Neutral Citation Number: [2022] EWCA Civ 1445

Case No: CA-2021-000698

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
MR JUSTICE JAY, UPPER TRIBUNAL JUDGE PITT, MRS J BATTLEY
SC/169/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2022

Before :

LORD JUSTICE BEAN
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE DINGEMANS

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
LISA SMITH	**Respondent**

- -
- -

Hugh Southey KC and Lara Smyth (instructed by **Birnberg Peirce)** for the **Respondent Lisa Smith**
Robin Tam KC and Natasha Barnes (instructed by **Government Legal Department**) for the **Appellant Secretary of State**

Hearing date: 27 October 2022

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Approved Judgment

This judgment was handed down remotely at 14.00 on 2 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Bean :

1. Lisa Smith lives in County Louth in the Republic of Ireland, about 5 to 10 minutes' drive from the border with Northern Ireland. On 12 September 2019, the Secretary of State decided to exclude her from the United Kingdom under regulation 23(5) of the Immigration (European Economic Area) Regulations 2016. That provision confers power to make an exclusion order in respect of an EEA national or the family member of an EEA national. Exclusion orders cannot be made against British citizens.

2. The decision to make the exclusion order was served on 31 December 2019. The decision letter stated that Ms Smith's exclusion from the UK was "justified on the grounds of public security because it is assessed that you travelled to Syria and aligned with ISIL/Daesh". The notice of appeal was lodged on 27 January 2020 by Phoenix Law, a firm of solicitors based in Belfast and regulated by the Law Society of Northern Ireland.

3. Amended grounds of appeal to the Special Immigration Appeals Commission ("SIAC") were filed on 20 March 2020, signed by Mr Southey (who is qualified to practise in both England and Wales and Northern Ireland) and Lara Smyth BL (who is qualified to practise in Northern Ireland only, but has been given a dispensation to appear before us in this case). These indicated that Ms Smith was born on 17 February 1972 to a father who was born in Belfast in 1954 and was a dual British/Irish citizen. Her parents never married. Had her parents been married at the time of her birth, she would automatically be a British citizen. Birth outside wedlock is a status for the purposes of Article 14 ECHR and falls within the class of suspect grounds where weighty reasons are required to justify discrimination. As a consequence, it was said that the Appellant's exclusion was a violation of Article 14 ECHR, read with Article 8. Reliance was placed on the decision of the Supreme Court in *R (Johnson) v Secretary of State for the Home Department* [2017] AC 365.

4. On 17 April 2020, SIAC wrote to the parties at the direction of the Chairman (Elisabeth Laing J, as she then was). She noted that three questions had to be resolved. The first two are not relevant to the present appeal. The third was "should the hearing take place in Northern Ireland or in England and Wales (specifically, in Field House)?". As to the location of the hearing, she noted that paragraph 4 of Schedule 1 to the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") provided that the Commission "shall sit at such times and in such places as the Lord Chancellor may direct" and that the Lord Chancellor had not directed that the Commission should sit in any other place than Field House, London. These were, therefore, and would continue to be, proceedings in England and Wales.

5. The Chairman said that if the Appellant wished the proceedings to be "proceedings in Northern Ireland", her representatives should ask the Lord Chancellor to direct that the substantive hearing should take place there. Ms Smith's solicitors wrote to the Lord Chancellor to request a direction to that effect but, we were told, never received a reply.

6. On 25 April 2020 Ms Smith's solicitors applied to the Commission seeking an order confirming that her current legal team could continue to represent her. No objection was raised to her chosen counsel and solicitors acting for her at any oral hearing in open court. However, she wished David Scoffield QC to be appointed to act as lead special advocate in any closed proceedings. The Home Secretary, while raising no objection

whatsoever to Mr Scoffield on personal grounds, questioned whether he could lawfully be appointed as a special advocate in the case because of the terms of section 6 of the 1997 Act. .

