EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

DECISION

Application no. 42387/13
K2
against the United Kingdom

The European Court of Human Rights (First Section), sitting on 7 February 2017 as a Chamber composed of:

Linos-Alexandre Sicilianos, *President*,
Kristina Pardalos,
Ledi Bianku,
Aleš Pejchal,
Robert Spano,
Armen Harutyunyan,
Pauliine Koskelo, *judges*,
and Abel Campos, *Section Registrar*,

Having regard to the above application lodged on 27 June 2013,

Having regard to the applicant's further submissions of 24 October 2016,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, a Sudanese national referred to as K2 in the domestic proceedings, was born in Sudan in 1982 and currently resides there. He was represented before the Court by G. Peirce of Birnberg Peirce & Partners, a firm of solicitors practising in London.

2. The then President of the Section decided of her own motion that the applicant's name should not be disclosed (Rule 47 § 4 of the Rules of Court).

A. The circumstances of the case

1. The factual background

3. The facts of the case, as submitted by the applicant, may be summarised as follows.

4. The applicant was born in Sudan. He arrived in the United Kingdom as a child and was granted indefinite leave to remain as the minor dependent of a refugee, namely his father. In 2000 he became a naturalised British citizen.

5. In 2009 the applicant was arrested and charged with a public order offence arising out of his participation in protests against Israeli military action in Gaza. He was released on bail but in October 2009, before he was required to surrender to his bail, he left the United Kingdom. He contends that he went directly to Sudan; however, according to the Secretary of State for the Home Department's open statement before the Special Immigration Appeal Tribunal ("SIAC"), the Security Service assessment was that he first travelled with two extremist associates to Somalia, where he engaged in terrorism-related activities linked to Al-Shabaab, a jihadist terrorist group based in East Africa, before travelling on to Sudan in April or May 2010 (see paragraph 22 below).

6. By letter dated 11 June 2010 the Secretary of State notified the applicant of her intention to make an order pursuant to section 40(2) of the British Nationality Act 1981 ("the 1981 Act") depriving him of his British citizenship on the ground that to do so would be conducive to the public good. On 14 June 2010 the Secretary of State signed the order.

7. Also by letter of 14 June 2010 the Secretary of State notified the applicant of her decision to exercise the Crown's common law prerogative power to exclude him from the United Kingdom on the ground that he was "involved in terrorism-related activities" and had "links to a number of Islamic extremists".

8. The applicant sought to challenge the decision to exclude him from the United Kingdom by way of judicial review. He also appealed against the decision to deprive him of his citizenship. As the Secretary of State had certified that this decision was taken wholly or partly in reliance on information which in her opinion should not be made public in the interests of national security, the applicant's right of appeal lay to SIAC. However, the SIAC appeal was stayed while the judicial review proceedings were pursued.

2. The judicial review proceedings

(a) The High Court

9. The applicant made three submissions before the High Court. First, he argued that the statutory scheme impliedly precluded the exercise of

prerogative power to exclude an individual on conducive grounds while an appeal against deprivation of citizenship was pending.

10. Secondly, relying both on the common-law principle of "fairness" and on European Union law (most notably, the judgment of *Janko Rottmann v. Freistaat Bayern* Case C-135/08 of 2 March 2010 – see paragraph 44 below), the applicant argued that the Secretary of State was required to make arrangements for him to return to the United Kingdom to instruct his lawyers and appear personally at the appeal hearing. He submitted evidence suggesting that if he were to give evidence by Skype or video-link there would be a risk that he would become of adverse interest to the Sudanese security service (the "NISS"), which would in turn put his safety at risk. His lawyers also gave evidence that they could not fulfil their professional duties to him unless they were able to speak to him face to face and in confidence.

11. Finally, the applicant submitted that the decision to exclude him unlawfully discriminated against him as a former British citizen.

12. The High Court handed down its judgment on 19 July 2011. In rejecting the first submission, it found that, as a matter of language, Parliament had authorised the exercise of the prerogative power to exclude before the right to appeal against the deprivation order had been exercised and/or while it was pending.

