Neutral Citation Number: [2024] EWCA Civ 172

Case No: CA-2023-001658

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**Sir Ross Cranston sitting as a High Court Judge**
**[2023] EWHC 1885 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 February 2024

**Before :**

**SIR GEOFFREY VOS, MASTER OF THE ROLLS**
**LORD JUSTICE SINGH**
and
**LADY JUSTICE WHIPPLE**

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**Between :**

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| **(1) DALSTON PROJECTS LIMITED**<br>**(2) SERGEI GEORGIEVICH NAUMENKO**<br>**(3) PRISM MARITIME LIMITED** | **Claimants/ Appellants** |
| **- and –** | |
| **SECRETARY OF STATE FOR TRANSPORT** | **Defendant/ Respondent** |

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**John Bethell** (instructed by **Jaffa & Co**) for the **Claimants/Appellants**
**Sir James Eadie KC, Jason Pobjoy and Emmeline Plews** (instructed by the **Treasury Solicitor**) for the **Defendant/Respondent**

Case No: CA-2023-001813

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**Mr Justice Garnham**
**[2023] EWHC 2121 (Admin)**

Royal Courts of Justice

Strand, London, WC2A 2LL

**Before :**

**SIR GEOFFREY VOS, MASTER OF THE ROLLS**
**LORD JUSTICE SINGH**
and
**LADY JUSTICE WHIPPLE**

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**Between :**

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| **EUGENE SHVIDLER** | **Claimant/ Appellant** |
| **- and -** | |
| **SECRETARY OF STATE FOR FOREIGN, COMMONWEALTH AND DEVELOPMENT AFFAIRS** | **Defendant/ Respondent** |

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**Lord Anderson of Ipswich KBE KC and Malcolm Birdling** (instructed by **Peters & Peters Solicitors LLP**) for the **Claimant/Appellant**
**Sir James Eadie KC, Jason Pobjoy, Rayan Fakhoury and Emmeline Plews** (instructed by **the Treasury Solicitor**) for the **Defendant/Respondent**

Hearing dates: 17-19 January 2024

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# Approved Judgment

This judgment was handed down remotely at 10 a.m. on 27 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Lord Justice Singh:**

Introduction

1. These two appeals both concern decisions that were taken by the Respondents under the Russia (Sanctions) (EU Exit) Regulations 2019 (SI 2019 No 855) ("the 2019 Regulations"), which were made under the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA"). Both appeals arise from claims that were brought in the High Court under section 38 of SAMLA.

2. Before I turn to each appeal separately, I will address two questions which are common to both. First, what principles should a first-instance court apply when reviewing a decision of the executive on grounds of proportionality under the Human Rights Act 1998 ("HRA")? Secondly, what principles should an appellate court apply when reviewing a decision of a lower court in such a case? Neither of these questions is new. Far from it: a great deal has been said about them both by the Appellate Committee of the House of Lords and the Supreme Court. Nevertheless, as the judgment of the High Court in *Shvidler* illustrates, the principles are not always as well understood as they need to be and so it will be helpful to summarise them here, to assist first-instance and appellate courts from hereon.

The Human Rights Act 1998

3. Section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, that is one of the rights in the European Convention on Human Rights which are set out in Schedule 1 to the HRA.

4. The relevant Convention rights for present purposes are Article 1 of the First Protocol ("A1P1") and Article 8.

5. A1P1 relates to the protection of property and states:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interests or to secure the payment of taxes or other contributions or penalties."

6. Article 8 concerns the right to respect for private and family life and states:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

7. Section 7(1) of the HRA provides that a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may (a) bring proceedings against the authority in the appropriate court or tribunal, or (b) rely on the Convention rights concerned in any legal proceedings, provided he is (or would be) a "victim" of the unlawful acts.

8. Accordingly, Parliament has made violation of a Convention right, contrary to section 6(1) of the HRA, one of the grounds upon which a claim for judicial review can be brought. Section 38(4) of SAMLA provides that: "In determining whether the decision should be set aside, the court must apply the principles applicable on an application for judicial review." Accordingly, breach of section 6(1) of the HRA is a ground for review under section 38 of SAMLA.

The principle of proportionality

9. The question whether or not an act of a public authority is incompatible with a Convention right will often depend on whether it complies with the principle of proportionality. That principle has been explained in the authorities as having four limbs, as set out by Lord Reed JSC in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700 ("*Bank Mellat*"), at para 74. It is necessary to determine: (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right; (2) whether the measure is rationally connected to the objective; (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (4) whether the measure's contribution to the objective outweighs the effects on the rights of those to whom it applies. The fourth limb is sometimes referred to as the "fair balance" issue or "proportionality stricto sensu", i.e. in the strict sense. Although Lord Reed was in the minority in *Bank Mellat*, there was nothing in his formulation of the concept of proportionality with which Lord Sumption JSC (who gave the main judgment for the majority) disagreed: see para 20.

10. As Lord Reed made clear at paras 72-73, the origins of the four-limb test in *Bank Mellat* can be found in the judgment of Dickson CJ in the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103 ("*Oakes*") and the Judicial Committee of the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 ("*de Freitas*"), at page 80 (Lord Clyde). The fourth limb was to be found in *Oakes* but had been (apparently inadvertently) omitted in *de Freitas*. It was reinstated by the House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 ("*Huang*"), at para 19 (Lord Bingham).

The role of the first-instance court when assessing proportionality

11. It is well-established that the question whether an act is incompatible with a Convention right is a question of *substance* for the court itself to decide; the court's function is not the conventional one in public law of reviewing the *process* by which a public authority reached its decision: see e.g. *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; [2007] 1 WLR 1420, at paras 13-15 (Lord Hoffmann). As Lord Hoffmann put it at the end of para 15:

> "… the question is … whether there has actually been a violation of the applicant's Convention rights and not whether the decision-maker properly considered the question of whether his rights would be violated or not."

12. I have some sympathy with first-instance judges such as Garnham J in *Shvidler* because what the appellate courts have sometimes said may be apt to mislead unless read very carefully. By way of example in *R (Al Rawi and Others) v Secretary of State for Foreign and Commonwealth Affairs and Another* [2006] EWCA Civ 1279; [2008] QB 289, in a well-known passage at para 148, Laws LJ (when considering issues touching both the conduct of foreign relations and national security) said that:

> "The court's role is to see that the Government strictly complies with all formal requirements, and rationally considers the matters it has to confront. Here, because of the subject matter, the law accords to the executive an especially broad margin of discretion."

13. The reason why that passage may be apt to mislead is that the first sentence may give the impression that the court is confined to asking whether the Government has "rationally considered" the matters which it must confront, whereas the second sentence makes it clear that the true principle is that the executive is afforded an "especially broad margin of discretion". So long as it is understood that the court's function is still to decide for itself whether there has been compliance with the principle of proportionality, and not simply to apply a standard of rationality, the first-instance court will not fall into error.

14. The fact that the court is the arbiter of proportionality does not mean that there is no room for appropriate respect and weight to be given to the views of the executive or legislature. This was made clear by Lord Sumption in *Bank Mellat*, at para 21, where he referred to the need, in the context of that case, to allow "a large margin of judgment"; and by Lord Reed, at paras 70-71, where he said that the "intensity of review varies considerably according to the right at issue and the context in which the question arises".

15. Lord Sumption repeated this important point in *R (Lord Carlile of Berriew and Others) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] AC 945 ("*Lord Carlile*"), at para 20. As Lord Sumption said at para 30, it is preferable to avoid the expression "merits review". At para 31, he made it clear that in human

rights cases a court of review is not entitled to substitute its own decision for that of the constitutional decision-maker: "However intense or exacting the standard of review in cases where Convention rights are engaged, it stops short of transferring the effective decision-making power to the courts." A similar point had been made by Lord Bingham in *Huang*, at para 13: "although the Convention calls for a more exacting standard of review, it remains the case that the judge is not the primary decision-maker."

16. As Lord Sumption continued in *Lord Carlile*, at para 34, various expressions have been used in the case law to describe the quality of the judicial scrutiny called for when considering the proportionality of an interference with a Convention right: "heightened", "anxious", "exacting" (that being the word he himself had used in *Bank Mellat*) and so on. But as he said, these expressions are necessarily imprecise because their practical effect will depend on the context; in particular, the significance of the right, the degree to which it is interfered with, and the range of factors capable of justifying that interference, which may vary from none at all (Article 3) to very wide-ranging considerations (Article 8).

17. In my view, the position was conveniently set out by Lord Sales JSC in *Director of Public Prosecutions v Ziegler and Others* [2021] UKSC 23; [2022] AC 408 ("*Ziegler*"), at para 130:

> "It is well established that on the question of proportionality the court is the primary decision-maker and, although it will have regard to and may afford a measure of respect to the balance of rights and interests struck by a public authority such as the police in assessing whether the test at stage (iv) is satisfied, it will not treat itself as bound by the decision of the public authority subject only to review according to the rationality standard: see *A v Secretary of State for the Home Department* [2005] 2 AC 68 ('the *Belmarsh* case'), paras 40-42 and 44 (per Lord Bingham of Cornhill, with whom a majority of the nine-member Appellate Committee agreed); *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 11; *R (SB) v Governors of Denbigh High School* [2007] 1AC 100, paras 29-31 (Lord Bingham) and 68 (Lord Hoffmann); and *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, paras 46 (Lord Wilson JSC), 61 (Baroness Hale of Richmond JSC) and 91 (Lord Brown of Eaton-under-Heywood JSC) (Lord Phillips of Worth Matravers PSC and Lord Clarke of Stone-cum-Ebony JSC agreed with Lord Wilson and Baroness Hale JJSC). This reflects the features that the Convention rights are free-standing rights enacted by Parliament to be policed by the courts, that they are in the form of rights which are enforced by the European Court of Human Rights on a substantive basis rather than purely as a matter of review according to a rationality standard, and that the question whether a measure is proportionate or not involves a more searching investigation than application of the rationality test. Thus, in relation to the test of proportionality stricto sensu, even if the relevant decision-maker has had regard to all relevant factors and has reached a decision which cannot be said to be

> irrational, it remains open to the court to conclude that the measure in question fails to strike a fair balance and is disproportionate."

18. Although Lord Sales was in the minority in *Ziegler*, that passage is not, I think, controversial; and it is supported by the authorities cited there.

19. The only part of that passage which perhaps needs clarification is the reference to the court being "the primary decision-maker". When the passage is read as a whole it is clear that Lord Sales was not suggesting that the court is the primary decision-maker in the sense of the person who makes the underlying administrative (or legislative) decision which is under review. As Lord Bingham had said in *Huang*, at para 13, and Lord Sumption had said in *Lord Carlile*, at para 31, the court never has that role, because its function is still one of reviewing the decision of the public authority concerned.

20. That said, the rest of para 130 in Lord Sales's judgment in *Ziegler* makes clear that the standard of review is not the rationality standard. It also makes clear that the issue under the HRA is not a question of process but a matter of substance. Finally, the passage makes clear that, depending on the context, the court may afford a measure of respect to the balance of rights and interests struck by a public authority.

21. It is also well-established in the authorities that the context will include (1) the importance of the right (e.g. in *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 ("the *Belmarsh*" case) the rights were personal liberty and the principle of equality, where there was a "suspect" ground, i.e. nationality); (2) the degree of interference; (3) the extent to which the subject matter is one in which the courts are more or less well placed to adjudicate, both on grounds of institutional expertise (e.g. they are the guardians of due process but are much less familiar with an area such as the conduct of foreign relations or national security) and democratic accountability (e.g. when it comes to social and economic policy, including the allocation of limited resources).

<u>The role of an appellate court when considering a decision on proportionality by a first-instance court</u>

22. The most recent and authoritative statement of the relevant principles to be applied by an appellate court when considering an appeal on the issue of proportionality is to be found in the judgment of Lord Reed PSC in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; [2023] AC 505 ("*Abortion Services*"), where he explained the position as follows, at paras 28-33 (with my emphasis):

> "28. In the course of their discussion of this issue [in *Ziegler*], Lord Hamblen and Lord Stephens stated at para 59: 'Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case'. One might expect that to be the usual position at the

trial of offences charged under section 137 in circumstances where articles 9, 10 or 11 are engaged, if the section is interpreted as it was in *Ziegler*; and that was the only situation with which Lord Hamblen and Lord Stephens were concerned. The dictum has, however, been widely treated as stating a universal rule; and that was the position adopted by counsel for JUSTICE in the present case.

29. That view is mistaken. In the first place, questions of proportionality, particularly when they concern the compatibility of a rule or policy with Convention rights, are often decided as a matter of general principle, rather than on an evaluation of the circumstances of each individual case. Domestic examples include *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53; [2009] 1 AC 287, the nine-judge decision in *R (Nicklinson) v Ministry of State for Justice* [2014] UKSC 38; [2015] AC 657, and the seven-judge decisions in *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening)* [2017] UKSC 51; [2020] AC 869 and *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223.

30. Those cases also demonstrate the related point that **the determination of whether an interference with a Convention right is proportionate is not an exercise in fact-finding**. It involves the application, in a factual context (often not in material dispute), of the series of legal tests set out at para 24 above, together with a sophisticated body of case law, and may also involve the application of statutory provisions such as sections 3 and 6 of the Human Rights Act, or the development of the common law. As Lord Bingham of Cornhill stated in the *Belmarsh* case (*A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, para 44), with the agreement of the majority of a nine-member Appellate Committee of the House of Lords: 'The European Court does not approach questions of proportionality as questions of pure fact: see, for example, *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. Nor should domestic courts do so.'

31. That is reflected in the approach adopted by this court to appeals on questions of proportionality. **In cases such as those cited in the previous two paragraphs, the court (or, in the *Belmarsh* case, the House of Lords) did not accord any deference to the assessment of proportionality by the courts below, or limit its review to an assessment of the rationality of their conclusion, but carried out its own assessment**. The same is true of other appeals concerned with rules or policies in which the facts of the individual case were of greater significance, such as *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700 and *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2022] 2 WLR 133.

