SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: **SC /204/2023**
Hearing Date: **16th January 2024**
Date of Judgment: **29th January 2024**

Before

THE HONOURABLE MR JUSTICE JOHNSON
UPPER TRIBUNAL JUDGE BLUNDELL
MRS JILL BATTLEY

Between

H5 & OTHERS

Applicants

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Mr A Straw KC and Mr A Vaughan (instructed by **Leigh Day solicitors**) appeared on behalf of the Applicants

Ms Samantha Broadfoot KC and Mr Nicholas Ostrowski (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Mr T Buley KC and Ms R Toney (instructed by **Special Advocates' Support Office**) appeared as Special Advocates

1. The applicants (H5 and members of his family) are citizens of Afghanistan. H5 worked as a patrol interpreter for UK forces in Afghanistan, from 2007 until 2011. In August 2021, UK forces withdrew from Afghanistan. The same month, the applicants sought to take advantage of the "Afghan Relocation and Assistance Policy" to secure visas to come to the UK. That involved a two stage process. First, it was for the Ministry of Defence to decide whether the applicants were eligible under the scheme. Second, if but only if the applicants were eligible, it was then for the respondent to decide whether to grant entry clearance.

2. The Ministry of Defence decided that the applicants were eligible under the Policy. The matter was referred to the Home Office to consider whether the applicants should be granted entry clearance. A decision was made on 17 August 2021 to refuse entry clearance on the grounds that H5's presence in the UK would not be conducive to the public good on grounds of national security due to his conduct, character and associations. No further detail was given. Following pre-action correspondence, the applicants applied for judicial review of the refusal of entry clearance.

3. On 6 May 2022, without serving an Acknowledgement of Service in the judicial review proceedings, the respondent agreed to withdraw the decision and to make a fresh decision on the application for entry clearance. On 17 February 2023, the respondent again refused entry clearance, on the same grounds. Again, no further explanation was provided. The respondent certified the decision to refuse entry clearance under section 2F of the Special Immigration Appeals Commission Act 1997.

4. On 17 March 2023, the applicants applied, under section 2F(2) of the 1997 Act, to set aside the decision of 17 February 2023. On 12 May 2023 (and then again on 15 May 2023) the respondent decided to maintain the decision of 17 February 2023. The substantive hearing of the application was listed for 16 and 17 January 2024.

5. On 20 December 2023, the respondent's solicitors said that the respondent had agreed to withdraw the decision to refuse entry clearance, and that the applications for entry clearance would be reconsidered as a matter of priority, with the intention of making a new decision in January 2024. No explanation has been given for the withdrawal of the decision except that the respondent had "kept the case under review" and that the decision had followed the service of skeleton arguments in these proceedings.

6. On 21 December 2023, SIAC recorded that the application to set aside the respondent's decision was to be treated as having been withdrawn, pursuant to rule 11A(2) and (3) of the Special Immigration Appeals Commission (Procedure) Rules 2003.

7. On 22 December 2022, the Special Advocates indicated to the applicants' solicitors that they would resist any attempt "to adjourn this case or have it remitted for a new decision in advance of the 16-17 January 2024 hearing." They indicated that the merits of the application were such that nothing short of a positive decision in favour of the applicants should lead to the hearing being vacated. On the same day, the applicants' solicitors wrote to SIAC in these terms:

"We invite SIAC to please suspend or revoke its notice dated 21 December 2023 that this application is treated as having been withdrawn. That notice was made without warning, without the Applicant or SAs having had any opportunity to make representations, and very shortly after the Respondent informed the Applicant that it had withdrawn the decision challenged (the Applicant was informed late on 20 December 2023). SIAC should not vacate the hearing and treat the application as having been withdrawn until the parties have had an opportunity to negotiate and, depending on those negotiations, until the Special Advocates and OPEN representatives have had a fair opportunity to make submissions about whether the hearing should be vacated, and the application withdrawn."