7. Section 6 of the 1997 Act is headed "Appointment of a person to represent the appellant's interests" (i.e. a special advocate) and provides as follows:-

> "(1) The relevant law officer may appoint a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded.
>
> (2) For the purposes of subsection (1) above, the relevant law officer is—
>
> (a) in relation to proceedings before the Commission in England and Wales, the Attorney General,
>
> (b) in relation to proceedings before the Commission in Scotland, the Lord Advocate, and
>
> (c) in relation to proceedings before the Commission in Northern Ireland, the Advocate General for Northern Ireland.
>
> (3) A person appointed under subsection (1) above—
>
> (a) if appointed for the purposes of proceedings in England and Wales, shall have a general qualification for the purposes of section 71 of the Courts and Legal Services Act 1990,
>
> (b) if appointed for the purposes of proceedings in Scotland, shall be
>
> (i) an advocate, or
>
> (ii) a solicitor who has by virtue of section 25A of the Solicitors (Scotland) Act 1980 rights of audience in the Court of Session and the High Court of Justiciary, and
>
> (c) if appointed for the purposes of proceedings in Northern Ireland, shall be a member of the Bar of Northern Ireland.
>
> (4) A person appointed under subsection (1) above shall not be responsible to the person whose interests he is appointed to represent."

As I understand it the office of Advocate General for Northern Ireland is occupied by HM Attorney General (of England and Wales) *ex officio*.

8. Rule 33 of the Special Immigration Appeals Commission (Procedure) Rules 2003 is headed "Representation of parties" and provides as follows:

> "(1) The appellant may act in person or be represented by—
>
> (a) a person having a qualification referred to in section 6(3) of the 1997 Act;
>
> …
>
> (c) with the leave of the Commission, any other person, provided that the person referred to in sub-paragraph (a) or (c) is not prohibited from providing immigration services by section 84 of the Immigration and Asylum Act 1999.
>
> (2) The Secretary of State and the United Kingdom Representative may be represented by any person authorised by them to act on their behalf."

Rule 34 deals with the appointment of the special advocate. Its terms are not material for present purposes.

9. Rule 33(1)(a) of the 2003 Rules may entitle anyone with any of the listed qualifications to represent Ms Smith before SIAC wherever in the UK the proceedings are held, but it is unnecessary to decide that point: Chamberlain J gave permission for an advocate with only a Northern Ireland qualification to appear before him, and there has been no objection to such an advocate being given any necessary dispensation to do so in open proceedings. The Secretary of State contended that as far as special advocates were concerned, however, as these were proceedings in England and Wales, only the Attorney General could appoint a special advocate, and only a person qualified in England and Wales could be appointed. This meant that it would not have been possible for Mr Scoffield to be appointed as special advocate in this case, since he was qualified in Northern Ireland only, unless he applied to be called to the Bar of England and Wales. (He has since been appointed to the High Court in Northern Ireland, so would now be unavailable in any event.) This difficulty did not apply to the original junior special advocate, Mr Adam Straw (now a KC), who is qualified in both Northern Ireland and England and Wales.

10. Chamberlain J, sitting as a judge of SIAC, was asked to rule on the issue of who could be appointed as lead special advocate. In a reserved decision of 8 July 2020 (SC/169/2020), which is publicly available, he decided that the appeal to SIAC by Ms Smith constituted "proceedings before the Commission in England and Wales" and that any special advocate had to have a general qualification under the Courts and Legal Services Act 1990. He said:-

> "23. I begin with the plain words of s. 6(2) and (3), which deal with the appointment of special advocates. These subsections rely on a distinction between "proceedings before the Commission in England and Wales", "proceedings before the Commission in Scotland" and "proceedings before the Commission in Northern Ireland". Applying their ordinary meaning, these words distinguish between proceedings by reference to the part of the UK where the Commission is sitting, not to some broader concept such as the place with which the

