IN THE SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/170/2020
Hearing Date: 26 May 2021
Date of Judgment: 13th July 2021

Before:

THE HONOURABLE MR JUSTICE JAY
UPPER TRIBUNAL JUDGE KOPIECZEK
MRS JILL BATTLEY

BETWEEN

C6

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MS S. HARRISON and MR A. BANDEGANI (instructed by Birnberg Peirce & Partners) appeared on behalf of the Appellant.

MR A. BYASS (instructed by the Government Legal Department) appeared on behalf of the Respondent.

MS S. RAHMAN QC (instructed by the Special Advocates' Support Office) appeared as Special Advocate.

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OPEN JUDGMENT

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MR JUSTICE JAY:

Introduction

1. C6 applies under r. 40(2) of the SIAC Procedure Rules for an order to strike out part of the Respondent's reply on the ground of non-compliance with para. 1 of the Order of Garnham J made on 20 April 2021. This part of his Order, made under r. 40(1), made it clear that non-compliance could have serious consequences.

2. The application is unprecedented. We are not aware of a r. 40(1) order being made in any previous case against the Secretary of State, although there have been several occasions on which such orders have been made against appellants.

Chronology

3. C6 has a long and chequered immigration history. Originally from Afghanistan, his British citizenship was revoked by the Respondent in 2014, and that decision was upheld by SIAC, Irwin J, as he then was, presiding. We have read SIAC's lengthy judgment, and note the conclusion that the Respondent was fully justified to act against him under s. 40 of the British Nationality Act 1981, given his associations with jihadi terrorists.

4. On 15 November 2016, C6 made a fresh claim application for asylum and humanitarian protection under para. 353 of the Immigration Rules. There was very considerable delay thereafter, with the Respondent withdrawing her refusal decision on two occasions; but eventually, on 19 February 2020, she made a decision refusing asylum and humanitarian protection. It is this decision which is the subject of the present appeal.

5. The date the Respondent initially proposed to file her r. 10 material was 30 October 2020. The pandemic had created difficulties before then, and we fully accept and understand that it continues to cause problems. The October date was not achieved, and on 2 December 2020 GLD proposed directions affording the Respondent until 5 March 2021 to make r. 10 disclosure, entailing moving the substantive appeal hearing back to December 2021.

6. Following email exchanges with the Commission, the Chairman was sufficiently concerned to call for a remote directions hearing which took place on 9 December 2020. Having heard submissions from Mr Ali Bandegani and Mr Andrew Byass, the Chairman effectively acceded to the Respondent's arguments and directed the Respondent to file a statement of the evidence relied on and any r. 10 material by 5 March 2021 and that the substantive appeal should take place on 6 December 2021. The Chairman invited the parties to agree the terms of a draft order which would reflect this basic temporal framework, and, on 6 January 2021, a formal order was made.

7. On 4 March 2021, GLD sought Birnberg Peirce's agreement to an extension of time for filing the statement of the evidence relied on and the r. 10 material relating to the safety on return ("SOR") issue, until 7 April 2021. There was said to be ongoing disruption caused by the pandemic. On 5 March, a similar application was made in relation to the national security issue, although the extension sought was only until 8 March. The Chairman granted that extension.

8. On 8 March 2021, the Respondent filed and served a national security statement and accompanying r. 10 material. No exculpatory material was said to fall for disclosure. We are not required to probe the merits of that proposition at this stage.

9. On 7 April 2021, GLD emailed Birnberg Peirce and the Commission seeking an extension of time to file and serve the Respondent's SOR statement and r. 10 material (by then, she was nearly five weeks late), and an adjournment of the r.38 hearing, listed for 20 April 2021, to 25 or 26 May. It was said that the exculpatory review had been completed.

10. On 9 April 2021, Birnberg Peirce indicated that this application would be opposed.

11. On 13 April 2021 C6 applied for directions under r. 40. The application made it clear that the Respondent was in default, and that "no material has yet to be served with regard to [SOR] in relation to [C6's] evidence in support of his refugee/human rights protection claim and exculpatory material". It is unnecessary to dwell on the terms of the application because Garnham J clearly accepted its essential elements.

