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Case No: CO/1802/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2019

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

THE QUEEN
on the application of
Abdullah Muhammad Rafiqul Islam — **Claimant**

- and -

SECRETARY OF STATE FOR
THE HOME DEPARTMENT — **Defendant**

- -

Ramby de Mello (instructed by **Capital Solicitors LLP**) for the **Claimant**
David Blundell (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 26 June 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE PEPPERALL :

1. This claim for judicial review concerns a challenge to a former Home Secretary's decision to deprive a British citizen who joined ISIL of his nationality and seeks orders requiring the Home Office to procure the man's return to the United Kingdom. It raises important issues and is, I was told, the first such case to have come on for hearing before this court. Accordingly, I have taken the unusual step of reserving my decision upon the application for permission to apply for judicial review.

2. By this claim, Abdullah Muhammad Rafiqul Islam seeks to challenge the Home Secretary's deprivation decision in respect of his son, Ashraf Mahmud Islam. The application was considered on the papers by Walker J who refused permission to apply for judicial review. The father now renews his application before me.

THE FACTS

3. In order to avoid confusion, I shall refer in this judgment to the father as Mr Islam and to his son simply as Ashraf. Mr Islam is a British citizen who was born in Bangladesh. He currently lives in Dhaka, Bangladesh.

4. Ashraf was born in London on 6 December 1996. He is a British citizen by birth and lived in some comfort as the only son of a barrister and his wife. He was educated in both the United Kingdom and Bangladesh and appeared to have every advantage in life.

5. In April 2015, the 18-year-old Ashraf was studying A-level law at Nottingham Law Academy in Dhaka when he disappeared. His father tracked him to a hotel in Istanbul. He was, however, 24 hours behind Ashraf and the trail ran cold. The father reported both Ashraf's disappearance and his suspicions that he might have crossed into Syria to the authorities. In the following month, the family's worst fears were confirmed when they learnt that Ashraf had joined ISIL.

6. By a letter dated 17 July 2017, the then Home Secretary, the Rt. Hon. Amber Rudd MP, informed Ashraf that she intended to deprive him of his British citizenship pursuant to section 40 of the British Nationality Act 1981. She wrote:

> "As the Secretary of State, I hereby give notice in accordance with section 40(5) of the British Nationality Act 1981 that I intend to have an order made to deprive you, Ashraf Mahmud Islam, of your British citizenship under section 40(2) of the Act. This is because it would be conducive to the public good to do so.
>
> The reason for the decision is that it is assessed that you are a British/Bangladeshi dual national who has travelled to Syria and is aligned with ISIL. It is assessed that your return to the UK would present a risk to the national security of the United Kingdom.

> In accord with section 40(4) of the British Nationality Act 1981, I am satisfied that such an order will not make you stateless.
>
> Further, I certify that pursuant to section 40A(2) of the British Nationality Act 1981, my decision has been taken in part reliance on information which, in my opinion, should not be made public in the interest of national security and because disclosure would be contrary to the public interest.
>
> I am also giving you notice of your right of appeal against the decision to make a deprivation order, under section 2B of the Special Immigration Appeals Commission Act 1997. Under rule 8(1)(b)(ii) of the Special Immigration Appeals Commission (Procedure) Rules 2003 (as amended) any notice of appeal must be given to the Commission no later than 28 days after you have been served with the notice. I attach an appeal form in case you wish to exercise this right.
>
> The order under section 40(2) of the British Nationality Act 1981 depriving you of your British citizenship will be made after you have been served with this notice. I will endeavour to ensure a copy is served on you."

7. Ms Rudd's letter was sent to Ashraf's family home in Bangladesh, being his last-known address. It was received by the father on 22 July 2017.

8. After years of silence, Mr Islam heard from his son in May 2018 when a message was conveyed to him through the offices of the International Red Cross. By then, Ashraf was detained with other ISIL fighters in a military prison in Kurdish-controlled north-eastern Syria. By a letter dated 26 April 2018, Ashraf sought his father's assistance. He wrote:

> "Please do whatever you can and contact whoever you can to help. It's been four months for me here and no one knows what's happening."

9. On 13 July 2018, the father lodged an appeal with the Special Immigration Appeals Commission ("SIAC") seeking to appeal against the Home Secretary's decision. SIAC immediately identified that there were issues as to whether the appeal had been properly instituted and whether it was in time. It therefore invited further submissions.

