
AL JEDDA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MS H WILLIAMS QC and MR T HICKMAN (instructed by Public Interest Lawyers) appeared on behalf of the Appellant

MR J SWIFT and MR R WASTELL (instructed by the Treasury Solicitor) appeared for the Secretary of State

MR A McCULLOUGH and MR BOWEN (instructed by the Treasury Solicitor Special Advocate Support Office) appeared on behalf of the Special Advocates

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OPEN JUDGMENT

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MR JUSTICE MITTING :

Background

1. The Appellant was born in 1957 in Kirkuk in Iraq. In different documents, he has given his date of birth as 5th January 1957 and 1st May 1957, a difference which we find to be of no significance. He was a successful basketball player and played for the Iraqi national team until 1978. He refused to join the Baath party when invited to do so and left Iraq for Abu Dhabi in 1978. There he pursued a lifestyle which, by the standards of an observant Muslim was dissolute. In circumstances which are obscure, he saw the error of his ways and became a devout practising Muslim. On an uncertain date towards the end of the 1980's, he was required to leave the Arab Emirates and went to Pakistan. While there he attended a mujahedin training camp in north west Pakistan, in circumstances which have been examined in some detail and are discussed below. In 1990, he married a Syrian woman Ihssan, by whom he had four children: K, a daughter, now seventeen, Hm and A, both sons aged sixteen and fifteen respectively and Hn, a daughter, aged eleven. He and his family (his wife and two oldest children) arrived in the United Kingdom on 17th November 1992 and immediately claimed asylum. On 5th August 1994, IND told the Appellant that he had been recognised as a refugee and granted him and his family four years leave to remain. On 7th July 1998, the Appellant, his wife and four children were granted indefinite leave to remain. On 24th November 1998, the Appellant and his family applied for British citizenship, an application which was approved on 13th January 2000, subject to them taking an oath of allegiance. They were granted British citizenship on 15th June 2000. The family then left for Syria. He was detained in July 2000 and held for eleven months. His wife and children returned to the United Kingdom. He and his wife were divorced in 2001. Shortly after, she left for Australia, from which she returned after about two years. She has since remarried and lives in London. The four children of their marriage remained with him. He travelled to Jordan and married a Syrian woman, Ehman, by whom he had a son Hh aged five. The Appellant and Ehman were divorced in 2008. She lives in Syria with their son. In the same year, 2001, he contracted a polygamous marriage with a Jordanian woman living in Baghdad, Asma, by whom he has two children, a son AR, aged four and a daughter M, aged two months. The Appellant was deported from Jordan to the United Kingdom in October 2002. Because Asma had no leave to enter the United Kingdom, he left without her. His four eldest children accompanied him to Jordan and left with him. In the first half of 2003 he and they spent about one and a half months in Sudan. Entries in his passport, supplemented by his own evidence, show that between 6th July 2003 and 30th July 2004, he and his four eldest children spent all but a few weeks in the Middle East. During that time, they made two trips to Saudi Arabia, four to Qatar and five to Iraq as well as numerous trips in and out of the United Arab Emirates. They spent about six months of that time in Iraq. The Appellant was, since about 1996, in receipt of

UK income support and invalidity benefit. There is no suggestion that he ever declared any other income to the UK Inland Revenue or HMRC, but had access to substantial sums of money, to facilitate his travel and to support himself and his family whilst overseas. The sources of that income are obscure. In a seventh witness statement dated 21st January 2009, he explains that he made substantial sums of money by letting accommodation in London to Arab visitors for substantially more than the rent which its owners demanded. He also made a profit, which he puts at £15,000 over ten years, from importing honey. In September 2004, the Appellant and his four oldest children made a further visit to Dubai intending to travel onwards to Iraq in a car bought by the Appellant from the brother of a Dubai friend, Ahmed Juma. On 20th or 21st September 2004, the Appellant was detained by Dubai Security Service officers and interviewed. He was released the same night, but too late to travel that day on the ferry to Basra. He and his children travelled the next day and then on to Baghdad. The car in which he was intending to travel was seized by the Dubai Security Service and found to contain transceivers (walkie talkies). On 10th October 2004, the Appellant was detained by US and UK forces in a house in Baghdad and flown to Basra. He was detained in military custody, in circumstances which have given rise to earlier litigation, until 30th December 2007. An Order depriving him of British citizenship was signed on 14th December 2007. He was flown to Baghdad on 30th December and then made his way to Kirkuk, having obtained a false Iraqi identity card. After about a month he, Asma and their son travelled to Turkey where they have remained until now. His four oldest children remained in Iraq until July 2005. They then returned to the United Kingdom to live with their mother. K returned to Iraq in October 2007, to visit her father and remained there until February 2008, when she joined him in (or, perhaps, accompanied him to) Turkey. Hm remained with his mother until March 2008 and then joined his father in Turkey. A travelled with K to Iraq to see his father and remained there until March 2008. From March to August 2008 he lived with his father in Turkey, but is now in Syria. Hn remained with her mother until March 2008 and then joined her father in Turkey.

The principal issues

2. The principal issues are:

   i) should the Secretary of State's decision that it is conducive to the public good to deprive the Appellant of his citizenship be upheld?

   ii) did that decision breach the Article 8 ECHR rights of the Appellant and his family?

   iii) did the decision breach the Appellant's Article 3 ECHR rights?