32. That also reflects the related fact that the judicial protection of statutory rights by appellate courts is not secured merely by review according to a standard of unreasonableness. Nor does such a restricted review meet the requirements of the Convention, as this court, and the House of Lords before it, have pointed out on many occasions: see, for

> example, the *Belmarsh* case, para 44, where Lord Bingham referred to '[t]he greater intensity of review now required in determining questions of proportionality'.
>
> 33. However, **in *Ziegler*, the majority of the court treated issues of proportionality as being susceptible to appeal by way of case stated only on the basis explained in *Edwards v Bairstow* [1956] AC 14: that is to say, if an error of law was apparent on the face of the case, or if the decision was one which no reasonable court properly instructed as to the relevant law could have reached** (see *Ziegler* at paras 29, 36 and 42-52). In arriving at that approach, Lord Hamblen and Lord Stephens interpreted the decision in *In re B*, in the light of a dictum of Lord Carnwath in *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; [2018] 1 WLR 4079 ("*R (R)*"), para 64, as meaning that appellate courts should adopt a standard of unreasonableness when considering issues of proportionality. ***In re B*,** like the more recent case of *In re H-W (Children)* [2022] UKSC 17; [2022] 1 WLR 3243, **was concerned with the proportionality of a specific care order in the light of the circumstances of a particular child: a one-off decision, affecting only persons involved in the proceedings, which the judge who heard the evidence was particularly well placed to take. The approach adopted by this court was that the appellate court should intervene if the lower court's assessment of proportionality was wrong.** That approach is capable of being applied flexibly, since the test or standard applied in deciding whether a decision is wrong can be adapted to the context, as Lady Arden noted in *Ziegler* at paras 102-103, and as Lord Sales emphasised in his judgment. The case of *R (R)* was a judicial review concerned with the disclosure of particular information about an individual's past in an enhanced criminal record certificate. Lord Carnwath followed the approach laid down in *In re B*, but added the observation cited by Lord Hamblen and Lord Stephens, that 'for the decision to be "wrong" … it is not enough that the appellate court might have arrived at a different evaluation'. It would, however, be a mistake to attach undue significance to a statement which was made by Lord Carnwath in the context of a particular case without reference to a plethora of other cases, some of which have been mentioned in paras 29-31 above, in which a more interventionist approach was adopted by this court in order to enable it to fulfil its constitutional function and to perform its duty under the Human Rights Act."

23. From Lord Reed's analysis it can be seen that there are three categories of case to be found in the authorities.

24. The first category is where an appeal lies on a point of law by way of case stated, typically where an appeal lies to the Divisional Court from the Magistrates' Court. In *Ziegler* a majority of the Supreme Court held that, in that context, an appellate court is not entitled to interfere with the first-instance court's assessment of proportionality (which is a question of fact) except on well-known *Edwards v Bairstow* [1956] AC 14 grounds, i.e. that the lower court has misdirected itself in law or has reached a

conclusion which was not reasonably open to it on the evidence before it. Although the proposition that the assessment of proportionality is a question of fact is open to question, especially in the light of *Abortion Services*, it is not for this Court to say that the majority decision in *Ziegler* was wrong in the context of an appeal by way of case stated. We do not have an appeal by way of case stated before us and, in any event, we are bound by the authority of the Supreme Court.

25. Secondly, there is a group of cases in which the appellate court will not accord any deference to the assessment of proportionality by the courts below but will carry out its own proportionality assessment. That much is clear from authorities such as the *Belmarsh* case, at para 44, where Lord Bingham said:

> "The European Court does not approach questions of proportionality as questions of pure fact: see, for example, *Smith and Grady v United Kingdom*, above. Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect Convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review. So would excessive deference, in a field involving indefinite detention without charge or trial, to ministerial decision. In my opinion, SIAC erred in law and the Court of Appeal erred in failing to correct its error."

26. This second category comprises primarily those cases which concern the compatibility of a rule (including primary legislation, as in *Belmarsh* itself) or policy with Convention rights. It is not concerned with cases where there has simply been an assessment of proportionality on the facts of an individual case. This is important in the present appeals, because in neither *Dalston Projects* nor *Shvidler* is there any challenge to the 2019 Regulations or any policy. What is challenged is simply the application of the relevant legislation to the facts of those two individual cases.

27. Before this Court it was submitted on behalf of the Appellants, in particular by Lord Anderson KC for Mr Shvidler, that the present case, like *Bank Mellat*, falls into this second category. I disagree. It is clear from Lord Reed's analysis, at para 31, that he placed *Bank Mellat* into this second category because, although "the facts of the individual case were of greater significance", it was still "concerned with rules or policies". In my view, we must follow that approach.

28. There is then the third category of cases into which, in my view, the present two appeals fall. They are cases where there has been an assessment of proportionality by a first-instance court on the facts of an individual case and the question is what this Court's role is on an appeal. The starting point is the terms of the Civil Procedure Rules ("CPR").

29. CPR Part 52.6 provides in relation to the permission to appeal test for first appeals as follows:

> "(1) Except where rule 52.7 or Rule 52.7A applies, permission to appeal may be given only where—

(a) the court considers that the appeal would have a real prospect of success; or
(b) there is some other compelling reason for the appeal to be heard."

30. CPR Part 52.21 provides as follows in relation to the hearing of appeals:

"(1) Every appeal will be limited to a review of the decision of the lower court unless—
(a) a practice direction makes different provision for a particular category of appeal; or
(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
(2) Unless it orders otherwise, the appeal court will not receive—
(a) oral evidence; or
(b) evidence which was not before the lower court.
(3) The appeal court will allow an appeal where the decision of the lower court was—
(a) wrong; or
(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.
(4) The appeal court may draw any inference of fact which it considers justified on the evidence. …"

31. The authoritative analysis of how this third category of cases should be treated by an appellate court remains that set out in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 ("*In re B*"), which has been re-affirmed in Lord Reed's analysis in *Abortion Services*, at para 33. In *In re B* the Supreme Court ruled on the appropriate approach to an appeal from a proportionality determination in a care case. The proportionality of an alleged interference with Article 8 rights was in issue. Lord Neuberger PSC, with whom a majority of the Court agreed, explained the position in some detail at paras 80-94. I will set out the salient passages here (with my emphasis):

"84. It is well established that a court entertaining a challenge to an administrative decision, ie a decision of the executive rather than a decision of a judge, must decide the issue of proportionality for itself – see the statements of principle in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, paras 29-30 and 63, and in *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, paras 12-14, 24-27, 31, 42-46 and 89-91. However, this does not mean that an appellate court entertaining a challenge to a judicial decision, as opposed to an executive decision, must similarly decide the issue of proportionality for itself. If it did, it would mean that (subject to obtaining permission to appeal) litigants would be entitled to (or forced to undergo) two separate sequential judicial assessments of proportionality. I do not consider that there is anything in the Strasbourg jurisprudence or in the 1998 Act which suggests that such an entitlement should exist, even where there is a right of appeal.

…

86. I agree with Lord Wilson at para 36 that, subject to the requirements of article 6 of the Convention, it must be a question of domestic law as to how the challenge to proportionality is to be addressed on an appeal. There is, in my view, no reason why the Court of Appeal in a case such as this should not have followed the normal, almost invariable, approach of an appellate court in the United Kingdom on a first appeal, namely that of reviewing the trial judge's conclusion on the issue, rather than that of reconsidering the issue afresh for itself.

87. That this is the normal function of the Court of Appeal is made clear by CPR 52.11 [now 52.21], which states that, save in exceptional cases, every appeal is limited to a review rather than a rehearing and the appeal will be allowed only where the decision of the lower court was "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings in the lower court". The "exceptional cases" are, as a matter of principle and experience, almost always limited to those where the Court of Appeal (i) decides that the judge has gone wrong in some way so that his decision cannot stand, and (ii) feels able to reconsider, or "rehear", the issue for itself rather than incurring the parties in the cost and delay of a fresh hearing at first instance.

88. As I see it, this limitation on the function of an appellate court is based on similar grounds as are set out in paras 53 and 57-61 above - see per Lord Diplock in *Hadmor Productions Ltd v Hamilton* [1983] AC 191, 220 and per May LJ in *EI du Pont* para 94. **If, after reviewing the judge's judgment and any relevant evidence, the appellate court considers that the judge approached the question of proportionality correctly as a matter of law and reached a decision which he was entitled to reach, then the appellate court will not interfere**. If, on the other hand, after such a review, the appellate court considers that the judge made a significant error of principle in reaching his conclusion or reached a conclusion he should not have reached, then, and only then, will the appellate court reconsider the issue for itself if it can properly do so (as remitting the issue results in expense and delay, and is often pointless).

89. Not only is this consistent with the normal practice of an appeal court in this jurisdiction but it is also consistent with good sense. In many cases, and this is one, the trial judge will have seen the witnesses and had a full opportunity to assess the primary facts and to make relevant assessments (I refer again to what Lord Wilson says at paras 41-42). Once one accepts that this means that the appellate court should defer to the trial judge at least to some extent (as Lady Hale rightly does in para 205), then, unless the appellate court is confined to a primarily reviewing function, it will have some sort of half-way house role between review and reconsideration. This would seem to me to be unprincipled and to be liable to cause confusion to actual and potential litigants as well as to the judiciary. Additionally, the introduction of a second layer of judicial assessment of proportionality is likely to lead to increased cost and delay

in many cases. Of course, where the trial judge has not heard oral evidence or where his findings have not depended on his assessment of the witnesses' reliability or likely future conduct, then the appellate court will normally be in as good a position as the trial judge to form a view on proportionality.

…

91. **That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments**. **In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong**. …

92. … However, at least where Convention questions such as proportionality are being considered on an appeal, I consider that, if after reviewing the trial judge's decision, an appeal court considers that he was wrong, then the appeal should be allowed. Thus, a finding that he was wrong is a sufficient condition for allowing an appeal against the trial judge's conclusion on proportionality, and, indeed, it is a necessary condition (save, conceivably, in very rare cases).

93. There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii).

94. As to category (iv), there will be a number of cases where an appellate court may think that there is no right answer, in the sense that reasonable judges could differ in their conclusions. As with many evaluative assessments, cases raising an issue on proportionality will include those where the answer is in a grey area, as well as those where the answer is in a black or a white area. An appellate court is much less likely to conclude that category (iv) applies in cases where the trial judge's decision was not based on his assessment of the witnesses' reliability or likely future conduct. So far as category (v) is concerned, the appellate judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case. However, if, after such anxious consideration, an appellate judge adheres to her view that the trial judge's decision was wrong, then I think that she should allow the appeal." [Emphasis added].

32. As that lengthy citation makes clear, the term "wrong" covers a spectrum: see also *Ziegler*, at paras 102-103 (Lady Arden) and para 131 (Lord Sales); and *Abortion Services*, at para 33 (Lord Reed). Although there is a spectrum, it does not seem to me that the court on appeal can simply substitute its own assessment of proportionality for that of the lower court (as in the second category of cases); nor is it bound by that assessment unless it can say that the lower court has erred in law or its conclusion was not reasonably open to it (as in the first category of cases).

33. What is perhaps missing from the analysis in *In re B* is how the court should deal with an appeal on proportionality where there were disputed facts at first instance. It seems to me that the appellate court should address this in the same way that it does other cases in civil proceedings where there is an appeal and primary facts have been found by the first-instance court. The "review" required in the Court of Appeal clearly does not envisage a re-hearing of the entire case, including finding primary facts again. Nevertheless, when it comes to deciding whether the assessment of proportionality was "wrong", the Court is not, in my view, confined to asking whether the court below erred in principle or whether the conclusion to which it came was reasonably open to it.

34. In cases in which the first-instance court has heard evidence and found facts on the basis of that evidence, a decision will not be said to be wrong unless the tests approved by Lord Mance in *Datec Electronics Holdings v United Parcels* [2007] UKHL 23; [2007] 1 WLR 1325, at para 46 are satisfied:

> "As to the correct approach in an appellate court to findings and inferences of fact made by a judge at first instance after hearing evidence, there was no disagreement between counsel. In *Assicurazioni Generali SpA v. Arab Insurance Group* [2003] 1 WLR 577, Clarke LJ summarised the position, referring also to a passage in a judgment of my own:
>
> > 14. The approach of the court to any particular case will depend upon the nature of the issues kind of case determined by the judge. This has been recognised recently in, for example, *Todd v Adam (trading as Trelawney Fishing Co)* [2002] EWCA Civ 509, Lloyd's Rep 293 and *Bessant v South Cone Incorporated* [2002] EWCA Civ 763. In some cases the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral evidence of the witnesses. In most cases, however, the position is more complex. In many such cases the judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents. In other such cases, the judge will have made findings of primary fact based entirely or almost entirely on the documents. Some findings of primary fact will be the result of direct evidence, whereas others will depend upon inference from direct evidence of such facts.
> >
> > 15. In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court

should be to interfere. As I see it, that was the approach of the Court of Appeal on a 'rehearing' under the Rules of the Supreme Court and should be its approach on a 'review' under the Civil Procedure Rules.

16. Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.

17. In *Todd's* case [2002] 2 Lloyd's Rep 293, where the question was whether a contract of service existed, Mance LJ drew a distinction between challenges to conclusions of primary fact or inferences from those facts and an evaluation of those facts, as follows, at pp 319-320, para 129:

> 'With regard to an appeal to this court (which would never have involved a complete rehearing in that sense), the language of "review" may be said to fit most easily into the context of an appeal against the exercise of a discretion, or an appeal where the court of appeal is essentially concerned with the correctness of an exercise of evaluation or judgment - such as a decision by a lower court whether, weighing all relevant factors, a contract of service existed. However, the references in rule 52. 11 (3) and (4) to the power of an appellate court to allow an appeal where the decision below was "wrong" and to "draw any inference of fact which it considers justified on the evidence" indicate that there are other contexts in which the court of appeal must, as previously, make up its own mind as to the correctness or otherwise of a decision, even on matters of fact, by a lower court. **Where the correctness of a finding of primary fact or of inference is in issue, it cannot be a matter of simple discretion how an appellate court approaches the matter. Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence**. In the present case, therefore, I consider that (a) it is for us if necessary to make up our own mind about the correctness or otherwise of any findings of primary fact or inferences from primary fact that the judge made or drew and the claimants challenge, while (b) reminding ourselves that, **so far as the appeal raises issues of judgment on unchallenged primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible**. In relation to (a) **we must, as stated, bear in mind the important and well-**

> **recognised reluctance of this court to interfere with a trial judge on any finding of primary fact based on the credibility or reliability of oral evidence**. In the present case, however, while there was oral evidence, its content was largely uncontentious.'
>
> In the same case Neuberger J stressed, pp 305-306, paras 61 to 64, that the question whether there was a contract of service on the facts involved the weighing up of a series of factors. Thorpe LJ agreed with both judgments.'