10. By a written decision dated 2 October 2018, the Chairman of SIAC, Elisabeth Laing J, rejected the appeal. She held that there was no evidence that Ashraf knew about the Home Secretary's decision or that he had given instructions to bring an appeal. Accordingly, the appeal was not properly brought within rule 9 of the Special Immigration Appeals Commission (Procedure) Rules 2003. Further, even if the father had been entitled to bring an appeal on his own behalf, he had delayed for nearly a year since service of the deprivation decision in Bangladesh. Accordingly, his appeal was out of time. The Chairman made clear, however, that her decision did not prevent Ashraf from seeking to pursue his own appeal once there was evidence that he knew about the Home Secretary's decision and that he had expressly authorised the bringing of an appeal.

11. Capital Solicitors LLP requested that the decision be reconsidered at a hearing. On 22 March 2019, Elisabeth Laing J directed that the oral hearing would only proceed in the event that the solicitors confirmed that they were instructed by Ashraf and that they had his instructions to proceed with the reconsideration hearing. Since the solicitors did not have instructions from Ashraf, they were not able to pursue the matter.

12. Meanwhile, Ashraf had been interviewed by ITV News. He confirmed to journalists that he had joined ISIL and that he had mixed with other British jihadis. With masterful understatement, he said that he had made "a mistake", that he wanted to "come home" and that he would be willingly imprisoned in a British prison.

13. The father's solicitor, Syed Ahmed, says that Mr Islam does not know whether his son was a combatant. In the detailed grounds, the father asserts his own belief that his son was not involved in any armed conflict. Such belief does not, however, appear to have any proper evidential basis and would appear to be rooted more in hope than hard fact. Indeed, Mr Ahmed notes in his evidence that, in his press interviews, Ashraf asked for forgiveness for having joined as a "foreign fighter".

14. The position in respect of former ISIL combatants remains fluid. Some countries, notably France, have agreed to take back their nationals. The United States is seeking to prosecute some of the most notorious ISIL members suspected of involvement in the beheading of Americans in its federal courts. Other countries, such as the United Kingdom, have not taken steps to repatriate their nationals. Indeed, where a person has dual nationality, the British response has been to deprive them of their British citizenship.

15. The evidence before me is that, if not taken back by their own countries, the Kurds are likely to hand-over the former ISIL combatants in their custody to either the Iraqi or Syrian authorities for trial. Combatants not taken by either Iraq or Syria may well be tried by an ad hoc tribunal set up by the Kurdish group holding them. Conviction of involvement as an ISIL combatant by the Iraqi or Syrian courts or by a tribunal established by the non-state actors in Kurdish-controlled Syria is likely to lead to the death penalty.

16. Mr Ahmed asserts that Ashraf does not have a Bangladeshi passport and that Bangladesh will not take Ashraf back. In his evidence, he relies on public statements made by the Bangladeshi government in respect of the well-publicised case of Shamima Begum. Bangladesh has publicly asserted that Ms Begum had not even visited the country. If that is right, then the position is of course different in the case of Ashraf since he was living and studying in Bangladesh immediately before travelling to Syria. There is, however, no evidence as to Bangladesh's position in respect of Ashraf.

JUDICIAL REVIEW

17. On 2 May 2019, Mr Islam filed a claim seeking permission to apply for judicial review against the former Home Secretary's decision of 17 July 2017. The detailed grounds set the net somewhat wider:

    17.1 The core complaint remains the deprivation decision and the Secretary of State's alleged failure to implement a "proper policy" in relation to the deprivation of citizenship of British nationals who are overseas and at real risk of treatment in breach of their human rights.

    17.2 Complaint is also made that the Home Office served the notice in Bangladesh. It is argued that the Home Secretary had no power to issue the decision while Ashraf was not in the United Kingdom. The father argues that maintaining the deprivation decision while Ashraf is detained overseas by a non-state armed group is unreasonable, arbitrary and disproportionate. He also complains that the Secretary of State failed to take all reasonable steps to bring the deprivation decision to Ashraf's attention in order that he could appeal to SIAC.

    17.3 Further, the father complains about the Home Secretary's failure to facilitate or take proper steps to return Ashraf to the United Kingdom.