The first issue raises important questions about the approach which the Commission should take to the Secretary of State's decision.

The Commission's approach to the Secretary of State's decision

3. Both Mr Swift and Miss Williams QC make considered submissions about the nature of the Commission's task. The only common ground between them is that it is for the Secretary of State to show that it is conducive to the public good for the Appellant to be deprived of his citizenship and that it is for the Commission to exercise its own judgment about the issues arising under Articles 8 and 3 ECHR. Miss Williams submits that the Commission should conduct a full merits appeal and, to the extent that the Secretary of State's decision rests on conclusions as to past facts, reach its own determination about those facts on balance of probabilities. Mr Swift submits that the Commission should not conduct a full merits appeal and should not "ordinarily interfere" with the Secretary of State's assessment unless satisfied that it was one which she could not reasonably have made; and that there is no need for the Commission to determine past facts on balance of probabilities or to any standard. The logical result of his submission, from which he did not shrink, is (and it is entirely unsurprising) that it is the Secretary of State and no one else who has power to determine that a British citizen should be deprived of his citizenship on conducive grounds.
4. Instinctively, we find Mr Swift's submission to be profoundly unattractive. Citizenship is the fundamental civic right. It is not necessary to go as far as Warren CJ in *Trop v Dulles* 356 US 86 in evaluating the importance of its loss as "the total destruction of the individual's status in organised society"; but, on any view, its loss, for the citizen, is a very serious detriment. Parliament could have legislated that the decision should be that of a member of the executive alone, subject only to an appeal to a judicial body whose powers are, if Mr Swift is right, in substance if not in form, limited to those of judicial review. The question is whether or not it has done so.
5. Section 40(2) British Nationality Act 1981, as amended by the Immigration Asylum and Nationality Act 2006, provides:

> "The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good".

The replaced provision empowered the Secretary of State to deprive a person of a citizenship status if "satisfied that the person has done anything seriously prejudicial to the vital interests of –

a) the United Kingdom, or

b) a British overseas territory."

The legislative purpose of the amendment seems clear: to broaden the grounds upon which a person may be deprived of citizenship and to permit the Secretary of State to take into account all relevant factors, whether they occurred before or after a person who acquired British citizenship by registration or naturalization did so, thus reversing *R(Hicks) v Secretary of State for the Home Department* [2005] EWHC 2818 (Admin).

6. Section 40A(1) affords to a person given notice of the Secretary of State's intention to deprive him of his citizenship a right of appeal to the Asylum and Immigration Tribunal, except when she certifies that the decision was taken wholly or partly in reliance on information which in his opinion should not be made public in the interests of national security, the relationship between the United Kingdom and another country or otherwise in the public interest, in which event, his right of appeal was to this Commission under section 2B Special Immigration Appeals Commission Act 1997. Section 40A(3), which applies to appeals to the Tribunal and the Commission provides that some of the provisions of part V Nationality Immigration and Asylum Act 2002 which apply to appeals against immigration and asylum decisions shall apply to an appeal to the Tribunal against a deprivation decision, one of which, by virtue of section 2B of the 1997 Act also applies to an appeal to the Commission: section 87 (which permits the Tribunal/Commission to give a direction for the purpose of giving effect to its decision). A notable omission from the provisions which are to apply to a deprivation appeal is section 86, which provides:

> "(3) The Tribunal must allow the appeal insofar as it thinks that –
>
> a. a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or
> b. a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently….
>
> (5)insofar as sub-section (3) does not apply, the Tribunal shall dismiss the appeal."

7. Mr Swift submits that the omission demonstrates Parliament's intention to narrow the decision making power of the Tribunal/Commission. In other cases, notably those involving an appeal against a decision to make a deportation order on conducive grounds under section 5(1) Immigration Act 1971, sub-sections 86(3) and (5) do apply. Accordingly, Mr Swift's submits, Parliament has demonstrated an intention that the duties thus imposed and, by necessary implication, the powers thus conferred are not to be exercised by the Tribunal/Commission in a deprivation appeal. We do not accept this submission, for two reasons: first, as a matter of language, the removal of a statutory duty to allow an appeal in two specified cases and otherwise to dismiss it enlarges rather than diminishes the power of the Tribunal/Commission, by leaving it free to decide what to do in the light of its findings; secondly it makes legislative sense to omit section 86. The Immigration Rules have no place in a deprivation decision. An appeal is a challenge to the merits of the decision itself, not to the exercise of a discretion to make it. And, as is explained at the end of this judgment, there may be good reasons why a mandated decision should not follow the primary findings

of the appellate body. Accordingly, Parliament may well have thought that section 86 could play no part in a deprivation appeal. Parliament has legislated for a right of appeal. The nature and scope of that right is to be determined not by words omitted from the legislation, but by the scheme which has been established for determining the appeal.