12. By letter dated 16 April 2021, GLD reiterated that the exculpatory review had been completed and that "[the SOR statement] will be finalised next week, and any

exculpatory material required to be filed and served, together with the statement of evidence, will be filed and served by 23 April 2021". Otherwise, the application dated 13 April was "strongly opposed".

13. The hearing before Garnham J took place on Tuesday, 20 April. No transcript of the proceedings or of his judgment are available, but Ms Shaheen Rahman QC's informal note of what he said was read out to the Commission during the course of these proceedings. He found that the Respondent was in serious breach of the Order, that her SOR statement and r. 10 material be filed by 5 March 2021 and made an order *inter alia* in the following terms:

> "1. By 4 p.m. on 23 April 2021, the Secretary of State shall:
>
> > (a) file with the Commission, and serve on the Special Advocates, a statement of the evidence on which the Secretary of State relies in opposition to the appeal concerning issues 7-9 in the Scott Schedule [SOR] ..., and any material pursuant to r. 10(1) (including all exculpatory material ...), and any objection pursuant to r.37(3).
> >
> > (b) serve on the Appellant an OPEN statement pursuant to r. 10(2), and any exculpatory material of which she is aware and which can be disclosed without disclosing information contrary to the public interest.
>
> 2. The Secretary of State having failed to comply with the Commission's previous directions to serve the material identified in para. 1 above by 5 March 2021 and 7 April 2021, this Order constitutes notice pursuant to r. 40(1)(a) that para.1 must be complied with by 4 p.m. on 23 April 2021, and that if the Secretary of State fails to comply with para. 1 the Commission may strike out the Secretary of State's reply.
>
> 3. The Secretary of State has liberty to apply in relation to paras. 1 and 2 above."

14. At 16:02 on 23 April 2021, GLD emailed SIAC and Birnberg Peirce attaching copies of the statement of Christine Tichler and OPEN exhibits. Ms Stephanie Harrison QC

for C6 did not advance a submission about the two-minute lateness. It does, however, leave a small mark in the sand.

15. According to Ms Tichler's witness statement, the Respondent took into account FCDO SOR assessments dated 9 and 16 December 2019, which were separately provided (by way of OPEN summary). This was updated on 23 April 2021 and a similar OPEN summary was also provided. The witness statement referred to other sources of information which were listed in Annex A, a document which was, unfortunately, omitted from the disclosure bundle on 23 April through oversight. In our view, this application cannot hinge on that failure.

16. We have, of course, considered the SOR assessments very carefully. They make it clear that the assessments were written in consultation with the British Embassy in Kabul and the views of the Afghanistan team in the FCDO were also taken into account.

17. No exculpatory material was served in OPEN on 23 April.

18. On 30 April 2021, Birnberg Peirce wrote to GLD stating that it was "entirely incredible" that there should exist no such exculpatory material, and noted that there appeared to be a "wholesale" breach of both r. 10 and para. 1 of Garnham J's Order of 20 April.

19. On the same day, Birnberg Peirce served what was entitled a "request for further information". We will be examining the substance of this document later. There is a dispute between the parties as to whether this request should be described as a document that identifies the respects in which the Respondent has not complied with her r. 10 obligations, or whether it is analogous to a request for specific disclosure and, therefore, falls within r. 4(3).

20. GLD responded to this request at 16:20 on 10 May. Nothing turns on the exact time because Garnham J's Order made no provisions for such requests, however they are properly characterised. Again, the substance of GLD's reply will be examined later.

21. Following this correspondence, on 19 May Birnberg Peirce wrote to GLD stating that it was clear that the Respondent was in breach of Garnham J's Order.

22. Meanwhile, the r.38 process was ongoing. Garnham J's timetable in relation to that was stringent, in particular in terms of the obligations it placed on the Special Advocates. They were going to have to work very hard indeed to meet the prescribed timeframe.