The judgment of Ward LJ in the *Assicurazioni Generali* case may be read as advocating a different test, which would equate the approach of an appellate court to findings of fact with its approach to decisions taken in the exercise of a discretion. As Waller LJ correctly pointed out in *Manning v. Stylianou* [2006] EWCA Civ 1655, that is not the correct test, and it is the judgment of Clarke LJ in the paragraphs quoted above from his judgment that gives proper guidance as to the role of the Court of Appeal when faced with appeals on fact." (Emphasis added)

35. It is instructive to note that the approach in *In re B* has been followed in extradition appeals from the Magistrates' Court without difficulty ever since the decision of the Divisional Court in *Polish Judicial Authority v Celinski (Practice Note)* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551, where Lord Thomas CJ said, at para 24, that the appellate court must assess whether the first instance judge "made the wrong decision" by reference to Lord Neuberger's analysis in *In re B*:

> "The single question therefore for the appellate court is whether or not the district judge made the wrong decision. It is only if the court concludes that the decision was wrong, applying what Lord Neuberger PSC said … that the appeal can be allowed. Findings of fact, especially if evidence has been heard, must ordinarily be respected. In answering the question whether the district judge, in the light of those findings of fact, was wrong to decide that extradition was or was not proportionate, the focus must be on the outcome, that is on the decision itself. Although the district judge's reasons for the proportionality decision must be considered with care, errors and omissions do not of themselves necessarily show that the decision on proportionality itself was wrong."

36. In my judgment, that passage neatly encapsulates the approach which this Court too should take in civil appeals such as those before us in these two cases. The single question for us is whether the assessment of the lower court was "wrong" and we must apply the approach in *In re B*. This means, first, that we are not simply rehearing the case as if we were the court of first instance. Secondly, findings of fact by the lower court must ordinarily be respected, especially if it has heard oral evidence on factual matters that were in dispute. Thirdly, the focus must be on the outcome of the assessment of proportionality. We are not confined to asking whether

the lower court erred in law or reached a conclusion which was not reasonably open to it. There is a spectrum but if, at the end of the day, we consider that the outcome of the assessment of proportionality was wrong, we can and should say so.

37. Against that framework of principle, I turn to each of the two appeals before this Court.

## The appeal in *Dalston Projects*

38. This appeal concerns the lawfulness of the Respondent's decisions, taken on 28 March 2022, 11 April 2022 and 3 January 2023, first to detain and then to continue the detention of a luxury yacht, the M/Y (motor yacht) Phi ("the Vessel") under the 2019 Regulations, as amended. The particular issues which arise are whether the decisions were (i) a lawful exercise of the Respondent's powers on conventional public law grounds and (ii) a proportionate interference with the Appellants' right to peaceful enjoyment of their possessions in A1P1.

39. The Vessel was moored at South Dock in the West India and Millwall Docks in London in December 2021, and remains there. It had stopped over in London both for tax reasons and to attend the World Superyacht Awards, and was due to leave London for Malta on 28 March 2022 for a chartering season in the Mediterranean.

40. The claim was brought under section 38(2) of SAMLA, which gives a right to challenge decisions of the kind in issue in these two appeals in the High Court. As I have said above, the principles which must be applied when considering such a claim are those which apply to a claim for judicial review: see section 38(4) of SAMLA. The claim form was issued under CPR Part 8. The procedure for such claims is governed by CPR Part 79 rather than Part 54 (which applies to claims for judicial review).

41. In a judgment given on 21 July 2023, Sir Ross Cranston, sitting as a High Court judge ("the Judge"), dismissed the claim. On 1 August 2023 the Judge granted permission to appeal to this Court on the ground that there was a compelling reason to do so in view of the importance of the issues, although he did not consider that any of the grounds of appeal had a real prospect of success.

## Factual Background

### *The Appellants*

42. The First Appellant is a company registered in St Kitts and Nevis and is the legal owner of the Vessel. The Third Appellant, a Maltese company, would, but for the detention of the Vessel, have become its legal owner. The Second Appellant (Sergei Naumenko) is the beneficial owner of the Vessel. He is a Russian citizen and is ordinarily resident in Russia.

43. Although Mr Naumenko did not file a witness statement in these proceedings, there is indirect evidence that he accumulated his wealth by (i) being one of the original owners of a privatised construction and development company (SMU-3 JSC) involved in major projects in the Ural region, (ii) selling his stake in an investment company established in 1991 (Troika Dialog) to the state-owned (and currently sanctioned) Sberbank Group in 2012, and (iii) as a regional manager and minority shareholder in an asset management company established in 1991 (ATON). The evidence before the Court includes a declaration as to the source of wealth of Mr Naumenko dated 31 March 2022, which was annexed to a letter from his representatives (Ward & McKenzie) dated 26 May 2022. There is also a letter from Mr Naumenko dated 23 May 2022, in which he denied that he had ever met President Putin or had participated in any political or near-political organisations, or had held any positions in the state or municipal authorities of the Russian Federation.

44. The Foreign, Commonwealth and Development Office ("FCDO") has not found sufficient evidence to "designate" Mr Naumenko as being "involved" in activities adverse to Ukraine or "obtaining a benefit" from supporting the Government of Russia.

*The decisions under challenge*

45. In early March 2022, following the escalation of the Russian invasion of Ukraine on 24 February 2022, the 2019 Regulations were amended to enhance the Respondent's maritime sanctions powers: see in particular Part 6 of the 2019 Regulations, which is concerned with ships. I will refer to the relevant legislation as it was in force at the material time.

46. Regulation 57D empowers the Respondent to give a "detention direction" to harbour authorities in respect of a ship owned, controlled, chartered or operated by a "designated person" (regulation 57D(3)(a)), but also in respect of a ship owned, controlled, chartered or operated by a much wider category of "persons connected with Russia" (regulation 57D(3)(b)), meaning those either ordinarily resident or located in Russia (regulation 57I(5)(a) and (b)). Regulation 57C empowers the Respondent to give a "movement direction" in similar circumstances: see in particular regulation 57C(1)(b), which refers to a ship owned, controlled, chartered or operated by "persons connected with Russia".

47. On 11 March 2022 the National Crime Agency ("NCA") shared initial information about the Vessel with the Department for Transport ("DfT"), and over the next two weeks the DfT worked with investigatory authorities to confirm that the vessel was purchased for €44 million and owned by Mr Naumenko.

48. **The First Decision:** On 28 March 2022 the DfT presented an urgent Ministerial Submission to the Respondent in light of the Vessel's impending departure.

49. On behalf of the Appellants Mr Bethell emphasises that the Ministerial Submission, dated 28 March 2022, did not contain any recommendation but simply advised that the Respondent had the statutory power to detain the Vessel. He also emphasises that

the decision to detain the Vessel was taken personally by the Secretary of State (at that time Grant Shapps MP).

50. The Respondent decided to issue the Phi (Russia (Sanctions) (EU Exit) Regulations 2019) Direction 2022 ("the Direction") and commented in the Ministerial Readout that: "it is most certainly both in the public interest to detain this ship and to publicise the fact of its detention". The Direction contained both a Detention direction, at para 3, and a Movement direction, at para 4. The Movement direction required the Vessel to remain in South Dock, West India and Millwall Docks. In the present proceedings both the Detention direction and the Movement direction are challenged but no separate legal issues arise in connection with the Movement direction.

51. On 29 March 2022 the Direction was served on the Vessel. DfT officials prepared a communication plan for the Secretary of State. Mr Shapps departed from the communication plan and made widely reported remarks in a TikTok video that the Vessel is "a yacht which belongs to a Russian oligarch, friends of Putin".

52. **The Second Decision:** On 8 April 2022 a Ministerial Submission sought a decision regarding the continuing detention of the Vessel. The rationale was set out in Annex D, which noted that the detention of the Vessel sat alongside a larger package of sanctions and would contribute to "wider social and cultural change", in particular by sending "… a clear message of intent to Russian oligarchs … with the aim of damaging support for Putin and limiting resources available to the Russian state".

53. On 11 April 2022 Mr Shapps decided to implement the recommended 'Option A – Maintain detention direction whilst seeking further evidence'. The Parliamentary Under-Secretary, Robert Courts MP, had commented that he agreed to "… maintain [detention] for now whilst we obtain further evidence – but we do need to consider this fully in the round once that is obtained and come to a properly evidenced decision."

54. **The Third Decision**: In response to the Appellants' letter dated 1 December 2022 requesting the Direction to be withdrawn, a further Ministerial Submission was prepared dated 13 December 2022, advising that the Vessel's continued detention was lawful under the 2019 Regulations, proportionate with Mr Naumenko's A1P1 rights, and in the public interest. Annex C set out the rationale for the Vessel's continuing detention, stating that the "… signalling provided by detaining luxury assets should be considered a useful tool alongside other trade, financial and transport sanctions", and that it was "intended to put pressure on oligarchs by disrupting their luxurious lifestyle (denying them the use of the asset, denying them income from chartering etc.) which would in turn place pressure on the regime".

55. On 3 January 2023 the Secretary of State, by now Mark Harper MP, confirmed that he agreed with the Ministerial Submission, and a letter was sent to the Appellants refusing their request that the Direction should be withdrawn.

56. Following pre-action correspondence, a claim for the Direction to be set aside under section 38(2) of SAMLA was commenced in the High Court on 27 March 2023.

The Judgment of the High Court

57. In the Statement of Facts and Grounds, at para 54, the original grounds of challenge were set out under four headings:

(1) "The *Padfield* ground of challenge."

(2) "ECHR A1P1, rationality, *Wednesbury* and *Tameside*."

(3) "ECHR Article 14."

(4) "The Defendant's inability to rely upon uncommunicated decisions or upon reasons not set out in the grounds for detaining Phi set out in the Direction."

58. It appears that, at the hearing before the Judge, the focus of the Appellants' submissions was on the first two of those grounds. The third ground (Article 14 of the ECHR) was barely mentioned in the Appellants' skeleton argument in the High Court and does not seem to have been pursued at the hearing before the Judge. The fourth ground seems to have been pursued only half-heartedly, certainly so far as the Judge was concerned. The Judge rejected all of the grounds.

59. First, the Judge held that the detention decisions were taken for a proper purpose, in accordance with *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 ("*Padfield*").

60. Secondly, the Judge rejected the Appellants' A1P1 challenge. He rejected the Appellants' challenge under limbs two (rational connection) and four (fair balance) of the proportionality test, as set out in *Bank Mellat*.

61. In relation to what the Judge clearly regarded as at best tangential points in view of the way in which the submissions were presented before him, he said that:

i) The Respondent had satisfied the requirement to state the "grounds" in the Direction, in accordance with Reg 57D(5)(c): see para 56 of the judgment.

ii) Although it was incorrect for Mr Shapps to say that Mr Naumenko was "connected with Putin", this had been "excusable political hyperbole" and had not formed part of the reasons for the Respondent's First Decision: see paras 69 and 90 of the judgment.

iii) The Second Decision had not been taken as only a "holding exercise", so that further enquiries should have been undertaken: see para 82 of the judgment.

iv) The Respondent had not assumed ownership or dominion over the Vessel, and so had not committed the tort of conversion: see para 91 of the judgment.

Grounds of Appeal

62. There are six grounds of appeal. I will address them in the order in which they were presented to us by Mr Bethell: Grounds 2, 4, 3, 5 (which are all based on

conventional public law grounds); Ground 1 (proportionality under A1P1); and Ground 6 (conversion).

Ground 2: proper purpose

63. Under Ground 2 the Appellants contend that the Judge was wrong to hold in effect (at paras 67-68 of his judgment) that it is sufficient, in order for the vessel-detention powers to be exercised for a proper purpose, merely that its owner is a person connected with Russia, and that the Respondent's aim was to apply pressure to Russia.

64. Specific complaints are made, at paras 5.1-5.2 of the Grounds of Appeal as follows:

> "5.1 The Judge ought to have held, consistently with the parliamentary material before the Court, that sanctions were only properly to be imposed upon persons not personally involved in the activities being targeted where that was a necessary consequence of the adoption of 'broad sectoral measures', and that the relevant sectoral purpose of the shipping measures in Part 6 of the Sanctions Regulations was to attack Russian economic interests in the context (as stated in the accompanying statutory report) that 'the vast majority of global trade in goods is carried on board ships'.
>
> 5.2 The Judge ought accordingly, and in the light of the specific designation and asset freezing provisions in the Sanctions Regulations, to have held that the proper use of the detention power such as regulation 57D needed either to rest upon the function or activity of the vessel itself; or alternatively that if based simply upon the ownership of that vessel, that the use of the power was consistent with the other asset-freezing provisions of the Regulations, and specifically with the manner in which the designation provisions had identified persons who were to be regarded as personally involved in the activities being targeted, so that subject to appropriate exemptions and procedural protections, their assets were properly to be frozen."

65. The Appellants' Ground 2 corresponds to what was Ground 1 in the claim for review before the High Court, namely that the power of detention was exercised in this case for an improper purpose in breach of the principle in *Padfield*. The Judge addressed this ground at paras 57-69 of his judgment, and rejected it, particularly at paras 62-68.