8. In appeals to the Commission, the scheme is described in detail in the Judgment of Lord Woolf MR in *Home Secretary v Rehman* [2003] 1 AC 153 paras. 4 – 16 and in *Secretary of State for the Home Department v M* [2004] 2 AER 863 paragraphs 6 to 16. The constitution and the procedures of the Commission have been established to permit an exhaustive enquiry to be made into the Secretary of State's reasons for making decisions about national security and related issues. Hence, its ability to receive evidence and information in closed session, the provision for Special Advocates and the presence in an appeal panel of a person with long practical experience of national security matters. Thus equipped, it is unsurprising that Lord Woolf observed at [2004] 2 AER 863 page 868 para. 15 that "SIAC's task is not to review or second guess the decision of the Secretary of State but to come to its own judgment in respect of the issue identified in section 25 of the 2001 Act" (now repealed) (i.e. to consider if (a) there are no reasonable grounds for a belief or suspicion that a person's presence in the United Kingdom is a threat to national security and for a suspicion that he is a terrorist or (b) that for some other reason the Secretary of State's certificate should not have been issued). The Commission has, by now, accumulated considerable experience in determining what individuals, assessed to have undertaken activities inimical to the national security of the United Kingdom, have in fact done and in assessing the future threat which they may or may not pose to it. Great weight is always given to the assessment of the Secretary of State or, more particularly, of her security advisers; but the Commission has not felt inhibited from differing from their assessment if persuaded that it is wrong; and it has never been suggested on behalf of the Secretary of State that it cannot, as a matter of principle, do so. We readily accept and routinely apply the observation of Lord Slynn at [2003] 1 AC 184 para. 26 that "the Commission must give due weight to the assessment and conclusions of the Secretary of State in the light at any particular time of his responsibilities, or of government policy and the means at his disposal of being informed of and understanding the problems involved". Once the error in SIAC's approach in ***Rehman*** to the issue of national security was corrected, there has never been any live issue about the Secretary of State's assessment of what national security in general requires and only rarely any issue about whether or not particular actions by an appellant threaten it. The principal issues on national security are invariably: what has an appellant done?; and what inference can be drawn from his past actions and current capacity and beliefs about the threat, if any, which he poses to national security?. These are matters of individual assessment, which the Commission is particularly well placed to make. Indeed, its procedures almost certainly ensure that the case of an individual appellant is subjected to greater scrutiny than could be given to it by the Secretary of State. We are, accordingly, uncomfortable with a hybrid approach which imposes constraints of uncertain extent upon our ability to determine an appeal on the facts found and assessments made by us.

9. The House of Lords did not speak with one voice on the approach which the Commission should take to past events. Lord Slynn, with whom Lord Steyn and Lord Hutton agreed, stated that "when specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof.": [2003] 1 AC 183 – 4 para. 22. Lord Hoffman treated the fact finding exercise as limited to determining whether the "opinion" of the Secretary of State that the appellant "was actively supporting terrorism in Kashmir" had a proper factual basis: [2003] 1 AC 193 para. 54. In his view, with which Lord Clyde and Lord Hutton agreed, the Secretary of State's "opinion" could only be rejected if it was one which no reasonable minister advising the Crown could in the circumstances reasonably have held: *ibid*. We do not accept this limitation upon our decision-making power. It is our duty to find the facts: paragraph 42 of the judgment of the Court of Appeal in *Rehman* [2003] 1 AC 168: "SIAC were, however correct to regard it as being their responsibility to determine questions of fact and law"

   Further, when the issue is whether or not an individual should be deprived of citizenship, and that issue depends significantly upon past events, we, too, consider that fairness requires that we determine those events on balance of probabilities. We reject the conclusion, implicit in Mr Swift's submissions, that an individual may be deprived of citizenship merely on the basis of suspicion, however reasonable, that he may have done something in the past which demonstrates that he may pose a threat to national security. It would be unwise to attempt to lay down a prescriptive approach to what must be found to uphold the Secretary of State's decision, but we have attempted to make findings of fact about significant past events on balance of probabilities and have founded our Judgment on conclusions thus based.

10. In reaching that conclusion, we have not overlooked the partly analogous considerations which apply in appeals against a notice of intention to deport given on conducive grounds. Section 86 applies to such appeals. The appellate Tribunal, now the Asylum and Immigration Tribunal, has an original statutory discretion to balance the public interest against the compassionate circumstances of the case: *M(Kenya) v Secretary of State for the Home Department* [2004] EWCA (Civ.) 1094 para. 64 and 83. Nevertheless, it is an error of law to fail to understand and give weight to the Secretary of State's decision when considering the public good: para. 83. In cases in which the Secretary of State has taken the view, in the public interest, that certain crimes of violence are sufficiently serious to warrant deportation, "her assessment had to be taken as a given, unless it is palpably wrong.": *OP(Jamaica) v Secretary of State for the Home Department* [2008] EWCA (Civ.) 440. The analogy, however, breaks down in one significant respect because of a fundamental difference between the issues to be considered in the two types of case: in the case of deportation on conducive grounds, founded on criminal convictions, the facts demonstrated by the convictions are not in issue. They have already been found by the Criminal Court. Not so in our jurisdiction. All that has occurred is that the Secretary of State has made an assessment (or, in Lord Hoffman's words, formed an opinion) about an appellant's past conduct and future risk. We have to find the facts. The analogy is sound as to the assessment of future risk. If our assessment of past fact does not differ

significantly from that of the Secretary of State, we must understand and give great weight to her assessment (more specifically, the assessment of her advisers) about future risk.