18. The primary relief sought is the quashing of the deprivation decision. The father also seeks:

    "6) An order directing the [Home Secretary], his servants or agents (including the Foreign Office) to locate and facilitate the Claimant's son's return or admission to the UK on the basis that he is a British/Union citizen and/or for the purposes [of] allowing him to present his appeal to SIAC.

    7) An order directing the [Home Secretary], his servants or agents (including through the Foreign Office) to take all reasonable steps to arrange communication contact between the Claimant, the Claimant's solicitors and his son."

PRELIMINARY MATTERS

19. By its Acknowledgment of Service, the Home Office takes three preliminary points:

    19.1 Standing: It disputes Mr Islam's standing to challenge the deprivation decision. It argues that any claim should be made by Ashraf and not his father.

    19.2 Time: This being a challenge to a decision made on 17 July 2017, the Home Secretary contends that it is obviously out of time.

    19.3 Alternative remedy: Further, the Home Secretary argues that Ashraf has an alternative remedy, namely an appeal against the deprivation decision to SIAC.

20. In my judgment, these points are not sufficient of themselves to determine the entirety of this application for judicial review.

STANDING

21. I distinguish between two different types of claim argued in the grounds:

21.1 The deprivation decision:

a) This was a decision directly in respect of Ashraf Islam. He is the obvious claimant.

b) The father is not, however, a "meddlesome busybody" (to use the expression coined by Sir John Donaldson MR in R v. Monopolies & Mergers Commission, ex parte Argyll Group plc [1986] 1 W.L.R. 763, at 773), but a loving father who is very deeply affected by the issues that he seeks to litigate. While it would be open to the court at a final hearing of this claim to deny Mr Islam any relief on the basis that he lacked standing, I do not consider that it would be appropriate to shut him out from arguing these serious issues purely on the basis of standing at the permission stage.

21.2 The policy grounds: Mr Islam's claim is, however, somewhat broader. In my judgment, he plainly has a proper interest in challenging the alleged policy of inaction in repatriating British ISIL suspects.

TIME

22. Rule 54.5 of the Civil Procedure Rules 1998 provides that a claim for judicial review must be filed "promptly" and, in any event, within 3 months after the grounds first arose. If this were simply a judicial review against a decision made on 17 July 2017 then it would plainly be badly out of time. This is not, however, the position:

22.1 First, the claim also seeks to challenge the continuing failure to take any steps to repatriate Ashraf and the continuing lack of consular assistance. Such claim is not out of time.

22.2 Secondly, on the unusual facts of this case, I should not refuse permission purely on the basis of time even if this claim were limited to a challenge to the deprivation decision:

a) While, like Elisabeth Laing J, I infer that Mr Islam knew of the deprivation decision by the end of July 2017, he did not at that stage have any information as to his son's whereabouts. He had last heard from him two years earlier and no doubt feared that he had been killed.

b) The father next heard from Ashraf in May 2018. Upon doing so and receiving his son's plea for assistance through the Red Cross, Mr Islam brought appeal proceedings in SIAC. It is difficult to criticise that decision when the Home Secretary's own case is that judicial review is inappropriate because of the availability of an alternative remedy through SIAC.

c) These proceedings were brought promptly upon SIAC's decision that it could not consider an appeal pursued by Mr Islam upon behalf of his son.

ALTERNATIVE REMEDY

23. Ashraf plainly has a right of appeal to SIAC. The Commission has already ruled that his father does not and accordingly Mr Islam does not have an alternative remedy. Further, the father's arguments about a duty to repatriate Ashraf are not matters for SIAC.

THE SUBSTANTIVE ISSUES

24. Accordingly, I turn to consider Mr Islam's claims upon their merits. In doing so, I regret that the Home Secretary chose not to assist the court with any substantive arguments. Indeed, at paragraph 40 of the Acknowledgment of Service, the Home Secretary simply asserted:

> "The Claimant's substantive arguments have no merit. But for the reasons set out above [namely the arguments of standing, time and alternative remedy], the Secretary of State does not further respond to them here."