66. In *Padfield*, at page 1030, Lord Reid famously said that there is no such thing as an unfettered discretion in administrative law. Parliament always confers a discretionary power with the intention that it should be used to promote the policy and objects of the Act concerned; and the policy and objects must be determined by construing the Act as a whole. If a Minister uses his discretion to thwart or run counter to the policy

and objects of the Act, then the decision will be reviewable by the court on judicial review.

67. On behalf of the Appellants it is submitted that the "key point" is that the reason for the detention decisions related exclusively to Mr Naumenko and his status as "a wealthy Russian resident" but had nothing to do with the Vessel itself, or with anything which Mr Naumenko or anyone else had done or proposed to do with it. It is submitted that this was tantamount to "freezing" an asset belonging to an individual because he is wealthy and resident in Russia. It is submitted that that purpose is inconsistent with the overall scheme of the 2019 Regulations in circumstances in which those regulations contain explicit provision for the freezing of the assets of individuals (see in particular regulation 11) but only where those individuals have been designated. It is also submitted that it is significant that the FCDO had decided that designation would not be appropriate in Mr Naumenko's case.

68. The fundamental difficulty with this argument is, as the Judge held, that the terms of the relevant legislation are clear. The power which was exercised in the present case does not depend upon an individual being designated. It is sufficient that he is "connected with" Russia and there is no dispute that Mr Naumenko is connected with Russia because he is ordinarily resident there. This does not mean that the discretionary power to detain a Vessel must be used: every case must be considered on its particular facts. But it does mean that the discretionary power in this case was not used for an improper purpose.

69. The second main argument which is made under Ground 2 on behalf of the Appellants is that the essential purpose of the relevant regulations is "to disrupt Russian shipping and thereby to inhibit Russian trade in, or transport of, goods or personnel." It is submitted that this is the correct construction of the structure of the regulations. It is further submitted that this is supported by what was said to Parliament when the Regulations were amended. It is also submitted that this is consistent with the essentially secondary role played by detention in the scheme of Part 6 of the 2019 Regulations because the first relevant power is to exclude Russian ships from UK ports: see regulation 57A. It is only because, fortuitously, this Vessel happened to be in a UK port at the relevant time that it could be detained. It is submitted that the purpose of Part 6 would have been better served by permitting the Vessel to leave the UK, as she had always intended to do in March 2022.

70. Like the Judge, I cannot see any hierarchy in the relevant legislation. In my judgment, the discretionary power to detain is broadly expressed and can be used for the purpose for which it was used in the present case. There is no need to read that power of detention as being a secondary power, incidental to the primary power to exclude Russian ships from the UK.

71. Furthermore, like the Judge, I do not consider that the general underlying policy which lay behind the introduction of the amending regulations, which was no doubt to disrupt Russian shipping and trade generally, is inconsistent with the detention of this particular Vessel. As a matter of ordinary language, to detain one Vessel is indeed to disrupt Russian shipping. The fortuitous fact that there was only one relevant ship in UK waters at the time does not mean that the power of detention was exercised for an improper purpose which was inconsistent with the purpose of the relevant legislation.

72. In this context Mr Bethell drew our attention to a letter dated 9 November 2017, which was sent by Lord Ahmad of Wimbledon, the Minister of State for the Commonwealth and the UN, to Lord Pannick KC (a crossbench peer) during the passage of the Bill which became SAMLA. Mr Bethell submits that the purpose of the legislation was to ensure that "broad sectoral measures" could be imposed across the board so that they can have maximum impact.

73. I do not agree that the statutory purpose of the relevant legislation was so limited. As Lord Ahmad's letter made clear, at page 2, the Government were aware that these were broad restrictions and had the potential for persons to be caught by them in circumstances that are "less than ideal." Nevertheless, as the Minister went on to say, this type of sanction was intended "to have a broad and deep impact (in order to bring about a change in the behaviour that the sanctions are targeted against) …". I can see nothing in the policy which lay behind either SAMLA or the 2019 Regulations, as amended, which is inconsistent with the way in which the discretionary power of detention was exercised in the present case.

74. Mr Bethell also referred us to the report made by the Government under section 18 of SAMLA when the 2022 (No 4) Amendment Regulations were put before Parliament. At para 11, it was said:

> "The ability to enforce transport sanctions through these offences is an important deterrent. The vast majority of global trade in goods is carried on board ships. Maritime sanctions are therefore crucial in achieving the objectives of the Russian sanctions regime and they are designed to cause significant short term disruption to Russian shipping, thereby restricting their economic interests and further holding the Russian government to account."

75. Like the Judge, I do not read that passage as limiting the discretionary power of detention of a ship in circumstances such as those in the present case.

76. Finally in this context, Mr Bethell submitted that, while there is a suite of safeguards for the freezing of bank assets, even as little as £100, there are no such safeguards for the detention of an expensive yacht as in the present case. He submitted that it cannot have been the intention of Parliament that there should be no such safeguards and therefore the detention power is incapable of being used in circumstances like the present.

77. In my judgment, that is to give insufficient effect to the clear and express legislation enacted in this context. While the safeguards may not be the same as for freezing of assets where a person is designated, it would be wrong in law to say that there are no procedural safeguards in the present context. That said, no specific argument has been made in these proceedings that there was procedural unfairness and so it is unnecessary to say more about that point.

78. For those reasons I have reached the clear conclusion that the Judge was correct that there was no breach of the *Padfield* principle in this case and Ground 2 on this appeal must be rejected.

Ground 4: taking into account irrelevant considerations in the First Detention Decision in March 2022

79. Ground 4 is formulated as follows, at paras 8-9 of the Grounds of Appeal:

> "8. The Judge was not entitled to hold (judgment paragraphs 69 and 90) that the Secretary of State's own statements, made a few hours after the decision to detain, had been personally taken by him, to the effect that detention had occurred because the vessel was owned by a person 'with close connections to Putin' or had 'made their money through their association with President Putin', were mere 'excusable political hyperbole' which 'did not feature as a consideration in the Secretary of State's own decision-making'. There was no evidence upon which such a finding could be made.
>
> 9. Since there was no such suggestion that these statements were true in Mr Naumenko's case, or that there had been any basis at the time for the Respondent to think that they were true, if the Judge had concluded that the Secretary of State's public statements meant what they said, he would have been bound also to conclude that the March 2022 decision was based upon legally irrelevant considerations."

80. At the hearing before us the following points were emphasised by Mr Bethell.

81. First, the undisputed facts are that, although Mr Naumenko is resident in Russia and is wealthy, he does not have any connections to President Putin. Nor is there any evidence to contradict the Appellants' evidence, that the ownership of the Phi was not deliberately concealed.

82. Furthermore, Mr Bethell emphasises that the decision in March 2022 was taken personally by the Secretary of State, at that time Mr Shapps. The submission which was presented to the Secretary of State before that decision simply advised him that he had the power to detain but did not recommend any particular course of action. Importantly, Mr Bethell emphasises the statements which were then made by Mr Shapps at the dock where the Vessel was located. We have seen transcripts of those statements. It was said, by way of example, that "we cannot have any benefit to these oligarchs with close connections to Putin …".

83. Mr Bethell submits that, if these erroneous matters were taken into account by Mr Shapps, they are clearly irrelevant considerations and the decision to detain was vitiated by a public law error.

84. Furthermore, Mr Bethell emphasises that the Respondent has not adduced any evidence from Mr Shapps directly or from anyone who had spoken to him about the matter. Accordingly, there was no evidence, he submits, upon which the Judge could conclude that Mr Shapps did not mean what he had said about why he had taken the decision to detain in March 2022. He submits that the Judge was wrong to dismiss these comments as mere "excusable political hyperbole", as he did at para 69 of his judgment, or "political messaging", as he did at para 90. Accordingly, Mr Bethell submits, the Judge was wrong to say, at para 90, that:

> "It did not feature as a consideration in the Secretary of State's own decision-making."

85. In my judgment, the crucial answer to this Ground is what then immediately followed at para 90 of the judgment:

> "In any event it made no difference to the outcome."

86. I am troubled by the Judge's reference to what was said by the Secretary of State at the time as "excusable hyperbole". It was not hyperbole; it was incorrect. There is hyperbole where a statement which is true is exaggerated, but the statement that was made about Mr Naumenko's connections with President Putin was not true. It ought not to have been said and it certainly should not have been taken into account when exercising a discretionary power.

87. Nevertheless, I have come to the clear conclusion that the Judge was right in his ultimate dismissal of this ground for judicial review because what the Secretary of State said did not make any difference to the outcome. It is clear on the evidence before the Court (for example para 91 in the First Witness Statement of James Driver) that the March 2022 decision (and the second decision in April 2022) would have been exactly the same for the reasons set out in writing in the Ministerial submission of 8 April 2022. Accordingly, two things are clear. First, events have superseded the original decision of March 2022 and there would be no practical purpose served by quashing that decision and remitting it for reconsideration. Secondly, and related to that point, if the Court were now to quash the March 2022 decision, it is perfectly clear what the outcome would be because the Court knows what the subsequent two decisions were and they were to the same effect.

88. Mr Bethell submitted that there would be some practical purpose to be served by quashing the March 2022 decision even if the later decisions were not quashed, because this would give rise to the possibility of a claim for damages for unlawful detention of the Vessel in the period from 28 March to 11 April 2022. I think this puts the cart before the horse. The remedies for a breach of public law do not normally include damages, although they may do so where, for example, a tort has been committed and the elements of that tort depend on there being a material error of public law. Since there is no such thing as a technical breach of public law, and it is perfectly obvious what the decision in March 2022 would have been even if the extraneous factors mentioned by the Secretary of State had not been mentioned, I

have reached the conclusion that there is nothing of substance in this complaint. Since there is no public law error which vitiates the decision, no question of a claim for damages can arise.

89. For those reasons I would reject Ground 4 on this appeal.

Ground 3: failure to state the grounds for the original detention

90. Ground 3 of the Grounds of Appeal is formulated as follows:

> "The Judge erred in holding (judgment paragraph 56) that the requirement in regulation 57D(5)(c) to state the grounds on which a vessel is detained did not amount to a requirement to give reasons for the exercise of the power of detention (as opposed to the basis upon which the power was believed to exist). The Judge ought to have held, consistently with the authority cited to him, that such a statutory requirement, whilst not calling for the giving of detailed reasons, did require the Respondent to 'explain broadly the basis of the decision.'"

91. Under this ground Mr Bethell submits that there was a failure to comply with the express requirements of regulation 57D(5)(c) and (d), which, so far as material, provide:

> "A detention direction given in relation to a ship–
>
> …
>
> (c) must state the grounds on which the ship is detained, and
>
> (d) must state that–
>
> (i) it is given under this regulation …"

92. Mr Bethell submits that it is clear both (i) that the detention direction itself must state the grounds on which the ship is detained; and (ii) this cannot be done simply by stating the regulation under which the direction is given, since that is a separate requirement of regulation (5)(d)(i). Mr Bethell accepts that the grounds need not constitute full reasons for the decision but submits that something of substance nevertheless needs to be said beyond simply rehearsing the statutory power under which the detention direction is made.

93. This ground has assumed a greater prominence before this Court than it had before the High Court.

94. It was not clearly raised as a distinct ground of challenge in the Statement of Facts and Grounds, for example where the four grounds of challenge were summarised at para 54, or at para 89, which had the heading 'The grounds stated in the Direction'. In any event, the point seems not to have been at the forefront of the submissions at the hearing before the Judge. This is why he said at para 56 of his judgment:

> "**If it had been necessary to address the claimant's challenge on a further ground**, that there was a failure of the detention direction to state the grounds relied upon, I would have dismissed it. Regulation 57D(5)(c) requires the direction to state the grounds on which the ship is detained, whereas regulation 8(4) requires a statement of reasons for designation under Part 2. The contrast in the language of the two provisions means that the detention direction does not require grounds to be equivalent to a statement of reasons." (Emphasis added)

95. Greater reliance has been placed before this Court on the decision of the High Court in *R v South Gloucestershire Appeals Committee, ex parte C* [2000] ELR 220 (Dyson J). Particular emphasis is placed by Mr Bethell on what Dyson J said at page 225:

> "I do not believe that the decision in *R v Birmingham City Council Education Appeals Committee ex parte B* lays down any general principle save perhaps to say that a minimum requirement of the grounds of a decision in that they explain broadly the basis of the decision. I respectfully agree with what Macpherson J said in *R v Lancashire County Council ex parte M* [1995] ELR 136; the statute requires broad grounds rather than detailed reasons. What is required will depend on the issues that have been raised on the appeal. In a complex case the grounds may well have to be more elaborate than in a simple one. Where however there is no dispute as to the primary facts, I do not consider that the grounds are required to make findings about those facts."

96. The first point to note about that passage is that, on its own terms, it is tentative. What Dyson J said was that he did not believe that the decision in the earlier case of *Ex parte B* laid down any general principle. At its highest it appeared to say that a minimum requirement of the grounds of the decision is that they explain broadly the basis of the decision.

97. Secondly, the decision in *Ex parte C* needs to be seen in its own context. In particular, as is clear from page 222 of the judgment, that case concerned an appeal which could be, and was, made by the applicant's father to the County Council. Although that would not have been a judicial decision, it was an appeal: in that context it is readily understandable that the court would expect more by way of reasoning than would be the case with most administrative decisions (in the absence of an express statutory duty to give reasons).

98. Thirdly, the fundamental point, as the Judge pointed out at para 56 of his judgment in the present case, is that the statutory scheme here does not require the giving of reasons.

99. Fourthly, I do not accept the submission that the grounds for the decision in the present case simply set out the statutory power under which it was taken. Para 5 of the Direction, dated 28 March 2022, stated that:

> "The Phi is being detained on the grounds that it is owned, controlled or operated by Sergei Georgievich Naumenko, a person connected with Russia."

In other words, it asserted certain facts, in particular as to the ownership of the ship and that Mr Naumenko is a person connected with Russia. These are facts which, as it happens, are true but, if they had not been or if they had been disputed by the Appellants, the stated grounds would have enabled them to challenge the decision. The purpose of requiring a statement of the grounds for detention was therefore achieved by what was said in the Direction in this case. No more was required than that.