11. Miss Williams accepts that, in assessing that future risk, both the Secretary of State and the Commission are entitled to take account of past events, even though there may be only a reasonable suspicion that they occurred. The reason is that fact finding about past events "is not the whole exercise. The Secretary of State, in deciding on whether it is conducive to the public good that a person should be deported, is entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned.": per Lord Slynn at [2003] 1 AC 184 A-B. How is this to be reconciled with the duty, as we perceive it, to attempt to make findings of fact about past events, and, if possible, to do so on balance of probabilities? Mr Swift submits that the effect of combining our approach to past facts and future risk is to produce an unsatisfactorily formalistic approach: if one out of ten allegations are proved on balance of probabilities, the other nine can be taken into account in assessing future risk; but not if none can be. Like him, we would deprecate such an approach; but, the experience of the Commission (and of its current President sitting in the Administrative Court in control order cases) is that this position has never arisen. It has always been possible to make findings, on balance of probabilities, about significant past events, sufficient to inform an assessment of future risk. We anticipate that this will be the case in future, provided that, as is its practice, the Commission gives full effect to rule 44(3) of the Procedure Rules (which permits it to receive evidence that would not be admissible in a court of law). Our conclusion is that we are not required to abandon an approach which has served well in practice because of the theoretical possibility that it might not do so in a highly unusual future case. The duties of the Commission do contain elements which are in tension (notably the obligation to find facts and to give proper weight to the assessment of the Secretary of State), as the differences between the speeches in ***Rehman*** show. We believe that the approach set out above, even if logically untidy, has proved workable and should be applied now and in the future.

12. Miss Williams submits that the Secretary of State, and by extension, the Commission, cannot rely on events which occurred before the grant of citizenship. The issue only arises in relation to the Appellant's admitted attendance at a training camp in north-west Pakistan before his arrival in the United Kingdom. Its principal significance is the light which it casts upon his credibility. Nevertheless, our conclusion is that the Secretary of State is entitled to rely upon it for all purposes. As already stated, one of the legislative purposes of the amendment of section 40(2) British Nationality Act 1981 was to overturn ***Hicks*** on this issue.

13. It is common ground that we must make our own assessment of the impact of the deprivation decision on the Convention rights of the Appellant, (and in relation to Article 8, of members of his family). We set out the approach which we have taken to these issues under the appropriate heads.

14. By a letter dated 19th March 2009, the Appellant's solicitors submit that the proceedings are unfair because he has not had disclosed to him the substance of significant closed material deployed against him in a case in which his rights under Articles 3 and 8 are in issue. We do not accept that submission. The determining procedural Article is Article 13. SIAC's procedural rules satisfy the requirements of Article 13: *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10 paragraph 177, per Lord Hoffmann. The observations of the Strasbourg Court in *A v UK* 3455/05 19th February 2009 in paragraphs 218 to 224 do not apply to these proceedings.

The conducive grounds relied on

15. The Secretary of State's reasons were set out in a letter dated 12th December 2007, in the following terms:

> "The reasons for my decision… are that you have:
>
> - connections with Islamist groups both within and outwith Iraq, who are responsible for attacks against coalition forces and kidnapping of Westerners;
> - recruited terrorists outside Iraq, and facilitated their movements to Iraq, with a view to commission of terrorist activities within Iraq;
> - facilitated the travel to Iraq of a terrorist explosives expert and conspired with that expert in order to conduct improvised explosives device ("IED") attacks against coalition forces in the areas around Fallujah and Bagdad;
>
> - further conspired with the explosives expert and members of an Islamist terrorist cell in the Gulf region to smuggle highly technical IED components to Iraq for use against coalition forces by insurgent terrorist elements".

In the course of submissions Mr Swift, for the Secretary of State, invited the words "in Iraq" to be substituted for "around Fallujah and Bagdad" in the third indented paragraph.

The Secretary of State certified that she relied on information which should not be made public because disclosure would be contrary to the public interest, thus giving rise to a right of appeal to this Commission.

16. Our consideration of the Secretary of State's assessment has focussed upon the grounds set out in the third and fourth indented paragraphs. We have approached our task on the basis that if we are satisfied on balance of probabilities that either or both grounds are substantially made out subject to the Articles 8 and 3 claims, the Secretary of State's assessment that it is

conducive to the public good that the Appellant should be deprived of his British citizenship must be upheld.

17. For the reasons which are set out in detail in the closed judgment, we are satisfied on balance of probabilities that the Secretary of State has substantially made out both grounds. In reaching that decision, we have given careful consideration to the Appellant's claim that his participation in the events which give rise to those conclusions was innocent. One important factor is the Appellant's own credibility. The reasons for our assessment of his credibility can be set out in this Open Judgment. We found him to be an unconvincing and dishonest witness. His evidence about one particular issue, illustrates and strongly supports that conclusion: his admitted attendance at a training camp in northwest Pakistan in the late 1980's. In his application for asylum, he said that, when in Pakistan, he worked with an Islamic league, teaching Afghan children. After the downfall of the Najiballah government, he faced harassment and "during my work there I was wounded by a bullet". (1/19/13). In an accompanying letter dated 11th January 1994, his then solicitors explained an army licence which accompanied the letter:

> "the licence was granted to our client in Pakistan to carry ammunition to protect himself from a possible second assassination attempt."

They also enclosed a medical report by Dr Ruben, who noted the Appellant's account of what had occurred:

> "In 1989, whilst helping in the running of a training camp in a valley some miles from Peshawar in Pakistan, he was shot by a stranger. The weapon used was a kalishnikov rifle which was fired from a distance of about five metres. The gunman then ran away and he has not seen him since."