THE DEPRIVATION DECISION

The statutory framework

25. Section 40(2) of the British Nationality Act 1981 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."

26. The Home Office guidance "Deprivation and Nullity of British citizenship" explains, at paragraph 55.4.4, that conduciveness to the public good means:

> "depriving in the public interest on the grounds of involvement in terrorism, espionage, serious organised crime, war crimes or unacceptable behaviours"

27. Such power is, however, subject to ss.40(4), (4A) and (5), which provide:

> "(4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.
>
> (4A) But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if–
>
> (a) the citizenship status results from the person's naturalisation,
>
> (b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands or any British overseas territory, and
>
> (c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.

(5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying –

(a) that the Secretary of State has decided to make an order, and

(b) the reasons for the order, and

(c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997.

Conducive to the public good

28. Article 7(1) of the European Convention on Nationality 1997 provides:

"A State Party may not provide in its internal law for the loss of its nationality ex lege or at the initiative of the State Party except in the following cases:

(a) voluntary acquisition of another nationality;

(b) acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant;

(c) voluntary service in a foreign military force;

(d) conduct seriously prejudicial to the vital interests of the State Party;

(e) lack of a genuine link between the State Party and a national habitually residing abroad;

(f) where it is established during the minority of a child that the preconditions laid down by internal law which led to the ex lege acquisition of the nationality of the State Party are no longer fulfilled;

(g) adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents."

29. Mr Islam argues that the test in s.40(2) unlawfully waters down the test in Article 7(1)(d). Without seeking to decide that point, I am prepared for the purposes of this judgment to read s.40(2) down so that it is compatible with Article 7(1). Even doing so, I consider that it is not properly arguable that Ashraf's voluntary involvement in the terrorist group ISIL was not "conduct seriously prejudicial to the [UK]'s vital interests". Indeed, it might in any event qualify as voluntary service in a foreign military force.

Statelessness

30. Since Ashraf was a British citizen by birth, Ms Rudd could not, and did not purport to, make the deprivation decision under s.40(4A). Accordingly, the Home Secretary's power to make a deprivation decision was subject to s.40(4), which reflects the United Kingdom's obligations pursuant to Article 4 of the 1997 Convention to avoid "statelessness".

31. By this claim, Mr Islam argues that Ashraf has been rendered stateless. While there is no evidence before me as to Bangladesh's attitude towards Ashraf, Mr Islam's

argument is supported by Mr de Mello's careful analysis of the applicable Bangladeshi law.

32. This is not, however, an issue for this court. If Ashraf has been rendered stateless, then that is a proper ground of appeal against the deprivation decision that can be considered by SIAC. There would therefore be an effective alternative remedy, namely an appeal by Ashraf himself in the event that he wishes to challenge the Home Secretary's decision.

33. Even if it were a matter for this court, there is no arguable ground for challenging the Home Secretary's decision that Ashraf has been rendered stateless in the absence of evidence as to Bangladesh's position.

34. In any event, as Mr Blundell observed, a successful challenge to the deprivation decision will not of itself secure Ashraf's release or his return to the United Kingdom. He is being held prisoner and can only travel back to Britain if he is first released by the Kurds and then freely allowed by the Syrian authorities to leave the country.

Territorial limits of s.40

35. Regulation 10 of the British Nationality (General) Regulations 2003 provides:

> "(1) Where it is proposed to make an order under section 40 of the Act depriving a person of a citizenship status, the notice required by section 40(5) of the Act to be given to the person may be – …
>
> (f) Sent by post, whether or not delivery or receipt is recorded; …
>
> (3) Where the notice is sent under any one or more of paragraphs (1)(c) to (g), it must be sent –
>
> (a) to the address for correspondence provided by the person's representative; or
>
> (b) where no such address has been provided, the person's last known address or the address of their representative.
>
> (4) Where –
>
> (a) the person's whereabouts are not known; and
>
> (b) either –
>
> (i) no address has been provided for correspondence and the Secretary of State does not know of any address which the person has used in the past; or
>
> (ii) the address provided to the Secretary of State is defective, false or no longer in use by the person; and
>
> (c) no representative appears to be acting for the person or the address provided in respect of that representative is defective, false or no longer used by the representative,

the notice shall be deemed to have been given when the Secretary of State enters a record of the above circumstances and places the notice or a copy of it on the person's file.