8. As a result of this request, the hearing was not vacated. Instead, we have heard submissions as to the procedural consequences of the respondent's withdrawal of the decision to refuse entry clearance.

The legal framework

9. Section 2F of the 1997 Act states:

> **"2F Jurisdiction: review of certain immigration decisions**
>
> (1) Section (2) applies in relation to any decision of the Secretary of State which-
>
> (a) relates to a person's entitlement to enter, reside in or remain in the United Kingdom, or to a person's removal from the United Kingdom.
>
> (b) is not subject-
>
> (i) to a right of appeal, or
>
> (ii) to a right under a provision other than subsection (2) to apply to the Special Immigration Appeals Commission for the decision to be set aside, and
>
> (c) is certified by the Secretary of State acting in person as a decision that was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public-
>
> (i) in the interests of national security,
>
> (ii) in the interests of the relationship between the United Kingdom and another country, or
>
> (iii) otherwise in the public interest.
>
> (2) The person to whom the decision relates may apply to the Special Immigration Appeals Commission to set aside the decision.

(3) In determining whether the decision should be set aside, the Commissioner must apply the principles which would be applied in judicial review proceedings.

(4) If the Commission decides that the decision should be set aside, it may make any such order, or give any such relief, as may be made or given in judicial review proceedings."

10. Section 5 states:

"5 Procedure in relation to jurisdiction under sections 2 and 3

(1) The Lord Chancellor may make rules-

(a) For regulating the exercise of the rights of appeal conferred by section 2 or 2B above.

(b) For prescribing the practice and procedure to be followed on or in connection with appeals under section 2 or 2B above including the mode and burden of proof and admissibility of evidence on such appeals, and

(c) For other matters preliminary or incidental or arising out of such appeals, including proof of the decisions of the Special Immigration Appeals Commission.

...

(6) In making rules under this section the Lord Chancellor shall have regard, in particular, to-
(a) the need to secure that decisions which are the subject of appeals are properly reviewed, and
(b) the need to secure that information is not disclosed contrary to the public interest.

..."

11. Section 6A states:

"Procedure in relation to jurisdiction under sections 2C to 2F

(1) Sections 5 and 6 apply in relation to reviews under section ...2F as tjey apply in relation to appeals under section 2 or 2B.

(2) Accordingly-

(a) references to appeals are to be read as references to reviews (and references to appeals under section 2 or 2B are to be read as references to reviews under section ...2F, and
(b) references to the appellant are to be read as references to an applicant under section... 2F(2)."

12. Rule 11A of the SIAC Procedure Rules 2003 states:

> **"11A Withdrawal of… application for review**
>
> …
>
> (2) An… application for review shall be treated as withdrawn if the Secretary of State notifies the Commission that the decision to which the… application for review relates has been withdrawn.
>
> (3) If an… application for review is… treated as withdrawn, the Commission must serve on the parties and on any special advocate a notice that the… application for review has been recorded as having been withdrawn."

Effect of withdrawal of decision to refuse

Submissions

13. Ms Broadfoot submits that the statutory regime is carefully drawn in a way that respects the different constitutional responsibilities of SIAC and the Secretary of State. It is for the Secretary of State to determine an application for entry clearance, and then (where the case comes within the ambit of the 1997 Act) it is for SIAC to review that decision, applying judicial review principles. If, but only if, SIAC decides to set aside the Secretary of State's decision, SIAC may then grant any other form of relief that may be granted in judicial review proceedings. Rule 11A is a procedural mechanism for bringing proceedings to an end when the relevant decision is withdrawn. It is wholly consistent with the very straightforward and clear meaning of section 2F, and is explicable by the need for respect for the constitutional allocation of responsibility between the executive and the courts which is particularly protected in the context of national security matters.

14. Mr Straw submits that:

(1) Judicial review principles apply: section 2F(3).

(2) Judicial review principles include the principle that a court may entertain a claim for judicial review even if it has become academic: *R (AM) v Secretary of State for the Home Department* [2022] EWHC 2591 (Admin); [2023] 1 WLR 732 *per* Lieven J at [36].