100. For those reasons I would reject Ground 3 on this appeal.

Ground 5: the nature of the April 2022 decision was that it was a "holding measure"

101. Ground 5 of the Grounds of Appeal is formulated as follows:

> "10. The Judge was not entitled to hold (judgment paragraphs 82, 89) that the April 2022 decision was not taken 'as a holding measure while further evidence was collected'. The specific decision taken was to adopt what the relevant ministerial submission described as Option A, namely 'Maintain detention direction whilst seeking further evidence'.
>
> 11. If the Judge had concluded accordingly, he would have been bound also to conclude that it was disproportionate and/or a breach of the *Tameside* duty to maintain the detention for a period of some 8 months thereafter without the Respondent either seeking further evidence, or reconsidering its decision in the light of factual material provided by the Appellants."

102. Ground 5 has also assumed a greater importance before this Court than it appears to have had before the High Court. In the original proceedings it was not a distinct ground of challenge but appears to have been raised in the context of an argument about proportionality under A1P1. Be that as it may, complaint is now made on behalf of the Appellants about what the Judge said at para 82 of his judgment:

> "Mr Giffin [who led Mr Bethell in the High Court] did raise an issue about the legitimacy of the April 2022 decision. The

> argument was that it could not be legitimate to detain the vessel as a holding measure while further evidence was collected, and then not to undertake further inquiries. In my view, this places too much weight on the comment of Mr Robert Courts MP, the Parliamentary Under-Secretary of State, and on the summary in the cover sheet to the ministerial submission. The Secretary of State did not expressly share Mr Courts' view, and the rationale of the decision in Annex D to the submission does not give any support to maintaining detention as a holding exercise. That Ward & McKenzie were invited to make further submissions does not detract from this point."

103. On behalf of the Appellants Mr Bethell submits that the Judge was wrong to characterise the April 2022 decision as not being "a holding measure while further evidence was collected".

104. When the submission was sent to the Minister's office on 8 April 2022, the covering message said that:

> "The owner of the Phi yacht, which SoS detained last month, has had his legal advisors get in touch."

The submission sought agreement for officials to respond as per Annex C and give a steer on what to do with the Phi, either "maintain detention" or "revoke detention". The Minister, Robert Courts MP, said that he was content and his decision was "maintain for now whilst we obtain further evidence". This reflected what had been put to the Minister as Option A:

> "Maintain detention direction whilst seeking further evidence (Recommended)."

105. The email conveying the Minister's response to the submission, dated 11 April 2022, said:

> "Minister Courts added that he is content to maintain detention whilst we obtain further evidence before considering fully in the round once that is obtained to come to a properly evidenced decision."

106. The email which was then sent on behalf of the Secretary of State on 11 April 2022 to the Appellants' representatives finished with this:

> "Accordingly, the Secretary of State remains content that the continued detention of the Vessel is appropriate and in accordance with the Regulations; however, the Secretary of State would be happy to consider any evidence Mr Naumenko

> may wish to present in writing in relation to the continued detention of the Vessel."

107. Like the Judge, I have reached the conclusion that this ground of appeal places undue emphasis on the words of Mr Courts taken out of context. The Secretary of State, who made the decision, was not of the view that this was simply a holding decision and that further evidence needed to be obtained. Rather the position was that he was content to maintain the continued detention of the Vessel but would be willing to consider any further evidence that might be presented on behalf of Mr Naumenko and was affording him the opportunity to do so. That is indeed what the Appellants' representatives then did, by letter dated 26 May 2022.

108. For those reasons I would reject Ground 5 on this appeal.

Ground 1: proportionality under A1P1

109. At para 3 of the Grounds of Appeal, it was said that the Judge held that the detention of the Vessel was proportionate even though Mr Naumenko himself "had no proximate responsibility for events around Ukraine, and could not be said to have assisted the Russian regime" (para 84 of the judgment), and it was "unclear what contribution [detention] will make in influencing the situation for which he is not directly responsible and over which he has no control" (para 85 of the judgment).

110. At para 4 of the Grounds it was observed that the burden of justifying the interference with rights in A1P1 rests upon the Respondent. So much is common ground. Paras 4.2 to 4.4.2 of the Grounds were formulated as follows:

> "4.2 It was necessary for the Respondent to explain in concrete terms how the measure was expected to serve the aim identified, whether that was because the detention was intended directly to influence the Russian authorities in a particular way, or because it was intended to cause Mr Naumenko to behave in a particular way which would in turn influence the Russian authorities. Without an explanation of that nature, the measure could not be rationally connected with the legitimate aim relied upon, and unless the explanation showed that the positive impact of the measure was commensurate with the interference with individual rights, it would also fail to strike the fair balance required by A1P1.
>
> 4.3 No such explanation was contained in the contemporaneous decision-making documents, and no such explanation was provided by the Respondent's evidence in answer to the claim.
>
> 4.4 It was not a sufficient answer (contrary to the Judge's ultimate conclusion on the issue as set out at paragraph 86 of

the judgment) to say:

> 4.4.1 That the Respondent 'need not demonstrate the efficacy of each individual detention . . . in order to maintain a sanctions measure.' Whilst that might be true in a situation in which a significant number of individual detentions resulted from a general rule or policy, so that it was the overall effect of the rule or policy which mattered, detention decisions under regulation 57D are individual and, on the Respondent's own case, specific to the particular facts; they are also, both in fact and by the very nature of Part 6 of the Sanctions Regulations, very few in number. Further, whilst it is legitimate to approach individual sanctions measures on the basis that it is their cumulative effect which is intended ultimately to influence the Russian government, it is nonetheless necessary to show that the individual measure can at least be expected to make some contribution to that effect.
>
> 4.4.2 That the Respondent had a broad margin of discretion, so that beyond a rational connection between the sanctions measure and the aim, it was 'not an issue for the court'. Proportionality is a matter for the court, which must scrutinise rigorously whether the sanctions measure makes logical sense, even though it will normally defer to any specific judgment made by the decision-maker at the time of the decision in relation to questions of foreign policy or similar issues. The evidence in this case disclosed no such concrete consideration of the measure's anticipated effect."

111. There can be no realistic suggestion that the Judge misdirected himself as to the correct legal approach which he had to take to the assessment of proportionality. At para 78, he correctly directed himself as to the four limbs of the *Bank Mellat* test. At para 79, he correctly directed himself that a proportionality challenge is ultimately a matter for the court to determine with reference to all the evidence before it and that this involves considering the substance of the Secretary of State's decision, not the process of its making. Thirdly, at para 80, he correctly directed himself that, although the court itself determines proportionality objectively on the basis of its own assessment, a margin of discretion will be afforded to the decision-maker, to the extent that it has itself considered the relevant issues at the time of the challenged decision. Further, in matters relating to foreign policy or the conduct of foreign relations, the court accords to the executive an especially broad margin of discretion. All of this was supported by the Judge's correct citation of relevant authority, both from this Court and from the Supreme Court.

112. The issue on this appeal therefore for this Court is whether we consider, in accordance with the principles which I have outlined above, that the assessment by the Judge of proportionality was "wrong". I therefore turn to each of the four criteria which are relevant to the assessment of proportionality.

113. First, it is common ground that the decision under challenge had a legitimate aim. It was part of a package of measures taken by the United Kingdom in response to the gross violation of fundamental norms of international law by Russia when it invaded Ukraine. On behalf of the Appellants, Mr Bethell also accepts that targeting Russian businesses could in principle contribute to changing Russian behaviour. There was also no serious suggestion made before this Court that, if the other criteria in *Bank Mellat* are met, there would be any less intrusive means (limb 3). The critical issues therefore relate to limbs 2 and 4, in other words whether the means adopted had a rational connection to the end being pursued, and whether the impact on the Appellants' rights under A1P1 was outweighed by the benefit to the general interests of the community.

114. I consider first the issue of rational connection. Mr Bethell accepts that a broad sectoral measure could be a rational measure in this context but submits that this was not such a case, because there is no general policy that all Russian ships should be detained. There is a discretion to do so and it is exercised in respect of each individual ship. He reminds us of the test as put by Lord Reed in *Bank Mellat*, at para 74: the extent to which the decision will make a contribution to the overall objective needs to be balanced against the benefit to the general interests of the community.

115. Mr Bethell submits that there is a close analogy with the facts of *Bank Mellat* because here there is only one ship affected, just as in that case there was only one bank affected. Further, Mr Bethell submits that it is necessary to show that the decision would have efficacy in making a material contribution to its objective in practice. He submits that the Judge was wrong to say, at para 86, that this is not an issue for the court.

116. In my view, this is to take one sentence in para 86 out of context. The Judge was well aware that the assessment was one for the court, as he had said earlier in his judgment. The point that he was making in para 86 was that all that is needed is a *rational* connection between the sanctions measure and the aim. He was also making the common sense point that it would be difficult to demonstrate that any one decision would have the desired foreign policy outcome.

117. Driven to its logical conclusion, the Appellants' submission would mean that, if 100 ships are detained, each owner of one ship could say that detaining his ship is not going to be particularly effective or make a material contribution to the overall aim and so it is disproportionate to detain it. That argument would obviously be absurd. It is the overall effect of detaining all 100 ships which is important and the detention of each one of them obviously has a rational connection to the overall aim in view.

118. The fact is that, in view of the circumstances in March 2022, most Russian ships had already been prohibited from entering UK ports. If, however, there had been other such ships such as the Phi, they would have been detained consistently with the objective of the detention of the Phi. This is also one important reason why the facts of this case are distinguishable from those of *Bank Mellat*. What troubled the

majority of the Supreme Court in that case was that there were other Iranian banks which were not affected by the measure: see e.g. Lord Sumption's judgment at para 22. This is what the Judge said at para 85 of the judgment in the present case, and I agree with him.

119. Finally in the context of rational connection, Mr Bethell submits that detaining the ship of one Russian wealthy person who has no association with politics in Russia has no rational connection to the legitimate aim. The Judge addressed this argument at para 84 of his judgment and again I agree with him. Given the likely direct and indirect links between Mr Naumenko's wealth, economic activities, and the Russian state, it is rational to consider that he is the sort of individual on whom sanctions could effect the "broad and deep impact" which Parliament intended via the "connected with Russia" powers in, at least, weakening their tacit support for the regime.

120. Moreover, I would be prepared to go further than the Judge and accept the additional point raised in the Respondent's Notice:

> "The patronage system that exists in Russia, and the loyalty that is required from wealthy Russians, provides a further basis on which it is rational to conclude that a person resident in Russia who retains significant wealth is likely, directly or indirectly, to have benefitted from the Russian regime. Mr Driver's evidence in his first witness statement (especially §§50-54 and §§136-139) and in his second witness statement (especially §§12-17) explains the nature of Russia's political economic context, and whilst the Judge did not consider it necessary to rely upon this evidence, it is respectfully submitted that, if necessary, it provides an additional reason to uphold the Judge's conclusion that detaining a superyacht such as the Phi is rationally connected to the legitimate aim of encouraging Russia to cease its actions in Ukraine by way of targeted sanctions measures."

121. In my view, the evidence before the Court, in particular from Mr Driver, which I summarise below, supports the proposition that (i) the patronage system in Russia and (ii) the need for loyalty to President Putin of wealthy Russians are such that it would not otherwise have been possible for an individual like Mr Naumenko to accumulate the significant wealth which he has. In this context it is appropriate to give weight to the judgment of the executive, since this is a matter which it is better equipped to assess than the courts can be.

122. In his first witness statement, at para 50, Mr Driver says that in Russia "wealth and power are highly centralised." He continues that:

> "The nature of the Russian political economy is essentially one of patronage. By this, I mean a system in which opportunities and material benefits, government contracts, and senior positions in the government and government-affiliated entities,

> are provided by the state to a small circle of insiders, in return for their loyalty and support."

123. At the risk of stating the obvious, one of the ways in which economic sanctions can be effective is, as Mr Driver says at para 49, by increasing the disadvantages felt by citizens. In this sense, the aim and the purpose of sanctions are not restricted to state institutions, or those who exercise political power and influence. In this way sanctions may provide a peaceful way to impose pressure on a hostile state.

124. At para 8 of his second witness statement, Mr Driver made it clear that there is no evidence to suggest that Mr Naumenko was part of President Putin's circle of insiders in the sense of holding a senior Government position or having contracts to provide the Government with services. Nevertheless, as he continues at para 9, Mr Naumenko was someone who had acquired a level of wealth that went significantly beyond that acquired in the ordinary course of business. That conclusion was based upon the fact that he owned the Phi, a custom-built superyacht valued at £38 million. In addition he owned her sister vessel, as well as another superyacht, the Aurelia. Further, as he states at para 11, the information before the DfT was that Mr Naumenko's economic activities had links to the activities of the Russian state, such that he was likely to fall within the business elite who benefitted from, and provided benefits to, the Russian regime. Mr Driver continues, at paras 12-16 of his second witness statement, to make the point that the system of patronage in Russia is not purely "political" in nature. Mr Naumenko will have had to accept the regime and show no sign of disloyalty. In this regard it is notable that he has never publicly criticised President Putin or his actions in Ukraine. Further, he has necessarily benefitted from the economic conditions which have subsisted under President Putin's regime and will, in turn, have benefitted the regime through, not least, payment of taxes from his successful economic activities. Finally in this context, Mr Driver says that retaining the loyalty of high net-worth individuals is important for ensuring the stability of the Russian regime in both political and economic terms and is particularly important at the present time in order to continue to resource Russia's war against Ukraine.

125. In my judgment, all that evidence sensibly leads to the conclusion that there was a rational connection between the decision under challenge and the legitimate aim.