13. The High Court also rejected the applicant's second submission. Insofar as he was seeking to rely on EU law, it found that the *Rottmann* judgment was of no assistance, since it was distinguishable on the facts and, as matters of national security were within the exclusive competence of Member States, EU law might not be engaged at all by the deprivation of citizenship on this ground. In any case, it considered it "highly doubtful" that EU law imposed any requirement on Member States to permit a non-EU citizen to be physically present in a State in order to challenge a decision to deprive him of citizenship when the Citizens' Directive denied such a right to excluded EU citizens. With regard to the more general question of fairness, the court did not consider it necessary to reach any firm conclusion on the possibility of the applicant giving instructions and/or evidence from Sudan since it considered that, on balance, he could obtain a Sudanese passport and travel to a safe third country. The applicant would need a passport to leave Sudan lawfully, and the court considered that if he were permitted to enter the United Kingdom to take part in the appeal hearing there was "little likelihood" that he would return. Emergency travel documents would first have to be obtained from the Sudanese Embassy in London, which would alert the authorities to the fact that he could not travel on his British passport. Consequently, it would be open to him to claim that he could not safely return, and he could thereby frustrate the decision to deprive him of his citizenship on grounds of national security.

14. Finally, the High Court considered the applicant's third submission to be "unarguable", since neither citizenship nor the right to enter a territory of a signatory State were Convention rights and, in any case, the applicant was in precisely the same position as a person abroad who had never had British citizenship. Neither would have the right of appeal against a free-standing decision to exclude on conducive grounds, but both would have a right of appeal against a decision to refuse entry clearance. Although the applicant had not applied for entry clearance, if his appeal against the deprivation of citizenship were to be successful, the Secretary of State's power to exclude him would fall away.

(b) The Court of Appeal

15. The applicant appealed to the Court of Appeal, which gave judgment on 21 May 2012. He again submitted that the Crown had no common-law or prerogative power to exclude an individual from the United Kingdom pending his appeal against a decision to deprive him of citizenship. However, the Court of Appeal agreed with the lower court that the legislative provisions could not be so construed. In reaching this conclusion, it noted that the reason why the applicant had to conduct his appeal from outside the United Kingdom was not the Secretary of State's decision to exclude him but rather his decision to flee the country before he was required to surrender to his bail.

16. He further submitted that the Secretary of State's decision to exclude him from the United Kingdom was so procedurally unfair as to be legally insupportable. Insofar as this argument was based on the common law, the Court of Appeal affirmed the findings of the lower court. The applicant was asserting a positive claim that the court should direct the Secretary of State to facilitate his return to the United Kingdom, and there was no warrant in the legislation or rules for any such obligation. In any case, it considered that the Secretary of State had put forward a substantial case to the effect that the applicant would be perfectly able to pursue his appeal from Sudan, but saw no reason to disagree with the judge's conclusion that the applicant could travel to a safe third country.

17. Furthermore, the Court of Appeal agreed that EU law had no application to the case as there had been no actual, attempted or purported exercise of any right conferred by EU law.

18. Finally, the applicant submitted that he had suffered discrimination by being prevented from attending his statutory appeal, in contrast to an alien who would be entitled to be present in order to appeal against the revocation of leave to remain. Lord Justice Laws, in his leading judgment, accepted that an alien whose leave to remain was cancelled while he was abroad was entitled to return in order to exercise his right of appeal. However, he did not consider that the applicant and the alien were in comparable situations, since citizenship was different in nature from the

right to remain. While Lord Justice Rix was less clear on whether there was a discriminatory aspect to this difference in treatment, he considered that as the applicant had left the country of his own volition, there was no requirement of domestic or EU law mandating his re-entry for the purposes of his appeal.

19. The Court of Appeal also considered that Article 14 of the Convention did not apply. On this occasion the applicant had argued that Article 14 could be read in conjunction with Article 8, since his right to respect for his private and family life had been interfered with, but the Court of Appeal found that the claim had "nothing whatever to do with Article 8". The applicant was not asserting a claim to enter the United Kingdom to enjoy the rights conferred by Article 8, and the attempt to engage Article 14 through this Article was "artificial and adventitious".