23. On 20 May 2021, the Special Advocates' Support Office wrote to GLD (representing the Respondent) supporting Birnberg Peirce's position in relation to the failure to provide exculpatory material. It was said that:

> "The exculpatory material served [in CLOSED] on 23 April 2021 was incomplete and the SAs made a number of r.4(3) requests in relation to the same which (in breach of Garnham J's Order) are yet to be responded to. In addition, the exculpatory material and SOR statement and exhibits were not in fact served on SASO until after 4 p.m. on 23 April 2021 rather than by 4 p.m. as required, following an email request for an update from SASO at 4:22 p.m. In practical terms, this meant that the (incomplete) material that had been served, could not be delivered to the SAs until the afternoon on 26 April ..."

24. We should make a number of observations about this. First, we have decided not to give a CLOSED judgment in this case. We can say quite simply that there is nothing in CLOSED that improves the Respondent's case (or, at least, materially improves it for present purposes, given the line we propose to take); and, to the extent that there may be material in CLOSED which improves C6's case, we do not think that we need to address it. It is far better, in our opinion, in an application of this sort, which is procedural in nature, for the judgment to be wholly in OPEN. Secondly, Garnham J's Order did not provide a timetable for responses to r. 4(3) requests. Thirdly, it was not wholly clear whether, had the delivery of the material to SASO taken place at, say, 15:59 on 23 April, the Special Advocates would have received it in chambers that same day. The highest we can properly put it is that late delivery increased the risk of delay. When relevant individuals read this judgment, no doubt they will give consideration to whether the delivery to SASO should occur before delivery to SIAC. In most cases, SIAC will not be reading papers on the same day; but, if it makes it plain in advance that it intends to, no doubt special arrangements could be made.

25. SASO's letter dated 20 May 2021 made the following additional points:

(1) The Special Advocates produced their r.38 submissions in time (by 4 p.m. on 5 May).

(2) The Respondent's response was late (i.e. after 4 p.m. on 14 May which meant that there could be no delivery to the Special Advocates' chambers until the Monday).

(3) That response was said to be incomplete, particularly on the issue of SOR.

(4) At approximately 6 p.m. on 19 May, the Respondent provided responses to some only of the Special Advocates' outstanding requests.

(5) It was now impossible, in obedience with Garnham J's Order, for the parties in CLOSED to meet and prepare the necessary Scott Schedule to be filed by Friday, 21 May.

(6) It followed from all of the above that the r.38 hearing fixed for 26 May could not be effective.

26. Proposition (6) above will need careful examination in due course. At this stage, it is necessary to add only this. On Friday 21 May, the Chairman directed the parties in CLOSED to do the best they could in the circumstances, and to meet to narrow issues. There was a meeting on 24 May, but we understand it did not get very far.

Relevant provisions of the SIAC Procedure Rules

27. Rule 4(3) provides as follows:-

> "(3) Subject to paragraphs (1) and (2), the Commission must satisfy itself that the material available to it enables it properly to determine proceedings."

28. Rule 10 provides

> **"Secretary of State's reply to an appeal**

(A1) This rule does not apply to an application to the Commission for review under section 2C, 2D or 2E of the 1997 Act.

(1) Where the appellant wishes to rely on evidence in support of his appeal, he must file with the Commission-
(a) a statement of the evidence on which he relies in opposition to the appeal; and
(b) any exculpatory material of which he is aware and serve on the Secretary of State and on any Special Advocate a statement of that evidence.

(2)Unless the Secretary of State objects to the statement being disclosed to the appellant or his representative, he must serve a copy of the statement on the appellant at the same time as filing it.

(3) Where the Secretary of State objects to a statement filed under paragraph (1) being disclosed to the appellant or his representative, rules 37 and 38 shall apply.

(4) Where a special advocate is appointed, the Secretary of State must serve on him a copy of the statement and material filed under paragraph (1).