> proceedings have the closest connection. Paragraph 4 of Schedule 1 to the 1997 Act provides that the Commission may sit in such places as the Lord Chancellor may direct. To date, the Lord Chancellor has not directed that the Commission should sit in any place outside England and Wales, which means that these and all other proceedings to date are and have been "proceedings before the Commission in England and Wales."
>
> 24. If there were any doubt about the proper construction of s. 6(2)-(3), those provisions must in my judgment be read together with s. 7, which deals with appeals. Here, the wording is, if anything, even clearer. *It provides that the "appropriate appeal court" is the Court of Appeal of England and Wales in cases where the determination appealed from is "made by the Commission in England and Wales". This language very clearly fixes on the place where the Commission members are sitting when they make their determination as the deciding factor*.
>
> 25. It makes sense that the special advocate appointed to appear before the Commission should be someone who is entitled as of right to appear before the appropriate appeal court. If the special advocate could not appear on appeal, particular practical difficulties would ensue. A new special advocate or advocates would have to be appointed and they would have to acquaint themselves with the open and closed material. This might inevitably give rise to delay and would certainly be wasteful of costs, which are met by the Crown. Unless there had been a timeconsuming handover process, the new special advocates would inevitably be less well-placed than the original ones to assist the appeal court in understanding how the decisions taken in the closed part of the proceedings on matters such as disclosure.
>
> 26. All these considerations make it likely that Parliament intended a simple delineation of proceedings based on the physical location where those proceedings take place. Although the wording used in s. 6(2)-(3) is not identical with that used in s. 7, Parliament appears to have assumed that, if proceedings take place before the Commission in England and Wales, that is where the Commission will make its decision and any appeal will lie to the Court of Appeal of England and Wales. In that case, the relevant law officer for the purpose of appointing a special advocate is the Attorney General for England and Wales (s. 6(2)(a)) and the person appointed must have a general qualification for the purposes of s. 71 of the Courts and Legal Services Act 1990 (s. 6(3)(a))." [emphasis added]

11. The next stage of the case was the hearing of a preliminary issue in Ms Smith's appeal against the exclusion order, namely whether the order was unlawful as being a breach of her rights under ECHR Article 14 read with Article 8. The hearing of that issue, which did not involve any closed material and thus no special advocates either, took

place before a panel of three members chaired by Jay J on 21 April 2021. The panel were sitting in Field House, London. The submissions on each side were made remotely: Mr Southey and the Secretary of State's representatives were in London, while the solicitors and junior counsel acting for Ms Smith from Belfast. On 7 May 2021 SIAC allowed Ms Smith's appeal against the exclusion. We are not concerned at this stage with the merits of that decision. The panel refused permission to appeal.

12. A Notice of Appeal by the Home Secretary was filed in this court on 23 June 2021. Elisabeth Laing LJ granted permission to appeal on the papers on 15 November 2021. However, in doing so she had not considered an objection taken by the Respondent (that is to say, Ms Smith) on the grounds that the appropriate appeal court was not the Court of Appeal of England and Wales but the Court of Appeal in Northern Ireland. Elisabeth Laing LJ therefore referred that issue to the full court for determination. If this court has jurisdiction, the substantive appeal by the Home Secretary is listed to be heard in February 2023. If, however, the Court of Appeal in Northern Ireland has exclusive jurisdiction, it is common ground that the grant of permission to appeal by Elisabeth Laing LJ would have to be set aside as a nullity.

13. Section 7 of the 1997 Act so far as material provides:-

> "**7 – Appeals from the Commission**
>
> (1) Where the Special Immigration Appeals Commission has made the final determination of an appeal any party to the appeal may bring a further appeal to the appropriate appeal court on any question of law material to that determination.
>
> ...
>
> (2) An appeal under this section may be brought only with the leave of the Commission, or if such leave is refused, with the leave of the appropriate appeal court.
>
> (3) In this section ... the appropriate appeal court" means –
>
> a) in relation to a determination made by the Commission in England and Wales, the Court of Appeal;
>
> b) in relation to a determination made by the Commssion in Scotland, the Court of Session;
>
> c) in relation to a determination made by the Commission in Northern Ireland, the Court of Appeal in Northern Ireland."