The clear impression given by these documents was that the Appellant was asserting that he had been deliberately shot by a stranger with intent to kill him. In paragraph 21 of his main witness statement dated 15th August 2008, he stated that he assisted in the running of a training camp near Peshawar as a fitness teacher. He attended for about two weeks. Whilst there, he was shot by a Palestinian called Abu Yousif, by accident while he was reading the Koran in a room inside. In paragraph 39 of his fifth witness statement dated 6th January 2009, he accepted that he had described the incident in his asylum application as an "assassination attempt" – because his solicitor advised him that his asylum application "needed to be strong in order to be successful". In his oral evidence, he demonstrated how he had been shot, by accident, by a person sitting next to him. We found his explanations for these changes in his account of an incident of which he can never have forgotten the detail, as wholly unconvincing. We do not know how he came to be shot, only that we do not believe any of the accounts which he has given about it. Equally unconvincing was his attempt to explain what he was doing at the camp. In his oral evidence he said that he had been driven about four hours from

Peshawar to the camp, at which he undertook his personal fitness regime of running, during which other people joined him – hence, the earlier suggestion that he was helping to run the camp. We are wholly unconvinced that the Appellant attended a mujahedin camp only for the purpose of personal fitness training. We are satisfied that he attended it, although not for only two weeks, for purposes of the jihad then being conducted (with western assistance) against Russia.

18. It is not possible in this open judgment to set out the inconsistencies between facts which we have found to have been proved in relation to the critical allegations and the Appellant's changing account about them without infringing rule 4(1) of the Procedure Rules, but we can set out the changes in the Appellant's account and why we do not accept his explanation for them.

19. In his witness statement prepared for the purpose of judicial review proceedings dated 17th June 2005, the Appellant said that it was his intention to sail from the UAE to Basra and then drive to Baghdad. He therefore purchased a car from a close friend, Ahmed Juma, and planned to take the car on the ferry with him, "but it needed some repairs and so I took it to a garage". On the day of his proposed departure, he took a taxi to the garage but was stopped by UAE Intelligence officers who took him away for interview. "The next day, I again went to the garage to retrieve my car. However the repairs were not complete" – so he decided to ask Ahmed Juma to send the car on once it was ready. (1/19/538 – 539, paras. 9 and 10). In his main witness statement dated 16th August 2008, he says that he bought the car from Ahmed Juma's brother for 8,000 dirhams while he was still in London. He was given the keys on arrival in Dubai by Ahmed Juma, but when he drove the car, discovered a fault with the brakes and asked him to arrange for it to be fixed. It was Ahmed Juma who took the car to the garage to be fixed. A few days later, he and Ahmed Juma went to the local police station to effect the transfer of the car to him. After being stopped and released by the UAE Intelligence officers, he says "I did not pick the car up before I went to Iraq", and told Ahmed Juma that "I did not have time to collect the car". Five or six days later, after he had arrived at Baghdad, Ahmed Juma called to tell him that the car had been fixed. He told him to send it to him. (2/20/109-115). In his fifth witness statement dated 7th January 2009, the Appellant attempts to explain the difference between the two accounts about who took the car to the garage by saying that "there was a slight misunderstanding between my solicitor at the time of preparing my June 2005 statement". We do not accept that explanation. In his June 2005 statement, he said that he had visited the garage twice, once to take the car and once to collect it. We are satisfied that the reason for the change in account is an attempt to distance himself from whatever was found in it.

20. Miss Williams submits that the decision to release the Appellant from detention in Iraq on 30th December 2007 demonstrates that, by then, he no longer posed a threat to national security. We do not accept this submission. He was detained pursuant to the powers conferred by United Nations Security Council Resolution 1546 which authorised the occupying powers to detain an individual on the ground that to do so was necessary for imperative reasons of

security in Iraq. Unsurprisingly, the threshold was set high: the individual would be held without trial and for an indefinite period. The fact that it was decided in November 2007 that it was no longer necessary to detain the Appellant for imperative reasons of security in Iraq does not mean that he had ceased to pose any threat to the national security of the United Kingdom, in the wide sense given to that phrase in ***Rehman***. The two tests, like the consequences of applying them, are different.

21. Miss Williams makes further submissions about national security in the context of the Article 8 claim. We will deal with them under that head. Subject to that, we are satisfied that it was, in December 2007, and remains, conducive to the public good that the Appellant should be deprived of his British citizenship and that the Secretary of State's decision to deprive him of it was reasonable.

Article 8

22. It is common ground that we must answer the five questions posed by Lord Bingham in *Razgar* [2004] 2 AC 368 at paragraph 17 and, following *Beoku – Betts v Secretary of State for the Home Department* [2008] 3 WLR 166 do so not just by reference to the Appellant's personal and family life, but by reference to the personal and family life of his entire family. We shall apply those tests.