(c) The Supreme Court

20. On 8 February 2013 the Supreme Court refused the applicant's application for permission to appeal.

3. The SIAC proceedings

(a) Preliminary issues

21. Following the conclusion of the judicial review proceedings, the applicant amended his grounds of appeal to SIAC. He raised a number of grounds which were dealt with as a preliminary issue, including the engagement of EU procedural obligations and the operation of Article 14 read in conjunction with Article 8. In a judgment of 24 October 2014 SIAC rejected those submissions, principally on the basis that the appeal was not subject to any procedural requirements derived from EU law.

22. In preparation for the substantive hearing, the Secretary of State set out her national security case against the applicant in an open statement. In summary, it assessed that in October 2009 he had left the United Kingdom for Somalia with two named extremists, and whilst in Somalia they had engaged in terrorism-related activities linked to Al-Shabaab. The applicant subsequently travelled from Somalia to Sudan in April or May 2010.

23. The applicant made three submissions on appeal: that he had a positive case which he wished to put in rebuttal of the Security Services' assessments and the Secretary of State's conclusions; that his positive case demonstrated that he did not pose any (or any sufficient) risk to national security and, accordingly, there was no adequate basis upon which he should be deprived of citizenship; and that he was unable to provide instructions as to the national security case against him and/or to participate meaningfully in his appeal as it was unsafe for him to do so from Sudan.

24. At the beginning of the appeal, the Special Advocates acting on behalf of the applicant indicated that in the absence of any instructions from

him as to the substance of the Secretary of State's open case, they felt unable to make any submissions or challenge to that case in the closed proceedings. In the circumstances, they did not consider that it could advance the applicant's interests for them to seek to engage with the Secretary of State's closed national security case, although they would seek to advance his position in relation to issues of procedural fairness in the closed proceedings. Although SIAC took the view that the Special Advocates were well-positioned to represent the applicant by testing the Secretary of State's case, it decided that the first hearing should proceed on the issue of procedural fairness only.

25. The applicant relied on Rule 4(3) of the SIAC Procedure Rules 2007, which required the Commission to "satisfy itself that the material available to it enables it properly to determine proceedings" (see paragraph 39 below). He argued that where an individual was unable to participate effectively in proceedings and was denied an opportunity to rebut the case against him because of legitimate and well-founded fears that to do so would create a risk of serious harm, SIAC could not ensure that all relevant material was before it and therefore was not in a position to comply with its statutory duties.

26. In essence, his "legitimate and well-founded fear" was that the allegation that he was a terrorist might have been communicated by the United Kingdom Government to the Sudanese or even the United States' authorities. He was therefore fearful that his movements and communications were subject to surveillance by the Sudanese authorities and possibly other counter-terror agencies. If that was the case, by communicating with his representatives or the court he would be placing himself at risk of great harm. He did not accept that he could travel to a third country. Although he acknowledged that he had obtained a Sudanese passport, he believed that he was the subject of a flight ban.

27. In its judgment dated 18 December 2014 SIAC noted at the outset that as an out-of-country appeal was not intrinsically unfair, it was for the applicant to show on the facts that he could not have a fair procedure. This would require clear, objective evidence that he was unable to instruct lawyers or give evidence to SIAC; showing that he had a subjective fear would not be sufficient.

28. Having considered the evidence carefully, SIAC accepted that there might be some risk attached to any attempt by the applicant to leave Sudan. However, it found that there were at least three viable means of communication between the applicant, his lawyers and SIAC: he could communicate with his lawyers via "discreet" communications with lawyers in Sudan; he could use email or some other internet-based system, since there was no convincing evidence in open as to the capacity of the NISS to intercept email, Skype or other social or communication media without

passwords being handed over; and visiting friends and relatives could carry documents to and from Sudan, or post material on his behalf.

29. With regard to the risk to the applicant if his instructions were intercepted, on the basis of the open evidence SIAC considered it very likely that the NISS was already aware of him, the accusations against him and his dispute with the United Kingdom authorities. However, the NISS appeared to have no active interest in him. SIAC further considered that his disputed British nationality would have a "protective effect". SIAC noted that the closed material confirmed these conclusions.