29. Rule 10A provides in material part:

Further material in relation to an appeal

(A1) This rule does not apply to an application to the Commission for a review under section 2C, 2D or 2E of the 1997 Act.

(1) Where the appellant wishes to rely on evidence in support of his appeal, he must file with the Commission and serve on the Secretary of State and on any special advocate a statement of that evidence.

(2) Where the appellant serves a statement under paragraph (1), the Secretary of State must—

(a) make a reasonable search for exculpatory material;

(b) notify the appellant of the extent of that search, subject to paragraph (4);

(c) file with the Commission any exculpatory material: and

(d) if he wishes to rely on further evidence, file with the Commission a statement of that evidence.

(3)The factors relevant in deciding the reasonableness of a search include the following—

(a) the number of documents involved;

(b) the nature and complexity of the proceedings;

(c) whether the documents are in the control of the Secretary of State;

(d) the ease and expense of retrieval of any particular document;

(e) the significance of any document which is likely to be located during the search.

..."

30. Rule 40 provides:

"Failure to comply with directions

(1) Where a party or the Special Advocate fails to comply with a direction, the Commission may serve on him a notice which states—

(a) the respect in which he has failed to comply with the direction,

(b) a time limit for complying with the direction; and

(c) that the Commission may—

(i) proceed to determine the appeal or application for review on the material available to it if the party or Special Advocate fails to comply with the direction within the time specified; or,

(ii) strike out the notice of appeal, notice of application for review or the Secretary of State's reply, as the case may be.

(2) Where a party or Special Advocate who has been served with such a notice fails to comply with a direction, the Commission may proceed in accordance with paragraph (1)(c).

(3) Where the Commission has struck out a notice of appeal, notice of application for review or the Secretary of State's reply under paragraph (1)(c)(ii), it may subsequently reinstate the notice or reply if it is satisfied that circumstances outside the control of the appellant or the Secretary of State (as the case may be) made it impracticable for the appellant or Secretary of State to comply with the direction."

31. There was some discussion during the hearing as to the interaction between r. 4(3) and r. 10. The obligation on the Respondent under r. 10 is a disclosure obligation which bears certain analogies with the obligations on a party in ordinary civil litigation under CPR Part 31. The analogy is, of course, not complete, but the Respondent is required to disclose exculpatory material of which she is aware. We will be coming to this in due course, but the obligation cannot be interpreted as being absolute, in the sense that the Respondent includes everyone within her department and other agencies who are advising her. If she were required to disclose anything and everything that everyone

knew, there would never be compliance. As a separate matter, there is, in fact, no obligation under 4(3) for a party to do anything. In practice, however, parties have treated r.4(3) as the mechanism for obtaining specific disclosure. Under Part 31 of the CPR, specific disclosure applies when one party considers that the disclosure given thus far has been inadequate.

32. The Respondent maintained the position in correspondence that she was not in breach of Garnham J's Order because she was merely reacting to C6's r.4(3) requests for which no timetable had been provided. That, in our view, misses the point. If the r.4(3) requests covered matters which should have been disclosed under r. 10, then the Respondent would be in breach of both that rule and the Order. Viewed in this manner, the r.4(3) requests would be doing no more than identifying the respects in which the Respondent was already in breach.

33. The Commission invited the parties to specify a test for determining whether or not the Respondent was in breach of her r. 10 obligations in relation to particular exculpatory documentation (a breach in respect of inculpatory documentation would hardly ever lead to the possibility of the r. 40 sanctions; the worst that could happen is that the Respondent would not be able to rely on it). We have already made the point that the Respondent is vast and that a modicum of pragmatism is required.