14. Paragraph 4 of Schedule 1 to the 1997 Act provides that the Commission shall sit at such times and in such places as the Lord Chancellor may direct. It appears that the only direction so far given is that it shall sit at Field House.

15. The central argument of the Secretary of State before us is a simple one. The proceedings before Jay J and his colleagues were "proceedings of the Commission in England and Wales", because the members of the panel were sitting at Field House in accordance with the Lord Chancellor's direction. Accordingly this court is "the

appropriate appeal court" as defined by section 7(3)(a) of the Act and has exclusive jurisdiction to consider Ms Smith's appeal.

16. On behalf of Ms Smith, Mr Southey KC and Ms Smyth submit that the position is not as simple as that.

17. Mr Southey relies on the decision of the House of Lords in *Tehrani v Secretary of State for the Home Department* [2007] 1 AC 521; [2006] UK HL 47. In that case the petitioner had arrived at London City Airport and claimed asylum. He was given temporary admission and provided with accommodation in Glasgow but his claim was subsequently rejected. He appealed to an adjudicator under section 69(5) of the Immigration and Asylum Act 1999. The adjudicator, sitting at Durham for the convenience of the petitioner's representative, dismissed the appeal. The Immigration Appeal Tribunal, sitting in London, refused the petitioner leave to appeal. He petitioned the Court of Session for judicial review of the determinations of the adjudicator and the appeal tribunal. The Lord Ordinary held that the Court of Session had no jurisdiction and the Inner House refused the petitioner's reclaiming motion.

18. However, these decisions were reversed by the House of Lords, who held that the Court of Session could exercise its supervisory jurisdiction at common law. At paragraph [60] Lord Hope of Craighead said:-

> "In my opinion the facts (1) that the petitioner was resident in Scotland at the time when the determinations were made, (2) that their harmful effects were liable to be felt by him in Scotland and (3) that the determinations were made in the exercise of a statutory jurisdiction which extends throughout the United Kingdom, taken together, indicate that there is a sufficient connection with Scotland for the supervisory jurisdiction to be exercised. I would repel the plea of no jurisdiction."

19. Lord Rodger of Earlsferry said at [100] to [101]:

> "100. In the present case, the mere fact that the Vice President of the Appeal Tribunal was sitting in London when he refused Mr Tehrani's application for leave to appeal does not mean that his decision is the decision of an English tribunal. The Appeal Tribunal was the creature of the 1999 Act which extends to the whole of the United Kingdom. Under para 6(1) of Schedule 2 to that Act, the Tribunal had to sit anywhere that the Lord Chancellor directed. Until 2002, it was indeed in the habit of sitting outside London - in Cardiff and in Glasgow, for instance - when that was convenient to the parties and their advisers. In 2002, in order to save time and to improve the efficiency of its operations, the tribunal adopted the practice of sitting in London and using video links to take submissions from representatives in other centres, such as Glasgow. But, equally, in theory at least, the tribunal could have set up its main offices in, say, Aberystwyth or Aberdeen and conducted the bulk of its hearings by video link to centres in England. However it arranged its operations and wherever it sat, the Appeal Tribunal remained the