(5) A notice required to be given by section 40(5) of the Act is, unless the contrary is proved, deemed to have been given – …

(e) where the notice is sent by post from or to a place outside the United Kingdom, on the twenty-eighth day after the day on which it is sent; …"

36. Accordingly:

36.1 Notice of a proposed deprivation decision can be sent by post: reg. 10(1)(f).

36.2 Where notice is sent by post, it must be sent to the person's last-known address unless the person or his representative has provided an alternative address for correspondence: reg. 10(3).

36.3 Since it is the father's own case that Ashraf's last-known address was at the family home in Dhaka and there is no evidence that an alternative address was provided, the Home Secretary was therefore required to send her decision to Dhaka.

37. Relying on the decision of the House of Lords in R (Al-Skeini) v. Secretary of State for Defence [2008] 1 A.C. 153 that domestic legislation will not generally operate on its subjects beyond the country's territorial limits, Mr Islam argues that the British Nationality Act 1981 does not apply to a British subject outside the United Kingdom. The example given by Lord Rodger in Al-Skeini, at [48], illustrates the point: a workman killed while working for a British company in Malta could not rely on domestic legislation as to workplace safety. Section 40 of the British Nationality Act 1981 does not, however, seek to regulate some activity in a foreign territory but removes rights enjoyed by a British citizen, primarily the rights to enter, live, work and study in the United Kingdom.

38. Mr Islam argues that to exercise the power under s.40 while Ashraf was in Syria offends against the United Kingdom's obligations on returnability. He argues that foreign states admit British citizens upon the expectation that they will be readmitted to the UK and that the UK has no right to require another state to accept its "outcasts and suspected terrorists" or to relocate them to a third state. He adds that the United Kingdom will be obliged by international law to readmit its citizens if they are deported. Further, Mr Islam argues that regulation 10 should be construed such that it does not apply extra-territorially or, alternatively, that the regulation is ultra vires.

39. There is, in my judgment, no merit in these arguments:

39.1 The construction point is hopeless. Regulation 10(5)(e) clearly envisages that notice can be given to a citizen while he or she is overseas.

39.2 There is nothing in s.41, under which the regulations were made, or otherwise in the 1981 Act to prevent notice from being served on a citizen who is overseas.

39.3 There is no doubt that, however undesirable it might be to have former ISIL combatants and supporters return to the United Kingdom, the Home Secretary's power to deprive such persons of their British citizenship is limited by the overarching principle in both domestic and international law that, save where s.40(4A) applies, no one can thereby be rendered stateless. Thus, the safety valve of s.40(4) prevents the power from being exercised so as to render a citizen stateless. If there are grounds for arguing that Ashraf will be rendered stateless then, as I have already observed, that is a matter that SIAC will consider on any appeal that he brings against the deprivation decision.

39.4 Syria has not attempted to deport Ashraf, still less has the United Kingdom refused to accept Syria's right to deport him to the UK. If Syria seeks to deport Ashraf and Bangladesh will not take him, then, arguably, the UK may have to take him. That point has not, however, arisen.

39.5 The possibility that Syria might in due course seek to deport Ashraf and the further possibility that Bangladesh might refuse to take him do not lead to the conclusion that regulation 10 is ultra vires. As I have already observed, the United Kingdom will have to deal with that situation if it arises but it does not render unlawful the exercise of the Home Secretary's powers under s.40(2) while Ashraf was overseas.

40. By reg. 10(5)(e), notice was therefore deemed, unless the contrary is proved, to have been given to Ashraf on 14 August 2017, being 28 days after the decision was posted to him in Bangladesh. At paragraph 21 of his detailed grounds, the father asserts his belief that Ashraf is aware of the deprivation decision. If so, then it may be that effective notice has been given. There must, however, remain a very real possibility that Ashraf does not know about the decision. Correspondence through the International Red Cross into a military prison in Syria is plainly difficult and subject to censorship. Certainly, there is nothing in the limited correspondence between father and son that has been placed before the court to indicate that Ashraf knows about the decision. Whether he does or not, it is not arguable that the Home Secretary acted unlawfully in seeking to give him notice at his last-known address.