(b) The substantive national security issue

30. SIAC gave judgment in the substantive case on 22 December 2015. In doing so, it noted that the nature of the case was broadly known to the applicant. In particular, the open evidence against the applicant, as set out in the National Security Statement, was that he:

- travelled from the United Kingdom to Somalia in October 2009 to engage in terrorism-related activities with [B] and [S];
- along with [B] and [S], engaged in a variety of terrorism-related activities which are likely to have been linked to, or directly involved with, the Somali based extremist group Al Shabaab;
- engaged in terrorism-related training;
- fought against forces of the African Union Mission in Somalia (AMISOM); and
- associated with known extremists in the United Kingdom and overseas.

31. Following its conclusion in December 2014, SIAC proceeded on the basis that there was no good reason why the applicant could not engage in the appeal and fully instruct his lawyers. However, although there had been "significant communications between him and his solicitors" since that date, and he had made four statements, he had not engaged with the national security case against him in any full or direct way.

32. In view of the fact that the Special Advocates were not engaging with the substance of the closed national security case, SIAC indicated that it would look for the most independent and objective evidence in the closed case and adopt particular caution in drawing inferences adverse to the applicant. It concluded:

> "36. Even following the cautious approach we have identified, we have come to the firm conclusion that K2 has not been frank in his witness statements. The contents of his statement amount to a denial that he was ever in Somalia. The CLOSED evidence is conclusive that he was present in Somalia at the relevant time.
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> 37. The CLOSED evidence is conclusive that K2 travelled to Somalia in October 2009 to engage in terrorism-related activities, in the company of [B] and [S]. There is convincing evidence that he remained in the company of those men and engaged in a

variety of terrorism-related activities connected with Al Shabaab. The evidence is conclusive that he engaged in terrorism-related training.

38. The OPEN evidence is supportive of those conclusions to this degree: we conclude that K2 has no good reason to remain silent to the extent that he has done, or indeed at all. Moreover, his statements are, we find, deliberately misleading about the timing of arrival in Sudan. They are misleading about a period when he was in fact in Somalia, and knows he was in Somalia.

39. We find those matters proved to the civil standard. These conclusions would withstand a review, however intense, with access to the CLOSED evidence. If it were necessary to apply the criminal standard of proof to those matters, we would reach the same conclusions.

40. We conclude on the CLOSED evidence that it is probable that K2 fought against AMISOM forces. Here we could not reach the criminal standard of proof, if that were necessary.

41. We do find that the terrorism-related activities were at least linked to Al Shabaab. On that point we would reach the criminal standard of proof, if that were required. It is highly probable that K2's terrorism-related activities were, at least in part, directly involved with Al Shabaab.

42. We do find that there is conclusive CLOSED evidence that K2 had established associations with known extremists in the UK and overseas. Here too, we would reach this conclusion to the criminal standard if that was necessary. We are further clear that these associations were conscious and deliberate associations, not accidental or unwitting contact."

33. SIAC then considered the interference with the applicant's right to respect for his family and private life. It noted that he had left the United Kingdom voluntarily, breaching his bail conditions. His wife had travelled to Sudan in March 2010 and remained there until February 2011, when she returned to the United Kingdom to give birth to their child. She and the child had travelled to Sudan towards the end of 2011 and remained there for six months before going back to the United Kingdom. However, SIAC found that the applicant's wife and child were no longer living in the United Kingdom; he and his wife had numerous family members in Sudan; his wife and child could freely visit Sudan and even live there if they wished; and the applicant's own natal family could – and did – visit him "reasonably often".

34. In view of the nature and extent of the applicant's activities, SIAC concluded that the Secretary of State had been fully justified in deciding to deprive him of his British citizenship. This would have been the case, even if it had found there to be a significant encroachment of his Article 8 rights. It therefore dismissed his appeal against the decision to deprive him of his citizenship.

(c) Court of Appeal

35. The applicant sought permission to appeal against the decision that he would have been able, had he chose, to take part in the proceedings. On 8 July 2016 the Court of Appeal refused the application for permission to

appeal, finding, *inter alia*, that the applicant had failed to discharge the burden on him to establish that he had been unable to have a fair procedure.

B. Domestic law and practice

1. Deprivation of citizenship

36. Pursuant to section 40(2) of the British Nationality Act 1981 ("the 1981 Act"), the Secretary of State has a power to make an order depriving a person of his British citizenship on the ground that deprivation is "conducive to the public good".