126. I turn to the fourth limb of the *Bank Mellat* test, that is the fair balance between the general interests of the community and the individual rights of the Appellants, noting that the individual rights in question here are most easily conceptualised as those of Mr Naumenko, the second Appellant.. Like the Judge, I conclude that this is straightforward. There can be no doubt that the interference with the Appellants' property rights is significant. Even if this is not strictly a deprivation of property case, the Appellants are deprived of the *use* of the Vessel for a significant and indefinite time. There are, however, as the Judge observed at para 87-88 of his judgment, weighty public interest factors on the other side of the balance, in particular the need to bring to an end the illegal use of force by Russia and the violation of the territorial integrity of Ukraine. Further, as the Judge noted, the individual burden on the Appellants is not as great as it would have been if, for example, they suffered particular hardship. The fact that this is the detention of a luxury superyacht is of relevance in that context.

127. Before this Court Mr Bethell emphasised that the disproportionality of the detention decision has become more pronounced over time and reminds this Court of the witness evidence filed on the Appellants' behalf, in particular by Mr Booth, paras 23-24 and Mr Booth's second witness statement, at paras 10-13. In outline, the Appellants are being put to expense because they have to maintain the Vessel and keep it safe from intruders and fire risks, its chartering value is being reduced and they have not been able to get indemnity insurance.

128. I acknowledge these impacts on the Appellants but cannot conclude that this leads to an unfair balance having been struck between the rights of the individual and the general interests of the community.

129. Mr Bethell submits that ultimately the Government's case comes down to the proposition that anyone with substantial wealth in Russia who does not leave or criticise the regime is a legitimate target for what is in effect the freezing of his assets. That puts it far too broadly. The fact is that Mr Naumenko is not a designated person and so his assets generally have not been affected by the sanctions regime. The decision under challenge is no doubt unwelcome to him but, as the Judge noted, concerns a luxury superyacht and does not cause him individual hardship in his normal daily life.

130. It is also relevant in this context to remind oneself of what is said in the evidence of Mr Driver. Mr Naumenko will necessarily have benefitted from the economic conditions which have subsisted under the present Russian regime. He has also benefitted that regime, for example through the payment of taxes. It is important in this context to note that Mr Naumenko has chosen not to file any witness evidence in these proceedings as to how he has accumulated his economic wealth.

131. For the above reasons I have come to a conclusion that the Judge's assessment of proportionality was not wrong. To the contrary I would reach the conclusion that he was right.

Ground 6: conversion

132. Under Ground 6 it is contended that:

> "The Judge ought to have held that the unlawful detention of an asset in such a way as to entail, for a prolonged and indefinite period, the owner being unable to use that asset for its intended purpose in accordance with normal rights of ownership amounts to the exercise of a right of dominion over that asset sufficient to constitute the former tort of conversion as now subsumed into the statutory tort of interference with goods."

133. It is common ground that Ground 6, which relates to the tort of conversion, would only arise if the appeal otherwise succeeded. Since I would dismiss the earlier

grounds of appeal, I do not think it is either necessary or appropriate to say anything on this issue.

Conclusion in *Dalston Projects*

134. For the above reasons, I would dismiss the appeal in the *Dalston Projects* case.

The appeal in *Shvidler*

135. This appeal relates to the lawfulness of the designation of Eugene Shvidler under the 2019 Regulations. It is an appeal against the decision of Garnham J dated 18 August 2023. Permission to appeal was granted by Lewis LJ on Ground 1 (proportionality under A1P1 and Article 8 of the ECHR) but refused on Ground 2 (Article 14 of the ECHR). Permission was granted on the basis that there was a compelling reason why the appeal should be heard in view of the importance of the issues and the fact that this Court had not previously considered this legal regime.

Factual Background

*Eugene Shvidler's background and business affairs*

(1) Background

136. Mr Shvidler left the former Union of Soviet Socialist Republics ("the USSR" or "the Soviet Union") in 1989 and moved to the United States, obtaining refugee status. At the hearing we were informed that he had to renounce his citizenship of the USSR in order to leave that country. He has never been a citizen of the Russian Federation, which became the successor state to the USSR on the latter's dissolution in 1991.

137. In 2004, Mr Shvidler was granted a British visa under the Highly Skilled Migrants Programme, and was subsequently naturalised as a British citizen in 2010. Mr Shvidler has five children, all of whom are British citizens (the elder three are naturalised, the younger two by birth).

138. Mr Shvidler was educated in the Soviet Union, graduating from the Moscow Institute of Oil and Gas in 1986. Before leaving for the United States, Mr Shvidler worked at the Oil Research Institute in Moscow. Once in the United States, Mr Shvidler obtained a Master of Science degree in International Taxation, and subsequently commenced work at Deloitte & Touche in New York.

(2) Executive work and relationship with Roman Abramovich

139. Mr Shvidler commenced a friendship with Roman Abramovich ("Mr Abramovich") in 1986, the pair remaining in contact during Mr Shvidler's time in the United States. In 1994, Mr Shvidler visited Moscow (travelling on a United States refugee travel

document with a Russian visa), and soon thereafter entered into business with friends and contacts in Moscow, led by Mr Abramovich.

140. From 1996, Mr Shvidler was Vice-President for Finance of Sibneft, an oil production company belonging to Mr Abramovich. Mr Shvidler became President of Sibneft in 1998, continuing in that role until 2005, when Sibneft was sold to a Russian company (Gazprom). Whilst President, Mr Shvidler, alongside all other Sibneft employees, was given a nominal shareholding in Sibneft: these shares did not form part of the sale to Gazprom.

141. In 2011, Mr Shvidler was appointed to the board of Evraz plc ("Evraz"), a UK listed company with subsidiaries in Russia, the United States, Ukraine, Canada, and the Czech Republic. By 2018, Mr Shvidler occupied that role as the nominee of Greenleas International Holdings Limited, a BVI entity controlled by Mr Abramovich. When Mr Abramovich's 28.64% shareholding was transferred into his personal control on 16 February 2022, Mr Shvidler again continued in his role on the Board.

142. Evidence before the Secretary of State further highlighted Mr Shvidler's relationship with Mr Abramovich, he being described as Mr Abramovich's "best friend", "right-hand man", and as being "joined at the hip". It also said that, along with Evraz, Mr Shvidler was Chairman of Millhouse LLC ("Millhouse"), the Moscow-based arm of the UK holding company that manages Mr Abramovich's assets (along with managing the assets of Mr Shvidler himself). Mr Shvidler reportedly stepped down from his role at Millhouse in March 2021.

143. Mr Shvidler resigned from his position as a non-executive director of Evraz on 10 March 2022, the day that Mr Abramovich was designated under the 2019 Regulations by the Secretary of State (as discussed below). Evraz' shares were suspended from trading on the London Stock Exchange on the same day.

*Designations*

144. This appeal relates to sanctions imposed by the Secretary of State under regulation 5 of the 2019 regulations. Designations are made pursuant to the criteria laid out in regulation 6, which provides, so far as material:

> "(1) The Secretary of State may not designate a person under regulation 5 (power to designate persons) unless the Secretary of State—
>
> (a) has reasonable grounds to suspect that that person is an involved person, and
>
> (b) considers that the designation of that person is appropriate, having regard to—
>
> (i) the purposes stated in regulation 4 (purposes), and

(ii) the likely significant effects of the designation on that person (as they appear to the Secretary of State to be on the basis of the information that the Secretary of State has).

(2) In this regulation, an 'involved person' means a person who—

(a) is or has been involved in—

(i) destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine, or

(ii) obtaining a benefit from or supporting the Government of Russia,

(b) is owned or controlled directly or indirectly (within the meaning of regulation 7) by a person who is or has been so involved,

(c) is acting on behalf of or at the direction of a person who is or has been so involved, or

(d) is a member of, or associated with, a person who is or has been so involved.

(3) For the purposes of this regulation, a person is 'involved in destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine' if—

(a) the person is responsible for, engages in, provides support for, or promotes any policy or action which destabilises Ukraine or undermines or threatens the territorial integrity, sovereignty or independence of Ukraine;

(b) the person provides financial services, or makes available funds, economic resources, goods or technology, that could contribute to destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine;

(c) the person provides financial services, or makes available funds, economic resources, goods or technology, to—

(i) a person who is responsible for a policy or action which falls within sub-paragraph (a), or

(ii) a person who provides financial services, or makes available funds, economic resources, goods or technology, as mentioned in sub-paragraph (b);

(d) the person obstructs the work of international organisations in Ukraine;

(e) the person conducts business with a separatist group in the Donbas region;

(f) the person is a relevant person trading or operating in non-government controlled Ukrainian territory;

(g) the person assists the contravention or circumvention of a relevant provision.

(4) For the purposes of this regulation, being 'involved in obtaining a benefit from or supporting the Government of Russia' means—

(a) carrying on business as a Government of Russia-affiliated entity;

(b) carrying on business of economic significance to the Government of Russia;

(c) carrying on business in a sector of strategic significance to the Government of Russia;

(d) owning or controlling directly or indirectly (within the meaning of regulation 7), or working as a director (whether executive or non-executive), trustee, or other manager or equivalent, of—

(i) a Government of Russia-affiliated entity;

(ii) a person, other than an individual, which falls within sub-paragraph (b) or (c);

(e) holding the right, directly or indirectly, to nominate at least one director (whether executive or non-executive), trustee or equivalent of—

(i) a Government of Russia-affiliated entity, or

(ii) a person, other than an individual, which falls within sub-paragraph (b) or (c).

…

(6) In paragraph (2)(d), being 'associated with' a person includes—

(a) obtaining a financial benefit or other material benefit from that person;

(b) being an immediate family member of that person.

(7) In this regulation—

…

'immediate family member' means—

(a) a wife or husband;

(b) a civil partner;

(c) a parent or step-parent;

(d) a child or step-child;

(e) a sibling or step-sibling;

(f) a niece or nephew;

(g) an aunt or uncle;

(h) a grandparent;

(i) a grandchild."

(1) Mr Abramovich

145. On 10 March 2022, Mr Abramovich was designated by the Secretary of State. On 23 August 2022, Mr Abramovich's designation was varied. The variation removed the reference to Mr Abramovich "being involved in destabilising Ukraine and undermining and threatening the territorial integrity, sovereignty and independence of Ukraine". However, the grounds of Mr Abramovich's designation continued to refer to his association with President Putin.

(2) Evraz

146. On 5 May 2022, Evraz was designated. Trading in Evraz' shares had been suspended by the London Stock Exchange since 10 March 2022, when Mr Abramovich was designated.

147. On 2 November 2022, Alexander Frolov and Alexander Abramov, both former non-executive directors of Evraz, were also designated.

(3) Mr Shvidler

148. On 24 March 2022, Mr Shvidler was designated by the Secretary of State. On 31 March 2022, Mr Shvidler's solicitors, Peters & Peters, wrote to the FCDO requesting the written reasons for the designation. Further, Mr Shvidler wrote personally to Elizabeth Truss MP, then the Secretary of State, requesting a reconsideration of the decision to designate him.

149. Peters & Peters received the Sanctions Designation Form, as well as a Sanctions Designation Form Evidence pack, substantiating the designation, on 16 June 2022. The designation was made on two grounds:

(1) Mr Shvidler is a business partner of Mr Abramovich, with whom Mr Shvidler has maintained a close relationship for decades. Mr Shvidler is therefore associated with a person (Mr Abramovich) who is or has been involved in destabilising Ukraine and undermining and threatening the territorial integrity, sovereignty and independence of Ukraine, and obtaining a benefit from or supporting the Government of Russia.

(2) Mr Shvidler is a former longstanding non-executive director of Evraz, in which he continues to hold shares alongside other companies operating in sectors of strategic significance to the Russian Government, primarily the Russian extractives sector. As such, Mr Shvidler is or has been involved in obtaining a benefit from or supporting the Government of Russia through carrying on business in a sector of strategic significance to the Government of Russia.

150. On 28 March 2022, Mr Shvidler was informed by Harrow School that his son's place would be withdrawn with immediate effect. Similarly, over Easter 2022 Mr Shvidler was informed by Marlborough College that his daughter would not be permitted to return to school for the remainder of the school year. Subsequently, Mr Shvidler's children had to continue their school education in the United States, where he now lives.

(4) Mr Shvidler's requests for review of his designation

151. On 14 July 2022, Peters & Peters submitted a request for a ministerial review of Mr Shvidler's designation, pursuant to section 23 of SAMLA. On 5 August, 9 September, and 28 September 2022, Peters & Peters wrote to the Secretary of State, requesting a response to the request for a ministerial review.

152. As set out above, Mr Abramovich's designation was varied on 23 August 2022.

153. On 14 October 2022, Peters & Peters again wrote to the Secretary of State requesting a response to the request for a ministerial review, and notifying the FCDO of Mr Shvidler's intention to seek judicial review of the Secretary of State's failure or refusal to conduct the administrative review (should no response be received). On 28

October 2022 Peters & Peters sent a pre-action protocol letter to the FCDO seeking a response to the request for a ministerial review.

154. On 11 November 2022, the Secretary of State completed the ministerial review, and amended the designation. An amended Sanctions Designation Form and Sanctions Designation Form Evidence pack were sent to Mr Shvidler. The amended bases for designation are as follows:

(1) There are reasonable grounds to suspect that Mr Shvidler is associated with a person (Mr Abramovich) who is, or has been, involved in obtaining a benefit from, or supporting, the Government of Russia.

(2) There are reasonable grounds to suspect that Mr Shvidler himself is, or has been, involved in obtaining a benefit from, or supporting, the Government of Russia through working as a non-executive director of Evraz, an entity carrying on business in sectors of strategic significance to the Government of Russia (namely, the Russian extractives sector).

## The proceedings in the High Court

155. A claim for statutory review brought under section 38(2) of SAMLA was issued in the Administrative Court on 24 February 2023.

156. By the proceedings, Mr Shvidler challenged the designation on two grounds. First, Mr Shvidler contended that the designation constituted a disproportionate interference with his rights under Article 8 of the ECHR and A1P1. Secondly, Mr Shvidler contended that the Secretary of State had exercised his discretion in a discriminatory manner in breach of article 14 (read with Article 8 and A1P1) of the ECHR.