34. There may well be authority on the application of the *Denton* jurisdiction to non-compliance with disclosure orders in ordinary civil litigation which is relevant for the question we pose. But we were not referred to any and, for present purposes, the matter can proceed on the basis of first principles. We are concerned here with the exercise of draconian powers under r. 40, in relation to an alleged breach of r. 10, and an Order made under r. 40(1) which identifies that breach and requires remedial action within a specified timeframe. The obligation under r. 10(1)(b) is for the Respondent to disclose exculpatory material of which she is aware. In our judgment, the Respondent will be in breach of r. 10(1)(b) if she fails to disclose exculpatory material of which relevant officials are, in fact, aware, or of which they clearly and obviously ought to have been aware. By "relevant officials", we would certainly include individuals within the Respondent handling C6's case, individuals within both of the Respondent and the FCDO advising on human rights and safety issues in connection with Afghanistan, relevant officials at or seconded to the British Embassy in Kabul, and

(necessarily more vaguely) officials within the agencies capable of offering direct input on these SOR issues.

35. This formulation may require revision and refinement in subsequent cases should these ever arise. We have set the bar quite high against C6. We accept that potentially tricky questions may arise when it comes to documentation within the knowledge of relevant agencies. We do not consider that these questions require resolution in the context of this application.

36. There are further questions of law which we will address at the appropriate time.

The evidence relevant to the issue of breach

37. The best way to approach this question is to take C6's r. 4(3) request line by line and compare it with the Respondent's response document.

38. We will adopt C6's numbering. The Respondent's numbering has gone slightly awry, but, with Mr Byass' assistance, we were able to follow the argument. We will ignore the alleged breaches that the Respondent has clearly answered. For example, request 11(i)(a) sought "the evidence from the OPEN SIAC judgment dated 22 December 2015". The Respondent does not rely on that evidence and is not required to disclose any as exculpatory material. In 2015, SIAC had before it and considered all the evidence made available to it, and the Commission's conclusions cannot readily be revisited. What can be considered is whether the national security risk constituted by C6 has changed since 2015; and, if it has, whether that is relevant. This, however, is outwith the scope of the present application.

39. Request 11(i)(b). Annex A was omitted. As we have said, it was omitted in error and we therefore say no more about it.

40. Request 11(i)(c). The Home Office country policy information note. C6 already had this document.

41. Request 11(ii)(a), (f) and (g). These requests relate to the views of FCDO colleagues in Kabul and the Afghanistan team at the FCDO (item (a)), the reports of the "UK experts" monitoring detention facilities in Kabul (item (f)), and the names and reports of the NGOs reporting arbitrary arrests and detention (item (g)). The Respondent says

that the material falling within (a) has already been disclosed in CLOSED, that the item (f) material will be subjected to further review and that, as for item (g), the 2018 State Department report does not provide any sources.

42. In our judgment, item (a) falls to be considered in connection with C6's case relating to the April 23 SOR assessment. We cannot agree that the Respondent is in clear breach in relation to item (f); she has said that she will review whether there is further material and that, if there is, it will be disclosed. It may be that there is nothing. In any case, we cannot assess at this stage whether material that may be disclosed later ought to have been disclosed on 23 April. We also consider that the Respondent has provided a complete answer to item (g).

43. Requests 11(ii)(b), (c), (d), (e) and (h). These requests relate to evidence of executions from 2005 to date (item (b)), the US State Department human rights report (item (c)), various UNAMA reports (item (d)), the revised Penal Code and similar documents (item (e)) and material stating that the ISKP in Nangahar is "defeated" (item (h)). The Respondent has agreed to provide copies of Amnesty's report for 2015-20 (item (b)), pointed out that items (c) and (d) were publicly available (and provided soft copies on 10 May), attached soft copies of the material it had falling within item (e), and also attached open-source reporting relevant to item (h).

44. In our judgment, the Respondent was technically in breach in relation to these various items. The seriousness of these breaches will need to be considered.

45. Request 11(iii)(a), This related to:

> "The 'consultation' (including any assessment, communication or information) shared between the head and deputy head of the by the [sic] counter-terrorist team, British Embassy, Kabul and the persons listed [in the April 2021 risk assessment]."