37. The Secretary of State must first take a decision to deprive the person of citizenship, and notice of this decision must be served on him. There is a right of appeal against this decision, either to the First Tier Tribunal (Immigration and Asylum Chamber) (by virtue of section 40A(1) of the 1981 Act), or, where the Secretary of State has certified that the decision was made wholly or partly on reliance on information which should not be made public in the interests of national security, foreign relations or the public interest, to SIAC (by virtue of section 40A(2) of the 1981 Act and section 2B of the Special Immigration Appeals Commission Act 1997).

2. SIAC

38. SIAC has a special procedure which enables it to consider not only material which can be made public ("open material") but also other material which cannot ("closed material"). Neither the appellant nor his legal advisor can see the closed material. Accordingly, one or more security-cleared, independent counsel, referred to as "special advocates", is appointed by the Solicitor General to act on behalf of the appellant.

39. Rule 4 (3) of Special Immigration Appeals Commission (Procedure) Rules 2003 ("the 2003 Rules") requires SIAC to satisfy itself that the material available to it enables it properly to determine proceedings.

40. Section 7 of the Special Immigration Appeals Commission Act 1997 confers a right of appeal to the Court of Appeal against a final determination of an appeal made by SIAC in England and Wales "on any question of law material to that determination".

41. A fuller explanation of the SIAC procedure is set out in *I.R. and G.T. v. the United Kingdom (dec.)*, nos. 14876/12 and 63339/12, §§ 28-35, 28 January 2014.

3. The Crown prerogative

42. The Crown (or "royal") prerogative refers to those powers left over from when the monarch was directly involved in government. Prerogative powers are today exercised by government ministers or by the monarch

personally acting, in almost all conceivable instances, under direction from ministers.

43. The defining characteristic of the prerogative is that its exercise does not require the approval of Parliament. However, an instruction made under an order in council (the main form of prerogative legislation) is subject, in principle, to judicial review.

C. European Union law

44. In *Rottmann v. Freistaat Bayern*, 2 March 2010, CJEU, C-135/08 [2010] ECR II-05089, the applicant had been born a citizen of Austria. After being accused in Austria of serious fraud in the exercise of his profession, he moved to Germany where he applied for naturalisation. By acquiring German citizenship he lost his Austrian citizenship by operation of the law. Following information from the Austrian authorities that he was the subject of an arrest warrant in their country, the German authorities sought to annul his acquisition of German citizenship on the grounds that he had obtained it fraudulently. This decision had the effect of rendering him stateless. The referring court wished to know if this was a matter that fell within the scope of EU law, as the applicant's statelessness also entailed the loss of Union citizenship. The Court of Justice of the European Union (CJEU) ruled that an EU Member State decision to deprive an individual of citizenship, in so far as it implied the loss of status of EU citizen and the deprivation of attached rights, fell within the ambit of EU law and, therefore, had to be compatible with its principles.

45. The CJEU concluded that it was legitimate for a Member State to revoke naturalisation on account of deception, even when the consequence was that the person lost their Union citizenship in addition to citizenship of that Member State. However, such a decision had to comply with the principle of proportionality, which, among other things, required a reasonable period of time to be granted in order for the person to recover the citizenship of his or her Member State of origin.

COMPLAINTS

46. The applicant complained under Article 8 of the Convention that the decisions to deprive him of his British citizenship and exclude him from the United Kingdom breached his right to respect for his family and private life and amounted to an attack on his reputation. He further complained that there were inadequate procedural safeguards to ensure effective respect for his Article 8 rights as there was very limited disclosure of the national

security case against him and he was unable to participate effectively in the legal proceedings.

47. The applicant also complained under Article 14 read together with Article 8 that he was treated differently from British citizens considered a threat to national security who did not hold a second nationality, as they could not be deprived of their British citizenship; and from non-national residents who enjoyed a suspensory appeal against the revocation of leave to remain in the United Kingdom.