157. On 18 August 2023 Garnham J ("the Judge") dismissed Mr Shvidler's claim.

## Grounds of Appeal

158. Although permission to appeal was granted only on Ground 1, that ground is divided into five sub-grounds.

159. The fundamental point (Ground 1A) which is made on behalf of the Appellant is that the Judge fell into error because he considered that the court's task was limited to assessing whether the Secretary of State's ultimate conclusion under each of the four limbs of *Bank Mellat* was properly open to the executive rather than conducting the exercise for himself.

160. The other sub-grounds under Ground 1 are as follows:

(1B) The Judge erred in concluding that the Appellant was associated with Mr Abramovich.

(1C) The Judge erred in concluding that the Appellant's designation was capable of contributing systematically to the desired objective of the 2019 Regulations, or was rationally connected to it.

(1D) The Judge erred in concluding that the Court was bound to defer to the Respondent's assessment of the efficacy of alternative, less intrusive, measures.

(1E) The Judge's assessment of whether a fair balance had been struck between the rights of the Appellant and the interests of the community was made on an erroneous basis.

Ground 1A: the correct approach to the assessment of proportionality

161. At para 80 of his judgment, the Judge recorded that it was agreed before him that the test for proportionality is that set out by the Supreme Court in *Bank Mellat* and quoted the relevant passage in Lord Sumption's judgment, at para 20, which sets out the four limbs of that test. The Judge noted that the first issue was not disputed: there was a legitimate aim which was "of the greatest importance and in principle justifies the limitation on the fundamental rights of those affected": see para 81. At para 85, the Judge set out the relevant issues which arose for decision by him.

162. I am very conscious that the judgment must be read fairly and as a whole. It would not be right to take one or two phrases or sentences out of context. Nevertheless, I have respectfully come to the conclusion that the Judge fell into error in relation to the proper role of the court in assessing proportionality: I have set out the correct approach above. I will give some examples of why I have reached that conclusion.

163. At para 79, the Judge said:

> "The Secretary of State has a discretion under the 2019 Regulations whether or not to impose sanctions on an individual and, where Convention rights are engaged as they are here, **it is necessary in the exercise of that discretion for the Secretary of State properly to consider the proportionality of the measure proposed**." (Emphasis added)

164. At para 91, the Judge said:

> "Undoubtedly, this is a case where close scrutiny is necessary in order to adjudicate on a complaint that Convention rights have been infringed. And it is the structured analysis articulated in *Bank Mellat* that must be applied. But the Court does not assume the role of primary decision maker on issues that turn on the exercise of judgment or the determination of policy, **limiting itself instead to asking whether the decision was one properly open to the executive**. …" (Emphasis added)

165. It may be that the Judge fell into error because of his understanding of the submission for the Secretary of State. Be that as it may, he recorded, at para 135, that Sir James Eadie had submitted on behalf of the Secretary of State (in the context of the fourth limb of *Bank Mellat*, fair balance) that the Secretary of State had had regard to the impact of sanctions on the Claimant and his family:

> "He says that Parliament has entrusted the Secretary of State with the authority to make decisions in relation to sanctions designations and that, having conducted a careful assessment, taking account of the relevant human rights considerations, **the Secretary of State was entitled to conclude that the Claimant's designation was proportionate.**"

166. When considering the third limb of the *Bank Mellat* test (absence of less intrusive measures), the Judge said, at para 131:

> "In my judgment, this is an area where the Courts have to defer to the judgment of the Secretary of State. The relative benefits, disadvantages and effectiveness of different measures taken in pursuit of foreign policy objectives is not one on which the Court can second-guess the Foreign Office. **All that can properly be said is that the Government's analysis is not self-evidently irrational or outside the range of reasonable responses**." (Emphasis added)

167. At para 141, the Judge said that the witness statements filed on his behalf:

> "demonstrate that the Secretary of State has had **conscientious regard** to the impact of designation on both the Claimant and his family. They **have properly been taken into account** but have been found insufficient to outweigh the community interest in the maintenance of sanctions in the Claimant's case. …" (Emphasis added)

168. At various points in his judgment the Judge referred to the fact that the court was required to show appropriate deference to the views of the Secretary of State when carrying out the proportionality assessment. It appears that the Judge confused that issue, and the related question of what weight should be given to the views of the Secretary of State, particularly in the context of foreign relations, with the different question of whether the role of the court is actually to form its own judgment when assessing proportionality or whether it is confined to reviewing the reasonableness of the Secretary of State's analysis. In my judgment, ultimately the Judge fell into error because he considered that there was a strict dichotomy between the primary decision-maker (the Secretary of State) and the reviewing court. By way of example, at para 92 he said:

> "The Secretary of State is the primary decision-maker under statute but the Court is well placed to judge the reasonableness of his analysis."

169. For those reasons, I have reached the conclusion that Ground 1A must succeed. Under CPR 52.20(1) this Court has all the powers of the lower court. Although it would be open to us to remit the case, neither party urged that course on us and I have concluded that that is not what we should do, because we are in a good position to make the assessment of proportionality ourselves. That said, in accordance with the principles which I have set out above, in particular the decision of the Supreme Court in *In re B*, this Court is still only conducting an appeal by way of review, not by way of rehearing.

170. Before I turn to Grounds 1B-1E, I will make some general observations in the light of submissions made on behalf of the Appellant.

General observations

171. On behalf of the Appellant it is submitted that the threshold criteria for designation under the 2019 Regulations are *necessary* conditions for designation but not *sufficient* ones. It is submitted that, precisely because the permissible grounds for designation are so broad, and because the fundamental liberties of a citizen can be so markedly curtailed for an indefinite period of time, it is imperative for the Court to scrutinise with particular care any reasoned plea that a designation is disproportionate.

172. The Appellant submits that his designation is disproportionate in breach of his rights under Article 8 of the ECHR and A1P1. Further, the Appellant submits that, while he was refused permission to appeal on Ground 2 (which concerned Article 14 of the ECHR), he is entitled to, and does, maintain that the Secretary of State's arbitrary operation of the sanctions regime supports his proportionality case on Ground 1, which is the only ground for which he has permission to appeal to this Court.

173. It is also emphasised on behalf of the Appellant that, while a closed material procedure is in principle available in proceedings of this kind, no application was made for there to be such a procedure used in this case.

174. The Appellant accepts (as he did in the Court below) that the second basis for his designation is made out: that by virtue of his former non-executive directorship of Evraz, he satisfied the criterion for designation in the 2019 Regulations. What is challenged (under Ground 1B) is the first basis of his designation.

175. There was and is no dispute that the Secretary of State's aim of encouraging Russia to cease actions destabilising Ukraine or undermining or threaten its territorial integrity, sovereignty and independence, is a legitimate one.

Ground 1B: the Appellant's association with Mr Abramovich

176. Under Ground 1B it is submitted that the Judge misdirected himself in law when determining that the Appellant was "associated" with Mr Abramovich within the meaning of Regulation 6(2)(d) of the 2019 Regulations. In particular, it is submitted that the Judge erred by:

(a) Holding that the Respondent had reasonable grounds to suspect that the Appellant had received significant financial benefits from Mr Abramovich, as opposed to two companies with which Mr Abramovich was involved.

(b) Eliding the (legally distinct) tests for identification as "concert parties" under the London Stock Exchange Listing Rules with the test for a "joint arrangement" under para 3(2) of schedule 1 to the 2019 Regulations and/or concluding that identification as "concert parties" provided (without more) reasonable grounds to suspect that a "joint arrangement" was in place.

(c) Holding (if and to the extent that para 98 of the judgment is to be so understood) that the mere existence of a long-standing personal and business relationship was, without more, a sufficient basis for finding that the Appellant was, on a proper interpretation of regulation 6(6) of the 2019 Regulations, associated with Mr Abramovich.

177. Under Ground 1B(a), it is submitted that the correct position is that:

(1) Any remuneration received from Sibneft (which in any event was as long ago as 2005) or from Evraz was received from those companies, not from Mr Abramovich himself.

(2) This position is not altered by the (openly acknowledged and well known) fact that the Appellant has a long-standing personal and business relationship with Mr Abramovich.

178. It is submitted that the Appellant no more received a financial benefit from Mr Abramovich than did the other 70,000 employees of Evraz.

179. Like the Judge, I would reject those submissions. The Judge addressed this issue at paras 98-101 of his judgment. He found that the Secretary of State had reasonable grounds to suspect that the Appellant had received significant financial benefits from Mr Abramovich, for the following reasons.

180. First, it was accepted in the letter from the Appellant's solicitors dated 14 July 2022, seeking a review of his designation, that Sibneft was "Mr Abramovich's company". It was accepted that the Appellant was Vice-President for Finance and then President of Sibneft between 1996 and 2005, a period when the company was owned by Mr Abramovich. It was accepted (both in that letter and in the Appellant's witness statement) that he was paid for that role. It was also accepted that he had received a "generous severance package" in the amount of approximately $10 million when he stepped down as President of Sibneft. Accordingly, I agree with the Judge that, while the Appellant may have received what were the normal incidents of his employment

with Sibneft, the fundamental fact remains that he owed his employment in those roles to Mr Abramovich.

181. I also agree with the Judge's second reason on this point. He found that the Claimant was one of Mr Abramovich's two nominee directors on the Board of Evraz, a role for which he says, in his first witness statement, he was paid £204,000 per annum in the period 2013-2021. He was appointed to that role by Mr Abramovich (as was made clear in a letter from Evraz to the Office of Financial Sanctions Implementation ("OFSI"), an office within HM Treasury, dated 11 March 2022). I agree with the Judge that the Appellant obtained a financial benefit from Mr Abramovich as a result of that act of patronage.

182. Under Ground 1B(b) complaint is made of the Judge's reasoning at paras 102-103 of his judgment:

> "102. Third, there was before me an interesting, but ultimately redundant, argument about the degree to which Evraz continues to be controlled by Mr Abramovich. The Claimant acknowledges, in his second statement, that Mr Abramovich and two other men, Messrs Abramov and Frolov (acting through companies owned by them) are regarded as '*concert parties'* and therefore '*controlling shareholders'* under the Financial Conduct Authority's Handbook. He points out that Mr Abramovich holds 28.64% of the shares, Mr Abramov holds 19.223% and Mr Frolov holds 9.65%. However, Lord Anderson seeks to draw a fine distinction between the generally understood definition of '*concert party*' in company law and the definition of joint arrangement under paragraph 3(2) of Schedule 1 to the 2019 Regulations. He says that in company law the phrase '*concert party*' is understood to mean a group of shareholders who coordinate their actions to obtain a given outcome, whereas a joint arrangement under the 2019 Regulations is defined as '*an arrangement between the holders of shares or rights that they will exercise all or substantially all the rights conferred by their respective shares or rights jointly in a way that is pre- determined by the arrangement.'* Accordingly he submits that to suggest that the Claimant received financial benefit from Mr Abramovich is based on an error of law.
>
> 103. I reject the Claimant's argument in this regard. In my judgment, Sir James was right in his submission that, given that Messrs Abramovich, Abramov and Frolov are treated by Evraz as '*acting in concert*', there are reasonable grounds to suspect that there exists a '*joint* arrangement' between them within the meaning of paragraph 3. Accordingly, each of them is to be treated as holding the combined shares of all three, and Mr Abramovich can be treated as owning, directly or indirectly, more than 50% of the shares or voting rights in Evraz."

183. Like the Judge, I do not consider that the Secretary of State made an error of law as submitted in this regard. Rather, the point is simply the common sense one that, in circumstances where Mr Abramovich, Mr Abramov and Mr Frolov are treated by Evraz as "acting in concert" and are therefore "controlling shareholders" within the meaning of the Financial Conduct Authority's Handbook, there are also reasonable grounds to suspect that there exists a "joint arrangement" between them within the meaning of para 3 of Schedule 1 to the 2019 Regulations. This is not a point which turns on the precise details of company law but is simply a common sense conclusion.

184. Under Ground 1B(c), complaint is made that the mere existence of a long-standing personal and business relationship is insufficient, without more, for finding that a person is "associated with" another person. With respect, I disagree.

185. In my judgment, this follows from the natural meaning of the phrase used. While the Regulations give an inclusive definition of the phrase "associated with" in regulation 6(6) and (7) (which I have set out above), that is often a drafting technique to put certain cases beyond doubt. I also do not accept Lord Anderson's submission that the broad language used in the Regulations should be read narrowly or strictly. While the fact that the language is indeed broad may well have a bearing on the assessment of proportionality, in particular under the "fair balance" limb, it does not seem to me that the plain meaning of the words used in the Regulations needs to be, or should be, cut down because of the human rights context.

186. For those reasons, I would reject Ground 1B.

Ground 1C: rational connection

187. Under Ground 1C the Appellant makes the following complaints in the grounds of appeal:

> "The learned Judge misdirected himself in concluding that the Appellant's designation was capable of 'contributing systematically to the desired objective' of the 2019 Regulations, or was rationally connected to it (Judgment, §128). In particular, the learned Judge erred in concluding that:
>
> (a) The assessment in the Appellant's case involved matters of executive judgement based on the Secretary of State's institutional expertise (Judgment §116), such that the Secretary of State was better placed to make an assessment than the Court and/or that the Secretary of State's decision was based on such judgements (a conclusion which finds no support in the Secretary of State's evidence).
>
> (b) The post-decision evidence of FCDO officials is to be equated with the reasons of the Secretary of State for making the decision under challenge and/or entitled to particular weight or deference, whether for the reasons provided at Judgment §96 or at all.

> (c) The mere existence of 'reasonable grounds' to suspect that a state of affairs existed suffices for the purposes of the proportionality assessment.
>
> (d) It was permissible to impose sanctions so as a 'send a message' that conduct which had already ceased was unacceptable (Judgment §122) either at all, or in a discriminatory fashion.
>
> (e) A systematic contribution could properly be inferred because sanctions on the Appellant 'may well discourage others from involving themselves in businesses supportive of the Russian state' or encourage them to divest (Judgment §§118, 127), or because the Appellant 'may well' be able to speak out privately (Judgment §124)."