23. As is summarised in paragraph 1 above, the life of the Appellant's family has, for at least the last eight years, been complex. As is set out below, the thrust of his claim is that the decision to deprive him of citizenship has disrupted the personal and family life of himself and his four eldest children by preventing him and them from resuming it in London, where their mother also resides. He makes no such claim in relation to his, now divorced, second wife nor to the five year old son of that marriage, Hh who, he accepts, will continue to live in Syria with his mother. Further, the deprivation decision has no bearing upon his relationship with Asma, who has no right to enter the United Kingdom or to live in London. The personal and family life which she and the Appellant have together has only ever been enjoyed outside the United Kingdom. The Appellant would wish to obtain leave to enter for Asma, but has said nothing about what would happen to his two children by her, if it could not be obtained. A further notable feature of the claim is that his three oldest children have all made witness statements in which they express their deep (and we have no doubt genuine) unhappiness at being separated from their father and their difficult relationship with their mother and step-father, but his eleven year old daughter Hn while expressing her (we accept, genuine) love for her father states (again, we accept, genuinely) that she misses her mother very much and does not get on well with her step-mother Asma. She states that if her father cannot return to the United Kingdom, she may well return to live with her mother. The significance of that is that, according to the opinion of Asli Istanbullu, a Turkish lawyer expert in the personal rights of individuals in Turkey, the key to the medium term ability of the Appellant and his four oldest children to remain lawfully in Turkey is the fact that Hn is continuing her education there. We have no reason to doubt that opinion.

24. Unsurprisingly, the upheavals of the last eight and a half years have had a significant and adverse impact on the four eldest children. There are medical reports from Dr Meltem Kora on K, Hm and Hn dated 10th October 2008. There is no report on A, because he was then and is now in Syria. Dr Kora is of the opinion that all three suffer from chronic post traumatic stress disorder, that K and Hm suffer from depression and that Hm and Hn suffer from anxiety disorder. The terrifying circumstances, personally experienced by them, in which their father was arrested on 10th October 2004 and the frightening journey made by K to see her father in detention in 2007 played a significant part. We have little doubt that A, whose behaviour at school was disruptive, would be found to suffer from similar conditions as his brother and sisters do if he were to be medically examined; and that Dr Kora's identification of the paramount remedy would be the same. She expressed it in identical words (which do not lose their force because they are identical) in her three reports:

> "The restoration of a family life in London is crucial factor for her/his psychological improvement. In the case the restoration of the family is impossible, the prognosis for adopting appropriate coping skills will be poor and her/his risks for continuing traumatic symptoms and restricted personality development will be reinforced."

25. There are two problems with Dr Kora's remedy: there is no family life in London to restore, save for that between the four children and their mother – as the summary set out in paragraph 1 above makes clear, this part of the Appellant's family has not enjoyed family life with him in London for more than short periods since July 2000; and if the Appellant were to return to the United Kingdom, he would, in the light of the Secretary of State's assessment and the Commission's findings about the risk which he poses to national security, inevitably be subjected to a stringent control order. In all probability, it would require him to live away from London (to separate him from his former associates), to be subjected to a lengthy curfew, most likely of sixteen hours, and to have his ability to work and invite visitors to his home significantly restricted. The circumstances postulated by Dr Kora would not occur, for good reason. Accordingly, the contention that the restoration of British citizenship to the Appellant would resolve, or at least go a long way to resolving, the personal and family problems experienced by his four eldest children, is unsound. All that can be concluded is that the restoration of his right to live in and come and go from the United Kingdom would make contact between the four children and their divorced parents easier, especially if they were to return to the United Kingdom. Given the already disrupted family history and the Appellant's extensive and prolonged travels in the Middle East whilst still a British citizen, it is far from certain that he and they would do so, especially if a rigorous control order were to be imposed upon him.

26. In a report also dated 10th October 2008 Dr Sahika Yuksel expresses the opinion that the Appellant also suffers from post traumatic stress disorder and depression, both arising out of the circumstances of his arrest and detention in Iraq. He states that if the Appellant is deprived of his British citizenship his recovery from both disorders "is very unlikely", but if he is permitted to remain British and return to live in the UK his recovery "is very likely". Dr Agrawal, who has not examined the Appellant, accepts the diagnosis of depression but doubts that of post traumatic stress disorder. He concludes that restoration of the Appellant's nationality status and return to the UK "cannot be an all encompassing necessary pre-requisite for recovery…". The difference between Dr Yuksel and Dr Agrawal is not great and nothing turns on it. We accept that if the Appellant were to be allowed to return to live in the United Kingdom, in complete freedom, in London, his mental health would be likely to improve; but as discussed above, that is not what would occur. He would be subject to a strict control order – a circumstance which in other cases, has been identified by reputable psychiatrists as contributing to continued mental disorder of the kind from which the Appellant suffers.

27. The factors considered above are in the first place relevant to Lord Bingham's first two questions. In the complex and unusual circumstances of the life of the Appellant and his four eldest children, we doubt that deprivation of his British citizenship is an interference with the exercise of their right to respect for their private or family life and/or that it will have consequences of such gravity as potentially to engage the operation of Article 8. We do not reach that conclusion because the formal effect of deprivation of British citizenship is not such as to amount to such an interference, but because of its practical consequences for this segment of the Appellant's family. It is a measure which has an impact upon a segment of a wider family which has inhabited, and continues to inhabit, a number of countries. The Appellant and his four children are used to maintaining contact with each other and with other members of the wider family over national boundaries, for long periods at a time. The inability of the Appellant to visit or to live in one, the United Kingdom, will only have a moderate impact upon the enjoyment of personal and family life by himself and other members of his family. If he and his four children are unable, or choose not, to remain in Turkey, his history and background suggest that he will find somewhere else to live, possibly including Iraq. His children may well return to London, but they could still keep in contact with him. The alternative – for the Appellant to return to the United Kingdom but be subject to a strict control order – would interfere to at least as great an extent with his and their exercise of their right to respect for private and family life.