46. The Respondent's response to this was as follows:

> "The request relates to the April 2021 SOR assessment, which was finalised on the day it was disclosed. The SSHD agrees to disclose (in OPEN or CLOSED as appropriate) any views which fed into the assessment which are exculpatory. The SSHD anticipates that this can be provided no later than 28 May 2021."

47. We will be returning to this important issue.

48. Request 11(iii)(b). This request related to the overseas security and justice assistance assessment. The Respondent agreed to disclose this in CLOSED, and such disclosure occurred on 21 May.

49. Request 11(iii)(c). This request related to the results of name searches. The request was connected to the April 2021 SOR assessment. The documentation is slightly confused, but the Respondent agreed to supply this information in CLOSED (insofar as it has not already been provided) by 28 May.

50. Request 11(iii)(d). This request related to the results of Open Source Internet Searches or newer versions of UNAMA, EASO and US State Department reports. The position here is that all bar two of the reports were hyperlinked footnotes to the April 2021 SOR assessment itself. These two were provided on 10 May.

51. Request 11(iii)(e). This duplicates request 11(iii)(a).

52. Request 11(iii)(f) – (i). All of these documents are publicly available. The Respondent provided them on 10 May.

53. Request 11(iii)(j). This request related to any assessment made about the implications of US troop withdrawal by 11 September 2021. The Respondent has agreed to review assessments which actually fed into the April 2021 SOR assessment and to disclose anything exculpatory in OPEN or CLOSED by 28 May.

54. Request 12. By this request, C6 sought the advice that the Respondent received from FCDO about whether it would be possible to obtain reliable diplomatic assurances from the Afghan authorities. The Respondent has said that the issue of assurances did not arise in this case and, in our view, this issue cannot be taken any further.

55. Request 13. This request related to exculpatory material that is said to be routinely provided in SIAC SOR cases, for example, inter- and intra-departmental communications relating to that very issue, at least in general terms. The Respondent does not accept that such material is routinely provided, avers that the request is unreasonable and disproportionate, and submits that in any case that such material has been disclosed.

C6's case in a nutshell

56. In her very effective and focused oral argument, Ms Harrison began to hone in on the failure of the Respondent to provide any exculpatory material in relation to the April 2021 SOR assessment. She maintained her case that the Respondent had significantly failed in other respects too (we have reflected this in the previous section), and also strongly relied on request 13, the material which was said to be provided on a routine basis in SIAC SOR cases. She submitted that there was no good explanation for the breaches and that they had a serious knock-on consequence. The r.38 hearing could not take place and the overall timetable is now in jeopardy.

57. Ms Harrison also made the strong submission that C6 is now being placed in an invidious position. He may have to compromise between retaining the December 2021 hearing date on the one hand and not having all the exculpatory material he should have on the other.

The Respondent's case in a nutshell

58. In equally effective, frank and helpful submissions, Mr Byass did not accept that the Respondent had perpetrated any material breaches of Garnham J's Order and submitted that, even if she had, they were not serious. He took the Commission through all the alleged breaches with reference to his schedule. He pointed out that the Respondent and the agencies are working under great pressure in present circumstances, a point which we obviously accept.

59. Mr Byass raised three matters of principle. First, he submitted that the r. 40(2) strike-out jurisdiction should be exercised only in exceptional circumstances against the Respondent in a national security case. Secondly, he submitted (in our view correctly) that it was necessary to retain an accurate focus on what was properly in issue: alleged non-compliance with para. 1 of Garnham J's Order. Thirdly, in connection with the April 2021 SOR assessment, he submitted that the assessment was not finalised until 23 April 2021, being the very day the disclosure was required. The exculpatory review, he said, could not have been undertaken before then.