(3) SIAC may grant any relief that may be granted in judicial review proceedings: section 2F(4).

(4) The relief that may be granted in judicial review proceedings includes a mandatory order: section 31 of the Senior Courts Act 1981.

(5) SIAC may grant such relief if it considers that the decision should be set aside, even if it does not in fact make an order setting the decision aside. That is because of the word "or" in section 2F(4).

(6) Section 2F of the 1997 Act is intended to enable SIAC to conduct judicial review proceedings in the same way as the High Court.

(7) Parliament is presumed (in the absence of clear statutory language) not to intend to impose any limit on judicial review: *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22; [2020] AC 491.

(8) There is nothing in section 2F which indicates that Parliament intended to restrict the ambit of judicial review (for example by preventing SIAC from ruling on an academic application).

(9) Section 5 should not be read in a way that conflicts with section 2F. So, it should not be read as authorising rules which restrict the ambit of judicial review.

(10) The 2003 Rules must therefore be interpreted in a way which enables SIAC to determine the present proceedings (and, if necessary make a mandatory order) even though the underlying decision has been withdrawn. If rule 11A cannot be interpreted in this way then it is *ultra vires* sections 5 and 6A of the 1997 Act.

Discussion

15. There is no OPEN evidence to justify the decision to refuse the application for entry clearance. The Special Advocates have, in effect, submitted that the only legally permissible decision on the application for entry clearance is to grant the application. In other words, the submission of the Special Advocates is that if the respondent refuses the application to grant entry clearance, that decision will be unlawful. If that submission is well founded, then Adam Straw KC, for the applicants, submits that (subject to the effect of the withdrawal of the decision to refuse entry clearance) the application to set aside the refusal of entry clearance should succeed, and SIAC should then (exercising its powers under section 2F(4) of the 1997 Act) make a mandatory order requiring the respondent to grant the application for entry clearance. The preliminary issue which arises is whether this power survives the withdrawal of the respondent's decision or whether the effect of that withdrawal is that SIAC has no further jurisdiction (save, possibly, as to costs).

16. The decision to withdraw the refusal of entry clearance was expressed as being a decision to withdraw a decision that was made on 12 May 2023. It should have been expressed as a decision to withdraw the decision of 17 February 2023, as maintained on 12 May 2023 and 15 May 2023. Nothing turns on this error and, in any event, it will be corrected by the respondent serving a further notification of the withdrawal of the decision to refuse entry clearance (with the correct date(s)).

17. The application for review relates to the decision of 17 February 2023. That decision has been withdrawn. There is therefore no extant decision. Section 2F(3) does not give SIAC a general residual or inherent discretion to use the entire judicial review toolbox irrespective of the decision that SIAC is making. It merely provides that SIAC must apply judicial review principles when it is determining if the decision should be set aside. Here, there is no question of SIAC determining whether the

decision should be set aside, because the decision has already been withdrawn. We do not therefore accept that section 2F(3) gives SIAC any broader judicial review jurisdiction that would enable us to breathe life into these proceedings.

18. Similarly, section 2F(4) is predicated on SIAC first deciding that the Secretary of State's decision should be set aside. There is no question of SIAC deciding that the decision should be set aside, because the decision has been withdrawn. There is therefore nothing to set aside. Mr Straw may be right that the general power to "give any such relief" arises even if SIAC does not make an order setting aside the decision, but that does not assist him. The language of section 2F(4) requires that SIAC has decided that the decision should be set aside (even if an order to that effect is not made) before the more general jurisdiction to "give any such relief" is engaged.

19. Further, the consequence of the withdrawal of that decision is that the application for review is "treated as withdrawn": rule 11A of the 2003 Rules. It follows that SIAC was required to serve a notice on the parties and on the special advocates, that the application for review had been recorded as having been withdrawn. SIAC does not have any discretion in that respect. That may be contrasted with the corresponding provision in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Rule 17(2) of the 2014 Rules states:

> "The Tribunal must (save for good reason) treat an appeal as withdrawn if the respondent notifies the Tribunal and each other party that the decision... to which the appeal relates has been withdrawn and specifies the reasons for the withdrawal of the decision."