28. If those conclusions are right, the question of justification for the interference does not arise. We will, however, consider it on the basis that it does. It is common ground that the interference is in accordance with the law. Accordingly, there are two issues: is the interference necessary in a democratic society in the interests of national security?; and, if so, is the interference proportionate to the legitimate public end sought to be achieved?

29. Witness Y spoke in both closed and open sessions about necessity. Her answers were more guarded in the open session than in the closed, but they are founded on the same two propositions: preventing the Appellant from making use of the United Kingdom as a base for activities contrary to national security inhibits those activities; and the loss of a British passport makes it more difficult for him to travel to countries in which national security interests are engaged. We unhesitatingly accept witness Y's assessment. The fact that the Appellant conducted the activities which we have found that he did from a UK base demonstrates the importance of the base to him. In or from it, he must have been able to raise the money, otherwise wholly unexplained, for his extensive foreign travelling and residence between his release from Syrian detention in 2001 and his detention in October 2004. His activities give rise to the reasonable suspicion that he might, while in the United Kingdom, associate with other individuals who pose a threat to national security and who live in or have access to the United Kingdom. We agree that possession of a British passport would be likely to facilitate travel to areas in which national security interests are engaged, including the Middle East and Central Asia and, without a visa, to friendly countries (such as EEA states) whose national security might be put at risk by his activities. In the balancing exercise, the Secretary of State is entitled to expect the Commission to give considerable weight to the views of the Security Service on this issue, unless palpably wrong.

30. Miss Williams suggested that, although it was not conceded that if the Appellant were to return to the United Kingdom, the imposition of a strict control order would be justifiable, nevertheless that was a more satisfactory means of dealing with the risk which the Appellant posed to national security than deprivation. We do not accept the proposition that if two measures are available to meet the same risk, a choice must be made between them; and that if it cannot be shown that the alternative (a control order) would not control the risk, the challenged measure (deprivation) should not be upheld. There is no such onus on the Secretary of State or the Commission. If deprivation is a necessary and proportionate means of controlling the risk, the Secretary of State is entitled to deploy it, whether or not an alternative means might serve just as well. We are, in any event, not satisfied that the imposition of a control order would deal with the long term risk posed by the Appellant as well as deprivation. It would inhibit, although it might not wholly prevent, activities contrary to national security, while it remained in place; but deprivation, as a permanent measure, is more secure. It has the significant advantage of leaving it to the Secretary of State to decide, at a future date, whether the entry into the United Kingdom of the Appellant could be permitted without risk to national security.

Article 3

31. Miss Williams submits that the decision to deprive the Appellant of his citizenship made and notified to him on 14th December 2007 subjected him to a real risk of torture or inhuman or degrading treatment or punishment contrary to Article 3. It is common ground that the Appellant was, at the date when the decision was made, entitled, as against the United Kingdom, to the

benefit of the rights conferred on him by the Convention. So much was also common ground in the proceedings which culminated in the decision of the House of Lords in *R(Al Jedda) v Secretary of State for Defence* [2008] 1 AC 332, subject to the overriding effect of the obligations of the United Kingdom pursuant to UN SCR 1546. Accordingly, if, in making and carrying into effect the deprivation decision, the Secretary of State acted in a way which was incompatible with Article 3, her decision would have been unlawful under section 6(1) Human Rights Act 1998. Miss Williams submits that the lawfulness of the decision is to be judged at the date when it was made and put into effect – i.e. on 14th December 2007. We accept that submission, which accords with the practice and jurisprudence of the Strasbourg Court. In *Saadi v Italy* 37201/06 28th February 2008, the Grand Chamber stated in paragraph 133:

> "With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the contracting state at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court…"

Miss Williams has referred to two cases in which, because the decision had been put into effect before the Court made its ruling, it applied the principle stated in the first cited sentence. In *Vilvarajah v United Kingdom* 14 EHRR 248 at para. 139, the Court stated:

> "In the examination of the nature and extent of the risk involved, and of the contracting state's responsibility in exposing a person to this kind of risk, the Convention organs must primarily analyse the information which was available at the time of the removal or proposed removal, for it is at this stage that the liability of the contracting state is incurred…However, what happens to the asylum seeker on return cannot be wholly ignored as it may cast light on whether the risk has been rightly or wrongly assessed by the contracting state."

In *Mamatkulov vTurkey* [2005] 41 EHRR 25, the Court made its assessment of the Article 3 claim by reference to the date on which the applicants were extradited: para. 74. Mr Swift submits that, as at the date when the deprivation decision was taken and put into effect, there can have been no question of a breach by the United Kingdom of the Appellant's Article 3 rights, because he was then in British detention and so was not at risk of ill treatment by the Iraqi state or by Iraqi non-state actors. That risk, if it existed at all only became real after he was released and flown to Baghdad on 30th December 2007. The liability of a state under the Convention is "incurred by the contracting state, by reason of its having taken action which has as a direct consequence the exposure of an individual to the risk of proscribed ill treatment": *Saadi v Italy* para. 126. There is room for debate about the precise

meaning of "direct", but an effect may not cease to be direct because of the existence of an intermediate step between decision and exposure to risk, such as deportation to an intermediary country: *TI v United Kingdom* 43844/98 ("the Court finds that the indirect removal in this case to an intermediary country, which is also a contracting state, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3…"). In this case, the deprivation decision was one of a series of decisions taken by British authorities within a short space of time which had the intended consequence that he would be released in the territory of Iraq without the rights and protections available to a British citizen. The decision to deprive him of citizenship had the direct consequence of removing those rights and protections at a time when they would have been of value to him and in circumstances intentionally created by British authorities.