Discrimination

41. Mr Islam argues that the deprivation decision discriminates against dual nationals and is therefore incompatible with Article 5 of the European Convention on Nationality 1997 and Articles 8 & 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). Clearly s.40 discriminates against dual nationals in the sense that the section generally prevents the Home Secretary from rendering anyone stateless. That is, however, a plainly justifiable distinction in order that the United Kingdom can exercise the power of deprivation while complying with the obligation under Article 4 of the 1997 Convention not to render anyone stateless. In any event, being a dual national is not, of itself, a protected characteristic.

LACK OF ACTION TO REPATRIATE ASHRAF

42. Mr Islam variously asserts an obligation to repatriate Ashraf in order:

42.1 that he can face justice in the United Kingdom;

42.2 to protect him from breaches of his human rights; and

42.3 in order effectively to challenge the deprivation decision.

43. It is not clear how the Home Secretary is under any legal duty to make arrangements to repatriate Ashraf in order that he can be tried in the United Kingdom. Ashraf got himself to Syria and might well have committed serious criminal offences in the Middle East. However repugnant his possible fate might be to British values, any British citizen who commits serious crimes abroad is subject to local justice and cannot simply demand that the British government extricates him from a situation of his own making in order that he can face the more palatable prospect of justice in a British court. The British government routinely urges foreign states to respect the human rights of its citizens who are suspected or convicted of crimes overseas and, in particular, argues against the imposition of the death penalty anywhere in the world. The United Kingdom cannot, however, properly insist that foreign states allow our own courts to try British citizens for offences committed abroad. Indeed, the government's policy was stated in a debate in the House of Commons on 17 January 2000 as follows:

> "British nationals detained abroad are subject to local jurisdiction wherever they commit their crimes. We respect the right of other countries to decide their own sentencing guidelines in accordance with their laws, customs and culture – just as we would ask them to do for us."

Unsurprisingly, it is not alleged that such policy is unlawful.

44. It is argued that it is unlawful for the United Kingdom to delegate the responsibility for prosecution to a non-state actor, namely any tribunal set up by the Kurds holding Ashraf, since "to do so would offend against the principle of sovereignty of the Syrian regime." It is somewhat ironic that such argument should be taken since the relief Mr Islam seeks is to ensure that his son faces British and not Syrian justice for crimes that might well have been committed on Syrian soil.

45. Further, Mr Islam argues that the fact that Ashraf is in Syria does not exclude the territorial reach of Article 6 of the ECHR, and that the Home Office would be in breach of Article 6 in the event that it encouraged a prosecution by a non-state actor which would not afford the basic requirements of a fair trial before an impartial and independent tribunal. There is, however, no evidence that the United Kingdom, still less the Home Secretary, has encouraged the Kurds to prosecute Mr Islam rather than handing him over to the state courts.

46. There is a more fundamental problem with the Article 6 claim. Article 1 of the ECHR requires contracting states to "secure to everyone within their jurisdiction the rights and freedoms" defined in the Convention. Absent evidence of some exercise of authority or control over Ashraf by British diplomatic or consular agents in Syria,

it is not properly arguable that Article 6 imposes any obligation on the United Kingdom in respect of possible criminal proceedings or the possible imposition of the death penalty in the Middle East: R (Sandiford) v. Secretary of State for Foreign & Commonwealth Affairs [2014] UKSC 44; [2014] 1 W.L.R. 2697; Al-Skeini v. United Kingdom (2011) 53 EHRR 589, GC; R (Maha El Gizouli) v. Secretary of State for the Home Department [2019] EWHC 60 (Admin), at [59].

47. The question of requiring the Home Secretary to give Ashraf leave to enter the United Kingdom in order to prosecute his appeal before SIAC is somewhat academic:

47.1 There is no appeal currently before SIAC.

47.2 Ashraf has not sought, and is not currently in a position to seek, to enter the United Kingdom. Consequently, the Home Secretary has not refused leave to enter in order to allow Ashraf to prosecute any such appeal.

In any event, as the Court of Appeal demonstrated in R (W2) v. Secretary of State for the Home Department [2017] EWCA Civ 2146; [2018] 1 W.L.R. 2380, an appeal to SIAC pursuant to s.2 of the Special Immigration Appeals Commission Act 1997 against the refusal of such leave provides an effective alternative remedy. It is not therefore a matter for this court.