20. In *ZEI and others v Secretary of State for the Home Department* [2017] UKUT 292 (IAC) the Upper Tribunal (Immigration and Asylum Chamber) gave examples of what was and was not likely to amount to a good reason within the meaning of rule17(2) of the 2014 Rules. Factors that the Tribunal considered were likely to be capable of being a good reason include undue delay by the respondent, and the fact that the appeal turns on a pure point of law which will almost certainly be decided in the appellant's favour.

21. So, the 2014 Rules preserve a discretionary power not to treat an appeal as withdrawn. By contrast, the 2003 Rules do not provide any discretion. It may very well be that if the 2003 Rules had included the discretionary power that is inherent in the 2014 Rules then it would have been appropriate to consider exercising it in the circumstances of this case. But it does not, and so the question does not arise.

22. The applicants say that in judicial review proceedings under CPR Part 54, if a decision has been withdrawn the court may still grant relief where that would make a substantive difference to the claimant. Accordingly, they say, because it is necessary to apply judicial review principles to the present proceedings, the same procedure must be available here. However, in proceedings under Part 54 the withdrawal of the impugned decision does not automatically lead to the withdrawal of the judicial review claim. There is no analogue to rule 11A of the 2003 Rules. The judicial review court therefore has continued jurisdiction to rule on the claim.

By contrast, under the present procedural regime, the withdrawal of the impugned decision leads inexorably to the withdrawal of the substantive claim. SIAC does not therefore have jurisdiction to rule on the claim, or to grant relief.

23. We do not consider that the statutory regime impermissibly restricts or ousts judicial review of the respondent's decision making. All it does, is to limit SIAC's reviewing power to the decision that is made by the Secretary of State. Where that decision is withdrawn, there is nothing for SIAC to review. That does not oust the High Court's more general powers of judicial review (or those of the Upper Tribunal). It seems to us that the withdrawal of the refusal of entry clearance is, itself, a public law decision which could, in principle, be the subject of a claim for judicial review. Further, Ms Broadfoot readily accepted that the Secretary of State is required to make a decision on the application for entry clearance within a reasonable period of time. It is now more than 2 years since the application was made, and the Secretary of State is yet to make an effective decision on the application. That failure, too, could in principle be subject to a claim for judicial review.

24. Accordingly, we do not accept that rule 11A can be given a restrictive interpretation in the light of the principles explained in *R (Unison) v Lord Chancellor* [2020] AC 869 at para 65. The effect of rule 11A does not amount to an ouster of the court's more general powers of judicial review.

25. This also provides an answer to Mr Straw's concern that the statutory regime is capable of giving rise to abuse, for example by the Secretary of State sequentially making and withdrawing decisions so as to avoid any effective review.

26. We accept the applicant's submission that there is the potential for this type of abuse of SIAC's procedures. We also accept the potential that continued delay may put the applicants at real and significant risk. There is, however, a remedy available to the applicants by way of a claim for judicial review of (a) the failure to make an effective decision on the application for entry clearance, and (b) the decision to withdraw the refusal of entry clearance. If need be, any such claim could be subject to considerable expedition, to a direction under section 6 of the Justice and Security Act 2013 to permit a closed material process, and to an application for interim relief.

27. The respondent has indicated that a fresh decision will be made this month, and that a submission will be put to the respondent on 22 January. In the event that the decision is adverse to the applicants then a fresh claim under the 1997 Act could be brought. That claim could be subject to considerable expedition, potentially leading to a substantive hearing in early March (or even, if the decision is made on 22 January or a day or two thereafter, at the end of this month).

28. So far as the present proceedings are concerned, however, the effect of the withdrawal of the underlying decision and the impact of rule 11A is that they are at an end, subject to any issue as to costs. We will make directions for the resolution of any argument as to costs.