> same and the law which it applied remained exactly the same. It was, in essence, a United Kingdom body, capable of sitting throughout the United Kingdom and applying exactly the same law throughout the United Kingdom based on a statute extending to the whole of the United Kingdom. Since the law applied by the Appeal Tribunal is just as much part of the law of Scotland as part of the law of England, when called upon to do so, the Court of Session is fully equipped to carry out the core function of judicial review, which is to ensure that the decision-maker acts within, and in accordance with, his legal powers. In that situation it would be much too crude an approach for the Court of Session to regard the Appeal Tribunal as a foreign tribunal for purposes of judicial review simply because it took a decision in London or Cardiff, but as a Scottish tribunal, within the scope of the court's jurisdiction, simply because it took a decision in Glasgow."
>
> 101. If it would be wrong to rely simply on the place where the Appeal Tribunal took its decision as determining the jurisdiction of the Court of Session, it would be equally wrong to go to the opposite extreme and to assert that in all cases all the United Kingdom courts enjoy concurrent jurisdiction to review the decisions of the tribunal just because the tribunal could sit and apply the same law in all parts of the United Kingdom. So, for instance, where the asylum seeker was given limited leave to enter at an English port, was living in England, appealed to an adjudicator sitting in England, was refused leave to appeal by the Appeal Tribunal in England and was liable to be removed from England, there would be no basis for saying that the Court of Session had power to interfere in such wholly English proceedings by judicially reviewing the decision of the Appeal Tribunal."

20. Mr Southey relies on *Tehrani* to say that geography is not conclusive.

21. Mr Southey submits that the 1997 Act should be read as a whole. A key purpose of the statute was to establish a tribunal (SIAC) with jurisdiction throughout the UK; and that individual submissions should be interpreted with that objective in mind. In the present case SIAC effectively sat in multiple locations. While the judges hearing the case were located in London, the parties were not. Section 6 of the 1997 Act is concerned with the appointment of a special advocate. This occurs at an early stage before the substantive appeal hearing and before the physical location of that hearing has been decided. Mr Southey further submits that the following matters demonstrate that in this case there was a determination made by the Commission in Northern Ireland, on a proper interpretation of section 7 of the 1997 Act:-

> "i) In the present case, the Respondent is an Irish national who lives very close to the Irish border.

> ii) The Respondent has sought to instruct Northern Irish lawyers. Some of those lawyers have appeared at SIAC while physically located in Northern Ireland.
>
> iii) The connection between Northern Ireland and the proceedings is abundantly clear from SIAC's judgment, which required consideration of the Good Friday Agreement, the right of those in Northern Ireland to exercise their rights of self-identification and the significance of the oath of allegiance to the crown for those who have to register as British citizens.
>
> iv) SIAC had to determine an issue of Northern Irish law when it made the costs order."

22. We were referred to *R (Barclay) v Lord Chancellor (No. 2)* [2015] AC 276; [2014] UKSC 54 in which Baroness Hale of Richmond DPSC said at [48] that "the courts of the Bailiwick [of Guernsey] are infinitely better placed to assess whether an island measure is 'necessary in a democratic society' or whether an island court would lack the necessary independence and impartiality".

23. The skeleton argument for Ms Smith contended that the words "determination made by the Commission in England and Wales" should be interpreted as meaning "a determination of the Commission which *has effect* in England and Wales, and similarly that if the determination made by the Commission is one which has effect in Northern Ireland it should be treated as a determination made by the Commission in Northern Ireland" so that the Court of Appeal in Northern Ireland becomes the most appropriate appeal court. In oral argument, when it was put to Mr Southey that a determination to uphold or reverse an exclusion order has effect throughout the UK, he suggested as an alternative that the test should be to ask with which jurisdiction the case has the closest connection.

24. Mr Southey turned next to a submission that the interpretation of sections 6 and 7 of the 1997 Act relied on by the Home Secretary and adopted by Chamberlain J has denied Ms Smith "the right to instruct her special advocate of choice". It is argued that she "has repeatedly asserted her wish to instruct a Northern Irish special advocate" and those wishes should only be restricted when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice. He submits that there is an inherent unfairness in the hearings before SIAC that must be counter-balanced so far as possible and that enabling an appellant to appoint a special advocate in whom she has confidence is an aspect of that. In the absence of any rational justification, the requirement that a special advocate must hold an English practising certificate in order to appear before the Commission is a violation of Article 14 of the ECHR read with Article 6 and/or 8. He asks us to consider "whether Article 14 would say nothing if there was discrimination in relation to the appointment of special advocates on the grounds of race, gender or disability". There is a difference of treatment based on a status which comes within the scope of Article 14. Those wishing to appoint English special advocates can do so and those wishing to appoint Northern Irish special advocates cannot.