Analysis and conclusions

60. We begin with the applicable law.

61. In his lengthy judgment in *HXA v. Home Office* [2010] EWHC 1177 (QB), King J considered the extent of the material that the Respondent should consider before being able to make a lawful decision in a deportation case. At para. 201 of his judgment, he said this:

> "I accept that the ECHR obligation focuses on the act of removal and hence for the purposes of any appeal against the decision to make a deportation order, the appeal tribunal will look at the risk of return at the date of the hearing. However, this cannot absolve the Defendant from considering as at the time of the decision to make a deportation order whether he will be able lawfully to remove the proposed deportee compatibly with the person's convention rights since removal is that to which a deportation order is directed, and an order for an incompatible deportation would be unlawful."

62. In *HXA*, the Secretary of State failed to apply her mind to the issue of SOR before the decision was made. In the instant case, the situation is not that, because the very fact that there was an updated SOR assessment on 23 April 2021 demonstrates that consideration was given to that issue. In any case, we are concerned not with the merits of the underlying substantive question but whether proper disclosure has been given under r. 10(1)(c).

63. In our judgment, there is force in Ms Harrison's submission that, contrary to what Mr Byass said, the Respondent should have carried out her exculpatory review as part and parcel of her obligation under r. 10. The requirement under r. 10 is to disclose the exculpatory material of which she is aware. We cannot accept that it was right or appropriate to delay this. Had it been, Garnham J's Order would have been differently worded, and it would have built in a timetable for an exculpatory review after 23 April with its inevitable knock-on consequences. Of course, para. 7 of Garnham J's Order provided the timetable for the further exculpatory review under r. 10A which would have to take place following the filing and service of C6's evidence. This has nothing to do with the primary exculpatory review required by r. 10 and referenced in para. 1 of Garnham J's Order.

64. Mr Byass was able to refer us to no authority which indicated otherwise.

65. The next issue which we must address is the test to apply in relation to r. 40(2) of the SIAC Procedure Rules. Here, paras. 93 and 94 of the Court of Appeal's judgment in *SSHD v. SS (Congo) and Others* [2015] EWCA Civ. 387 are relevant. Essentially, the test is the familiar tripartite one laid down by the Court of Appeal in *Mitchell v. NGN* [2013] EWCA Civ. 1537; [2014] 1 WLR 795 and *Denton v. TH White Ltd* [2014] EWCA Civ. 906; [2014] 1 WLR 3926. It is unnecessary for us to summarise these cases.

66. However, the application of *Denton* principles to public law cases does raise an issue. This was addressed by the Court of Appeal at para. 94 of *SS (Congo)*:

> "The court in *Hysaja* added some points of particular relevance to the present context. At para. 41 of his judgment, Moore-Bick LJ ... said that it would be quite wrong to construct a special regime for applications for extension of time in public law cases, but he accepted that 'the importance of the issues to the public at large is a factor that the court can properly take into account when it comes at stage three [of *Denton*] of the decision-making process to evaluate all the circumstances of the case. At para. 42, he rejected the contention that the court could construct a special rule for public authorities, which "have a responsibility to adhere to the rules just as much as any other litigants". He added that "the nature of the proceedings and the identification of the responsibility for delay are factors which it may be appropriate to take into account at the third stage".

67. We accept that the issue becomes particularly acute in national security cases where the Respondent is acting in the public interest. One need only imagine a hypothetical case where the Respondent may be in clear breach of a r. 40(1) notice and there is equally clear evidence that the appellant represents a serious threat to the national security of the UK.

68. That national security issue provides important context. It is a factor that we must take into account, but we reject Mr Byass' submission that the strike-out jurisdiction should be reserved for exceptional cases - in the sense that this is part of the *Denton* test. That is not the approach that SIAC applies to the making of r. 40(2) orders against appellants, nor should it be. There must be a reasonably level-playing field,

particularly in the context of litigation which involves a CLOSED procedure. We do accept, of course, that it will only be in very rare circumstances that r. 40(2) orders will be made against the Respondent. But that it to express an outcome rather than any legal criterion.

69. It is also relevant that to strike out the Respondent's reply would not inevitably lead to her having to grant ILR to C6. Mr Byass informed us that the Respondent would still fight the appeal on the national security issue and that C6's bail conditions would apply in the interim. The best that C6 could aspire to is the grant of restricted leave for six months. The SOR issue could be revisited and, if necessary, taken on appeal at the end of that period.