32. In paragraphs 15 to 19 of his fourth witness statement and in paragraphs 1 to 5 of his sixth witness statement, the Appellant sets out his account of what happened to him between his release on 30th December 2007 and his departure for Turkey at the end of January 2008 and of what he claimed to have feared at the hands of the Iraqi authorities and of non-state actors within Iraq. We accept that after being flown to Baghdad, he travelled the next day to Kirkuk, the place of his birth. We accept that he remained there until his departure for Turkey and that he obtained and used a false Iraqi identification card to facilitate his departure. We do not, however, accept as true his claim that he left Iraq because of fear of death or ill treatment at the hands of Shia or Kurdish militias. Nor do we accept that, merely because he was a Sunni Arab living in Kirkuk he faced a serious and individual threat to his life or person, such as to bring into question the sufficiency of protection afforded to him by the Iraqi state. The first conclusion is based on two factors; our findings as to the Appellant's credibility, especially when the evidence given is self serving; and the fact that he moved freely in and out of Iraq in 2003 and 2004, accompanied by his oldest children and, with them spent a total of about six months there between August 2003 and October 2004. The second conclusion is founded on *KH (Article 15(c)) Qualification Directive) Iraq CG* [2008] UKAIT 00023. *KH* was heard between 28th January and 1st February 2008 and encompasses the period with which we are concerned. There has been no material deterioration since. It is, therefore, unnecessary for us to set out or analyse the objective material considered in *KH* or produced since. The Third Section of the Strasbourg Court reached a similar conclusion in *F.H. v Sweden* 32621/06 20th January 2009.

33. The Appellant maintains that, by reason of his profile, he was at heightened risk. We accept the undisputed objective material that well known sportsmen and/or those believed by reason of their western contacts, to be relatively wealthy, are at greater risk of kidnapping, torture and assassination than ordinary citizens with a lower profile. The Appellant claims that he fits squarely into both categories; but his claims are fanciful. He last played basketball for the Iraqi national team in 1978. Apart from his own claim, there is no evidence or information that anyone outside his immediate family and, perhaps, those with whom he played, would recognise him as such. The lack

of any threat to him as a result of perceived wealth is demonstrated by what he did in 2004: he imported cars and, by local standards, spent freely. He states that in September/October 2004 he took around $10,000 with him, with which he paid a year's rent in advance on a property and furnished it at a cost of $4,000. He contemplated buying a house for $40,000, with a view to re-selling it at a profit: see paragraphs 69 – 74 of his fifth witness statement. It was not fear of kidnapping or worse which prevented him from doing so, but his arrest.

34. The Appellant also claims that he would be at risk of arrest and ill treatment by the Iraqi authorities. We accept that it is possible that he left Iraq for Turkey at least in part because he feared arrest and prosecution by the Iraqi authorities. We do not know what, if any, information they have about him; but such little evidence as he has provided about the issue suggests that they have no interest in him: in paragraph 5 of his witness statement dated 15th May 2008 (but, surprisingly, not produced at the hearing of the preliminary issue to which it relates), he states that his brother-in-law went to the Citizenship and Immigration Office in Kirkuk (the reference to Baghdad was a mistake) to inquire whether it was possible for him to obtain Iraqi identification. He was told that it was not, because he had lost his Iraqi citizenship. After that conversation, the Iraqi Intelligence Services stopped questioning his family about him. There is no doubt that the Iraq authorities were aware of his existence, because six representatives of Iraqi central government sat on the committee which recommended his release from detention in December 2007. Accordingly, if the Appellant did fear arrest by the Iraqi authorities, there is no evidence or information to substantiate that fear, even to the low level of proof applicable in asylum/humanitarian protection/human rights cases.

35. Accordingly, for the reasons stated we are satisfied that there did not exist substantial grounds for believing that, if deprived of British citizenship and released into Iraqi territory, the Appellant would be subjected to proscribed ill treatment. In fact, he was not. Applying the observations of the Strasbourg Court in paragraph 139 in *Vilvarajah v United Kingdom*, subsequent events have shown that, if the risk was assessed when the decision was made, it was rightly assessed. The Appellant is now safely, if perhaps precariously, in Turkey. We do not know what will happen to him if the Turkish authorities insist that he leaves. Given his long history of international travel and relocation, sometimes using false documents, we suspect that if he felt at risk of compulsory departure from Turkey, he would be able to relocate himself to a territory in which he felt safe. However, the consequences of any change in his present circumstances could not legitimately be described as a direct consequence of an action which exposed the Appellant to the risk of proscribed ill treatment, which is the basic test in cases of this kind: *Saadi v Italy* para. 126. They would be incapable of engaging the United Kingdom's responsibility under Article 3.

36. If we had decided that the Secretary of State's decision breached Article 3, we would, nonetheless, not have allowed the appeal. The Appellant has not been subjected to ill treatment. If he endured a risk, it was a risk of an event which did not occur. If section 86(3)(a) Nationality Immigration and Asylum Act

2002 did apply to this appeal, we might have been required to allow the appeal. But because it does not, we conceive that we would have been under no obligation to allow an appeal against a fully justified decision because of a purely technical infringement of section 6 Human Rights Act 1998.

Conclusion

35. For the reasons given, we dismiss this appeal.