Submissions for the Secretary of State

25. Robin Tam KC submits that we are concerned with a hard-edged jurisdiction question. The phrase "the appropriate appeal court" is what he described as an "identifier" and does not confer any discretion. Since the Lord Chancellor has only given a direction for SIAC to sit at Field House, that was the only location at which Jay J and his colleagues *could* sit.

26. Mr Tam said that it is a matter for speculation as to what would have happened if Ms Smith's legal team had challenged the Lord Chancellor's failure to give a direction for SIAC to sit in Belfast. Mr Tam did not concede that this failure was unlawful or that a refusal (if the Lord Chancellor had responded to the request and refused to give the direction) would have been unlawful. He pointed to some practical difficulties in the handling of closed material in more than one location, although he conceded that the courts in Belfast are familiar with cases requiring high security of various kinds (including proceedings under section 6 of the Justice and Security Act 2013, in which special advocates are regularly appointed). But the fact is that in this case SIAC did sit in London.

27. Mr Tam submitted that there is no scope for rewriting or "reading down" the 1997 Act to comply with any human rights obligations. There is, as he put it, "nothing wrong with the legislation". Sections 6 and 7 of the 1997 Act expressly contemplate that SIAC may sit in England and Wales, in Scotland, or in Northern Ireland. The problem, if there is one, is that no direction has been given by the Lord Chancellor for SIAC to sit anywhere other than in London.

28. In any event, he submitted, there can be no valid complaint by Ms Smith, of a breach of ECHR Article 14 taken with Article 6 and/or Article 8. No-one, wherever they may be resident, has the right to instruct or appoint a special advocate. All they can do is suggest to the relevant law officer a name from the panel of special advocates of the one they would like to see nominated. Article 6(3) is irrelevant because it applies only in criminal cases. So far as Article 14 is concerned Ms Smith has failed to identify any relevant status forming the basis of the alleged differential treatment. Ms Smith's complaint, as set out in her skeleton argument, is "those wishing to appoint English special advocates can, and those wishing to appoint Northern Irish special advocates cannot". These are categories defined solely by reference to the differential treatment complained of and thus cannot form the basis of status for the purposes of Article 14. Any claim of indirect discrimination also fails for the same reason. Appellants to SIAC of Irish nationality cannot request the appointment of a special advocate whose only professional qualification is in Northern Ireland, but nor can anyone else.

29. Mr Tam also points out that the alleged prejudice is extremely tenuous. Ms Smith can appoint her own legal team on the basis of their local knowledge. If a special advocate is appointed in her case who lacks that local knowledge, he or she can be briefed about it by Ms Smith's lawyers at the outset, before the special advocate sees any closed material and thus can have no further direct contact with them.

Discussion

30. I would accept Mr Southey's proposition that "mere physical location does not necessarily determine the character of proceedings" as far as it goes, while emphasising

the word "necessarily". But where an appeal is brought under a statute, the terms of the statute may dictate the court or tribunal to which an appeal must be brought. In *Tehrani* the Immigration Appeal Tribunal had power to sit anywhere in the UK, in contrast to SIAC which can only sit in a location where it has been directed to sit by the Lord Chancellor. Moreover, *Tehrani* was not a case of a statutory appeal but of the extent of the supervisory jurisdiction exercised in judicial review (in Scotland, by the Court of Session).