48. Further, any complaint that the British government has failed to provide consular assistance in order to extract Ashraf from detention in Syria is a complaint that should be made, if it is to be pursued at all, to the Foreign and Commonwealth Office. Contrary to the assertions quoted at paragraph 18 above, the Foreign Secretary and his staff do not work for the Home Office. While this is not the place to opine upon the merits of a claim that has not been brought, the Court of Appeal rejected the claim of a British citizen captured in Afghanistan and detained without trial in Guantanamo Bay that the British Foreign Secretary should be compelled to make representations to the United States government in R (Abassi) v. Secretary of State for Foreign & Commonwealth Affairs and the Secretary of State for the Home Department [2002] EWCA Civ 1598.

49. Even if it were arguable that any policy operated by the FCO of refusing to assist British nationals who became involved in the ISIL insurgency is unlawful, it cannot sensibly be argued that the FCO, still less the Home Secretary, is under some duty to assist non-British nationals. Accordingly, Ashraf would first have to challenge successfully the deprivation decision before he could seek to argue his case for consular assistance.

MR ISLAM'S ARTICLE 8 CLAIM

50. Finally, Mr Islam argues that the deprivation notice has breached his own rights to private and family life pursuant to Article 8 of the ECHR.

51. A parent's claim based on Articles 3 and 8 was roundly rejected by the Divisional Court in R (Maha El Gizouli) v. Secretary of State for the Home Department [2019]

EWHC 60 (Admin). The case concerned a challenge to then Home Secretary's decision to give mutual legal assistance to the United States in the cases of Shafee El Sheikh and Alexanda Kotey, two British jihadis dubbed part of the "Beatles" by the press for their alleged involvement in the video-recorded beheading of a number of British and American prisoners, without seeking the customary assurance that the death penalty would not be imposed. In rejecting the claim based on El Sheikh's mother's human rights, Lord Burnett of Maldon CJ and Garnham J said:

> "136. Even if the ECHR contemplates a parent's claim based on the treatment of the child outside the jurisdiction of the ECHR, the parent must show the existence of 'special factors'. Those must give the suffering a dimension and character distinct from the emotional stress which is inevitably caused to relatives of the victim of a serious human rights violation.
>
> 137. In our view such factors are absent in this case. First, Mr El Sheikh is an adult, not a child, who had left the family home long before the events in question. Secondly, he chose to leave his home in order to engage in jihad. He chose to put his life at risk in one of the most violent conflicts in recent history. Thirdly, the claimant has had only limited contact with her son since 2012. The circumstances could scarcely be further removed from those in cases like Mayeka where the child was five years old and was detained and deported alone by the contracting state.
>
> 138. The claim based on article 3 has no foundation.
>
> 139. In our view, the case fares no better under article 8. The claimant and her son have been apart since 2012 entirely as a result of his actions. His life has been in peril as a result of his own actions. The claimant argues that because the concept of private life includes both 'a person's physical and psychological integrity', her suffering breaches her article 8 rights. The prospect of her son's prosecution, possible conviction and execution in the US causes her psychological suffering.
>
> 140. The claimant cannot make good any claim that her son's treatment violates the ECHR. She must rely upon a positive obligation on the state to refrain from taking measures which cause her intense distress. Yet there is no 'direct and immediate link' between the measures and the claimant's private and/or family life (Botta v. Italy [1998] 26 EHRR at [33]-[35]). As Sir James submits, here there are various causes for the claimant's distress, most noticeably the voluntary actions of her son. We reject the suggestion that the failure to secure assurances, when the alternative would leave Mr El Sheikh with an uncertain future in Syria or propel him to Guantanamo Bay, constitutes such a direct and immediate link for the purposes of article 8."

52. So too here, Mr Islam does not have an arguable human rights claim:

    52.1 Ashraf is in detention in Syria and at risk of trial in the Middle East and the possible imposition of the death penalty entirely because of his own actions in travelling to Syria and engaging in jihad.

    52.2 He has no viable claim pursuant to the ECHR.

52.3 The only action taken by the Home Secretary in this case has been to deprive Ashraf of his British citizenship. He is not in peril in Syria because of that decision but because he is being held on suspicion of involvement in the ISIL insurgency.

52.4 There are no special factors that gives rise to an arguable breach of Mr Islam's Article 8 rights.

CONCLUSION

53. Accordingly, there is no merit in Mr Islam's proposed claim for judicial review and I refuse this renewed application for permission.