188. Before this Court not all these points were advanced, at least with any vigour, but other points were made. A highly detailed critique was put to this Court, criticising each of the eight ways in which FCDO officials had said there was a rational connection in this case:

(1) The Secretary of State considers that the Appellant's designation will incentivise him to put pressure on Mr Abramovich to (i) encourage President Putin to cease or limit Russia's actions in Ukraine; and/or (ii) to distance himself from (and thereby isolate) President Putin; and/or (iii) to speak out against the Russian invasion of Ukraine: see the first witness statement of Mr Reed, para 69(d).

(2) The designation will send a signal to the Appellant himself, and others in his position, that there are negative consequences to having implicitly legitimised the Government of Russia's actions in that way: see the first witness statement of Mr Reed at para 69(a).

(3) The designation will disincentivise others from associating themselves in future with those individuals who are close to President Putin and individuals who have carried on business in sectors of strategic significance to the Government of Russia. It will also encourage others to dissociate themselves from those individuals who are close to President Putin and individuals who have carried on business in sectors of strategic significance to the Russian Government: see the first witness statement of Mr Reed at para 69(b).

(4) The designation will incentivise the Appellant and others in his position to oppose more robustly Russia's invasion of Ukraine: see the first witness statement of Mr Reed at para 69(c).

(5) The designation will send a signal to the Appellant himself, and others in his position, that there are negative consequences to having implicitly legitimised the Government of Russia's actions in that way: see the first witness statement of Mr Reed at para 70(a).

(6) The designation will encourage the Claimant, and others in his position, to distance themselves from sectors of strategic significance to the Government of Russia and will incentivise them to divest from companies in sectors of strategic significance to the Government: see the first witness statement of Mr Reed at para 70(b).

(7) The designation will disincentivise others from taking up director level positions in entities that are carrying on business in sectors of strategic significance to the Government of Russia, as well as encouraging others to resign from such positions, thereby disrupting the operations of those entities: see the first witness statement of Mr Reed at para 70(c).

(8) The designation will incentivise the Appellant and other prominent business people who are, or have been, involved in carrying on business in sectors of strategic significance to the Government of Russia to oppose its invasion of Ukraine: see the first witness statement of Mr Reed at para 70(d).

189. At this stage I would make certain fundamental points of principle.

190. First, it is important to recall that what is required under the second limb of the *Bank Mellat* test for proportionality is a rational connection, no more and no less. There does not have to be a perfect fit between the legitimate aim and the means chosen to achieve it, provided there is a rational connection between them.

191. Secondly, this is an objective test. It calls for analysis by the court itself. As I have already mentioned, proportionality is, unlike conventional judicial review grounds, concerned with the substance of the matter, not the process by which the decision was reached. If, as a matter of objective analysis, there is a rational connection proved to the court's satisfaction, it is immaterial whether or not this featured in the reasoning process of the decision-maker at the time.

192. Thirdly, as the Judge observed at para 128 of his judgment, the Respondent does not have to establish all eight of the factors which were argued about extensively both before him and before this Court. Some of those factors may have been weaker than others. What is crucial at the end of the day is whether there is a rational connection between the legitimate aim and the means chosen to achieve it. In my judgment, the answer to that question is obvious: there clearly is.

193. Finally in this context, I should mention the submission made by Lord Anderson that there was no rational connection because the measure was arbitrary. In this way Lord Anderson attempts to resurrect his discrimination argument, for which permission to appeal was refused. He submits that the decision of the House of Lords in the *Belmarsh* case, in particular Lord Hope's speech, makes it plain that a discriminatory measure will be arbitrary. If it is arbitrary, there can be no rational connection. In my view, there are several difficulties with this line of argument.

194. First, the Appellant has been refused permission to advance the discrimination argument. It is not therefore open to him to bring it in through "the back door". The distinction with the *Belmarsh* case is that, there, the House of Lords (by a majority) held that there was discrimination on the ground of nationality. The foundation for the argument that the measure adopted by Parliament was therefore irrational and

arbitrary was present. In contrast, in the present case the discrimination foundation for the argument is absent.

195. Secondly, I agree with the Judge, at para 151 of his judgment, that the case on discrimination presented to him was "hopeless". There was no foundation on the evidence before the Judge for the suggestion that the Appellant was designated, whereas others in a similar position were not, because of race, nationality or ethnicity. Before this Court Lord Anderson complained that this had never been part of the Appellant's submissions. He submitted that the complaint was not one of direct racial discrimination but rather one of indirect discrimination. Be that as it may, and even if it is permissible to resurrect this argument before this Court, it would have to be shown that the Respondent had adopted a measure which was more likely to have a disproportionate impact on people from certain ethnic groups rather than others, even though it appeared on its face to be neutral. The fact is that the Respondent did not adopt any such rule or policy. As the Judge observed, at paras 151-152 of his judgment, the reason why some people were designated and others were not had everything to do with the roles that they had played in Evraz and nothing to do with their race, nationality or ethnic origins.

196. Accordingly, I would reject Ground 1C.

Ground 1D: less intrusive measures

197. Under Ground 1D, as I have already explained, I accept the criticism which is made of the judgment below to the extent that the court must assess for itself whether each limb of the *Bank Mellat* test is satisfied and cannot confine itself to asking the question whether the Respondent's choice was self-evidently irrational or outside the range of reasonable responses: see para 131 of the judgment below.

198. Lord Anderson submits that, if properly directed, the Judge ought to have concluded that the aim of sending a political message to the Government of Russia, the international community, and those who are currently (or who are contemplating) involvement in strategic sectors of the Russian economy could be achieved more effectively (and, indeed, had already been achieved) with less intrusive measures. Indeed, it is submitted, the UK Government has itself published a comprehensive list of the ways in which it has already sent such a message, including by providing humanitarian aid to Ukraine, by supplying weapons and military training to Ukraine's armed forces, by changing the UK immigration system to help bring Ukrainians to safety, by the removal of Russian banks from the SWIFT system and by the imposition of properly targeted sanctions.

199. The fundamental problem with this line of argument is that it poses a false dichotomy between other measures and the designation concerned. Driven to its logical conclusion, it would mean that the Government would not be able to designate any individual such as the Appellant.

200. In formulating the third limb of the test in *Bank Mellat*, at para 74, Lord Reed said that it poses the question whether "a less intrusive measure could have been used

without unacceptably compromising the achievement of the objective". The crucial word there is "unacceptably".

201. Furthermore, as the authorities in this area make plain, the mere fact that there may be other means available does not mean that the proportionality test is not satisfied. There is room for judgment in this area.

202. As Lord Reed observed in *Bank Mellat*, at para 75, by reference to American and Canadian caselaw, "a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation", especially if he is unaware of the relevant practicalities and is indifferent to considerations of cost. He also observed that a margin of appreciation is also essential if a federal system such as Canada, or a devolved system such as that of the UK, is to work, since a strict application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting protective rights. Although he was there referring specifically to legislation, in my view, the point of principle is of more general application.

203. Accordingly, I have reached the conclusion that, despite the error in the court below as to approach, the third limb of the *Bank Mellat* test is satisfied in this case.

Ground 1E: fair balance

204. Ground 1E relates to the fourth and final limb of the *Bank Mellat* test, that is a fair balance between the rights of the individual and the general interests of the community.

205. Ground 1E is formulated as follows in the Grounds of Appeal:

> "The learned Judge misdirected himself in respect of the proper approach to the assessment of whether a fair balance had been struck between the rights of the Appellant and the interests of the community. In particular, the Learned Judge erred:
>
> (a) In concluding that the Secretary of State had regard, at the material time, to the fact that the Appellant's British citizenship meant that his designation had worldwide effects (Judgment, §§140-141).
>
> (b) In concluding that the effects of designation were mitigated on the basis that they are "temporary and reversible" (Judgment, §141). The sanctions imposed on the Appellant are open-ended, the government's own statements suggest that existing Russia sanctions are liable to remain in place for the long term, there is no obligation on the Secretary of State to review their appropriateness, and (unless there is a material change of circumstances) the Appellant is not entitled to request a ministerial review.

> (c) In applying *obiter* remarks of Sir Ross Cranston in *Dalston Projects Ltd v Secretary of State for Transport* [2023] EWHC 1885 (Admin) to the assessment of fair balance. Both rational connection and fair balance properly fall to be demonstrated by reference to individual designation decisions and not by reference to 'the cumulative effect of all the measures imposed under that regime, together with other types of diplomatic pressure' (Judgment, §§136-138). Properly directed, the Court ought to have concluded that the Appellant's designation imposed an unfair and disproportionate burden on him."

206. As Lord Reed said in *Bank Mellat*, at para 74, the question is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure. In this context, it is submitted for the Appellant, particular regard has to be given to whether the individual is being called upon to bear a disproportionate and excessive burden. Lord Anderson submits that the Appellant is plainly bearing a disproportionate and excessive burden. Properly and objectively assessed, he submits, the likely benefit is non-existent: the Appellant's designation has no real prospect of delivering any real benefit (whether practical or symbolic).

207. The first specific complaint that is made on behalf of the Appellant is that the Judge was wrong to conclude that the Respondent had had conscientious regard to the adverse effects of the designation on the Appellant and his family. This is demonstrably not the case, it is submitted, not least because the Respondent did not consider (so far as the contemporaneous records show) that the consequence of the fact that the Appellant is a British citizen means that he is subject to a world-wide asset freeze.

208. The difficulty with this line of argument is that, as I have already explained, and is common ground, the proportionality assessment required of the Court is not concerned with the decision-making process by the Respondent. It is a question of substance for the court to decide, in the light of all the material before it.

209. The second criticism which is made of the judgment below relates to the Judge's conclusion that the effects of designation were mitigated on the basis that they are "temporary and reversible". It is submitted that in truth the sanctions imposed on the Appellant are open-ended and may well be in place for an indefinite period: see the judgment of this Court in *Mints & Others v PJSC National Bank Trust & Others* [2023] EWCA Civ 1132, at para 181. It is pointed out that, in the light of an amendment that was made to the 2019 Regulations in June 2023, the sanctions regime may be in place even after cessation of hostilities in Ukraine because they will retain the purpose of promoting the payment of compensation by Russia for damage, loss or injury suffered by Ukraine as a result of its invasion. Furthermore, it is pointed out, there is no obligation on the Respondent to review the appropriateness of a designation and (unless there is a material change of circumstances) the Appellant is not entitled to request either a further Ministerial Review or to bring a further court challenge.

210. I would accept that these sanctions are both severe and open-ended. But this does not meet the fundamental point that sanctions often have to be severe and open-ended if they are to be effective. If sanctions are to be effective, a serious price has to be paid by those who are within the definition of people to be designated under the 2019 Regulations. On the other side of the balance is Russia's very serious violation of international law and the need to bring the invasion of Ukraine to an end.

211. I am particularly conscious of the consequences of the Appellant's designation for his children, whose school education was disrupted. That said, they have been able to continue their education in the United States and, if they had remained in the UK, they would have had access to the publicly funded education system in this country, even if that was not their or their parents' first choice.

212. Furthermore, it is of some relevance that the Appellant and his family are able to meet the costs of their needs through the system of licensing operated by OFSI at HM Treasury. If they have reason to complain about the way in which the licensing system is operated in practice in relation to them, they have a remedy available against HM Treasury but that would not be a reason to question the lawfulness of the designation of Mr Shvidler as such.

213. The third criticism which is made of the judgment below is the adoption by the Judge of the remarks of Sir Ross Cranston in *Dalston Projects* concerning the assessment of fair balance. It is submitted that both the issue of rational connection and the issue of fair balance properly fall to be demonstrated by reference to *individual* designation decisions and not by reference to "the cumulative effect" of all the measures imposed under that regime, together with other types of diplomatic pressure.

214. For reasons I have already given in relation to the appeal in *Dalston Projects*, I would reject that submission. As a matter of law and of common sense, the cumulative effect of individual measures does have to be taken into account in assessing proportionality. If it were otherwise, each individual who is designated could complain that the sanction imposed on him is not going to be particularly effective. Logically that would mean that no particular individual could ever be the subject of designation. The purpose of the designation scheme is to make a real contribution: each individual designation does make a contribution to the overall impact.

215. Accordingly, I would reject Ground 1E.

Conclusion in *Shvidler*

216. For the reasons I have given I would dismiss the appeal in *Shvidler* too.

**Lady Justice Whipple:**

217. I agree.

**Sir Geoffrey Vos, Master of the Rolls:**

218. I also agree. I want, however, to add a few words about Singh LJ's lucid explanation of the role of an appellate court when considering a decision on proportionality by a first-instance court (at paras 22-37 above).

219. Singh LJ says correctly at para 27 that Lord Reed in *Abortion Services* at para 31 placed *Bank Mellat* in the second category of cases (i.e. in the category where the appellate court does not accord any deference to the assessment of proportionality undertaken by the court(s) below).

220. For my part, I can see an argument for suggesting that *Bank Mellat* was not, in fact, a case that fell into that second category. Paras 19-27 of Lord Sumption's judgment in *Bank Mellat* make it clear that the case concerned whether or not it had been proportionate for HM Treasury to make a direction against Bank Mellat alone under schedule 7 of the Counter-Terrorism Act 2008. The majority of the UK Supreme Court decided it had not because the distinction between Bank Mellat and other Iranian banks was an arbitrary and irrational one which made the direction disproportionate (Lord Sumption at para 28). It was arguably not, therefore, a challenge to the legislation, rules or policies themselves, but to their application in the particular case.

221. In these cases, as Singh LJ has said, neither SAMLA nor the 2019 Regulations were challenged. What was challenged were the decisions to make and sustain the direction against the Phi and the designation of Mr Shvidler. I think it is very clear that challenges to those decisions fell into the third category of cases, to which the correct approach on appeal is explained by Lord Neuberger's judgment in *In re B* (see paras 28-36 of Singh LJ's judgment). In these circumstances, I would go so far as to say that I do not think it matters for the resolution of this case whether *Bank Mellat* was a second or third category case.