70. We must next proceed to the issue whether the Respondent is in serious and significant breach of para. 1 of Garnham J's Order.

71. We do not think that the Respondent is in serious or significant breach in relation to any of the open-source documentation or anything that was disclosed on 10 May. Ideally, the Respondent should do more than provide hyperlinks, but in modern circumstances this is probably good enough, save where an appellant is not legally represented. Documents which would require an internet search should be identified more specifically, but we would not found a r. 40(2) order on any technical breach in that regard.

72. Returning to the issue that we left hanging in para. 44 above, we cannot accept that these were serious and/or significant breaches. We bear in mind the 17-day delay and the nature of the material at issue.

73. In our judgment, the whole application really hinges on the April 2021 SOR assessment. Not merely does this feature in its own right, requests 11(iii)(c) and (j) are clearly relevant to it.

74. We are not overlooking request 11(iii)(b) which was not disclosed in CLOSED until 21 May. However, that breach, whether taken in isolation or in combination with other more technical breaches, would not in our opinion justify making a draconian order under r. 40(2).

75. We are also not overlooking request 13 above about which there was some controversy. We do not doubt Miss Harrison's experience that request 13 material has

been disclosed in other cases and we also do not doubt Mr Byass' experience, supported by his instructions, that this is habitually reserved for cases involving DWA. However, we cannot resolve this issue in the context of this application, nor do we think that we need to.

76. We return to what the Respondent had said on 10 May, as cited at para. 46 of this judgment. It is said in terms that the Respondent will disclose "any views which fed into the assessment which are exculpatory". However, she will not have done this until 28 May 2021. In our judgment, this should have been done by 4 p.m. on 23 April and her failure amounts to a serious and significant breach.

77. The Chairman invited submissions from the parties as to whether SIAC should delay handing down this judgment until 28 May disclosure had been analysed. Ms Harrison submitted that we should not and Mr Byass did not submit that we should.

78. The second question is whether there are good reasons for the breach. We have already recognised the inevitable pressures upon the Respondent and the agencies. However, the relevant period under consideration is not the period after 23 April but the lengthy period leading up to then. Garnham J was informed in terms that the 23 April date would be met. Maybe it could never have been, but the Order was made on that premise. Further, when consideration is given to the period extending from approximately October 2020 to April 2021, we cannot conclude that the delay has been justified.

79. The third question involves a broad and general consideration to be given to all the circumstances of the case. In this regard, we have not forgotten what SIAC said about C6 in 2015. We have also borne in mind the material in CLOSED. To strike out the Respondent's reply would have potentially significant consequences for the public, although these would be attenuated to some extent: see para. 69 above.

80. As against that, we have carefully considered the knock-on effects of the Respondent's breaches. In our judgment, C6 was justified in bringing this application. It had to be considered by the Commission on 26 May and it occupied the whole day. This meant that the r.38 hearing was lost, but we also accept Ms Rahman's submissions in CLOSED (which did no more than amplify what was said in the SA's letter of 20 May 2021) that no effective r.38 hearing could have taken place on 26 May in any event.

81. The ripple effect has been clear. No r.38 hearing could now take place until mid-July 2021, and we consider that there is force in Miss Harrison's submission that the December 2021 hearing date would probably be lost; or, if it were retained, that C6 would have to make uncomfortable compromises and be prejudiced.

82. Additionally, the case load of this Commission and the clamour of appellants to get their cases listed cannot be ignored. The loss of the December 2021 fixture could well mean that the dates cannot now be filled with another case, although the Chairman will work hard to ensure that this is not so.

83. These are all considerations germane to *Denton* stage three, adapted as necessary to this particular public law context.

84. In our judgment, Miss Harrison has made out her client's case under r. 40(2) and the Respondent's SOR reply must be struck out.