31. In contrast to this decision in a judicial review case there are the authorities where the position is governed by statute. In *Gardi v Secretary of State for the Home Department (No. 2)* [2002] 1 WLR 3282 this court had to set aside a judgment it had previously given ([2002] 1 WLR 2755) on an appeal from an immigration tribunal because the adjudicator who had heard the original appeal had been sitting in Glasgow. The "appropriate appeal court" prescribed by paragraph 23 of Schedule 4 to the Immigration and Asylum Act 1999 was:-

> "(a) if the appeal is from the determination of an adjudicator made in Scotland, the Court of Session; and
>
> (b) in any other case, the Court of Appeal."

Since the statute was entirely prescriptive the previous decision of this court in Mr Gardi's case had to be set aside.

32. More recently, in *KP (Pakistan) v Secretary of State for the Home Department* [2019] 1 WLR 5631; [2019] EWCA Civ 556 the claimants had applied for leave to remain; the First-Tier Tribunal sitting in Glasgow allowed their appeal; but the Upper Tribunal, again sitting in Glasgow, allowed the Home Secretary's appeal against that decision. The claimants sought permission to appeal from the Upper Tribunal, submitting their applications to its London office. In due course they received the Upper Tribunal's determinations refusing their applications. Those determinations were headed "Application for permission to the Court of Session".

33. This court (Peter Jackson LJ and myself) held that the Upper Tribunal, in accordance with the requirement of Section 13(11) of the Tribunals, Courts and Enforcement Act 2007, had been required to specify a single court as the relevant appellate court, with sole jurisdiction to hear any appeal from the Upper Tribunal's decision; that the documents issued by the Upper Tribunal in refusing permission itself had specified the Court of Session as the "relevant appellate court" and that accordingly this court had no jurisdiction to hear the appeal, notwithstanding that four years had passed since the application for permission to appeal had first been made to this court. Despite our sympathy for the claimants, we held, "however reluctantly", that this court had no jurisdiction. This was another example of where the terms of the statute giving jurisdiction were entirely prescriptive.

34. Mr Southey's Article 14 argument is defeated by each of several obstacles. The main one, as Chamberlain J held when the special advocate issue was first raised, is that *no* appellant to SIAC or on appeal from SIAC has the right to appoint a special advocate of his or her choice. The most an appellant can do is suggest who would be suitable, the decision being for the senior law officer in the relevant jurisdiction. There is

accordingly no difference in treatment between Ms Smith and anyone else based on nationality or any other status recognised for Article 14 purposes.

35. In the present case no one is disputing Ms Smith's right to be represented before SIAC by counsel and solicitors of her choice. Nor is it suggested that there would be any objection to Ms Lara Smyth, the Northern Ireland barrister who has acted as junior advocate in the case so far, continuing to do so. Some members of the panel of special advocates are dual qualified, including Mr Straw KC who was originally appointed as the junior special advocate in this case and appeared in that capacity before Chamberlain J. The inability of a member of the Bar of Northern Ireland who does not hold a practising certificate in England and Wales to be nominated as special advocate in a SIAC case is a quirk of the statutory provisions concerning SIAC, but in my view if it affects Ms Smith's ECHR rights at all it does so only to a very limited extent.

36. Mr Southey's arguments show to my mind that if this was a matter of asking, as the Supreme Court did in *Barclay*, which court has the greater knowledge of local conditions (to the extent that they are relevant on the facts of the present case, given the grounds on which the exclusion order was made), there would be a great deal to be said for an appeal being to the Court of Appeal in Northern Ireland. But that argument is not available because of the plain wording of the statute creating SIAC. SIAC could only sit in London because that is the only place for which the necessary direction had been given. Jay J and his colleagues were sitting at Field House, London when they heard the case and it was from there that the determination was issued. It was therefore made in England and Wales.

37. Section 7 of the 1997 Act uses the words "*the* appropriate appeal court", not "the most appropriate" or "the more appropriate" appeal court. There is no element of discretion. Since the determination was "made by the Commission in England and Wales" – and it cannot have been made in two places at once – I would hold that the appropriate appeal court is this court and no other.

Lady Justice Nicola Davies:

38. I agree.

Lord Justice Dingemans:

39. I also agree.