THE LAW

A. Alleged violation of Article 8 of the Convention

48. The applicant complains under the substantive and procedural limb of Article 8 of the Convention about the decisions to deprive him of his British citizenship and exclude him from the United Kingdom. Article 8 provides as follows:

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

1. Deprivation of citizenship

49. The Court has accepted that an arbitrary denial of citizenship might, in certain circumstances, raise an issue under Article 8 of the Convention because of its impact on the private life of the individual (see *Karassev v. Finland (dec.)*, no. 31414/96, ECHR 1999-II; *Slivenko v. Latvia (dec.)* [GC], no. 48321/99, § 77, ECHR 2002-II; *Savoia and Bounegru v. Italy (dec.)*, no. 8407/05, 11 July 2006; and *Genovese v. Malta*, no. 53124/09, § 30, 11 October 2011). Recently the Court has accepted that the same principles must apply to the revocation of citizenship already obtained, since this might lead to a similar – if not greater – interference with the individual's right to respect for family and private life (see *Ramadan v. Malta*, no. 76136/12, § 85, ECHR 2016 (extracts)). In determining whether a revocation of citizenship is in breach of Article 8, the Court has addressed two separate issues: whether the revocation was arbitrary; and what the consequences of revocation were for the applicant.

50. In determining arbitrariness, the Court has had regard to whether the revocation was in accordance with the law; whether it was accompanied by

the necessary procedural safeguards, including whether the person deprived of citizenship was allowed the opportunity to challenge the decision before courts affording the relevant guarantees; and whether the authorities acted diligently and swiftly (see *Ramadan v. Malta*, cited above, §§ 86-89). In view of the relevance of procedural safeguards to the assessment of arbitrariness, the Court considers that in the present case it would be artificial to separate the applicant's substantive and procedural complaints. It will therefore address these complaints together.

51. Although the applicant does not appear to have invoked the guarantees under the procedural limb of Article 8 either in the judicial review proceedings or before SIAC, in view of the fact that the procedural and substantive complaints are not easily separated, and in light of its findings at paragraphs 52-67 below, the Court does not need to reach any firm conclusion on whether the applicant has exhausted domestic remedies in respect of his procedural complaint within the meaning of Article 35 § 1 of the Convention.

(a) Arbitrariness

i. Was the deprivation in accordance with the law?

52. It is not suggested that the decision to deprive the applicant of his citizenship was anything other than "in accordance with the law". Pursuant to section 40(2) of the 1981 Act the Secretary of State has a power to make an order depriving a person of his British citizenship on the ground that the deprivation is "conducive to the public good" (see paragraph 36 above). In addition, the Crown enjoys a common law prerogative power to exclude a person from the United Kingdom. Although in the judicial review proceedings the applicant argued that the statutory scheme impliedly precluded the exercise of the prerogative power to exclude an individual on conducive grounds while an appeal against deprivation of citizenship was pending (see paragraphs 9 and 15 above), both the High Court and the Court of Appeal found that the relevant legislation could not be so construed (see paragraphs 12 and 15 above). The applicant does not repeat that complaint before this Court and, in any event, the Court has repeatedly stated that the interpretation of domestic legislation is primarily a matter for the national courts (see, among many examples, *Söderman v. Sweden* [GC], no. 5786/08, § 102, ECHR 2013 and *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], no. 13279/05, § 49, 20 October 2011). Furthermore, the applicant did not contest the foreseeability or quality of the law either before the domestic courts or before this Court.

ii. Did the authorities act diligently and swiftly?

53. Furthermore, there is no evidence of any failure on the part of the Secretary of State to act diligently and swiftly in deciding to deprive the

applicant of his citizenship. While it is not known exactly when the United Kingdom authorities became aware of his activities, the open evidence before SIAC indicated that he left the United Kingdom in October 2009 and engaged in terrorist-related activities in Somalia from that date until April or May 2010, when he went to Sudan (see paragraph 22 above). The Secretary of State notified him of her intention to make an order depriving him of his citizenship by letter dated 11 June 2010 and on 14 June 2010 she signed the order (see paragraph 6 above).

iii. Procedural safeguards

54. Therefore, the principal issue for the Court to address in the present case is whether the applicant was afforded the procedural safeguards required by Article 8 of the Convention.

55. In this regard, the Court notes that the applicant had a statutory right of appeal to SIAC against the decision to deprive him of citizenship (see paragraph 37 above). Although he contends that there was very limited disclosure of the nature of the national security case against him, the Court notes that in advance of the substantive hearing he was provided with a National Security Statement setting out clearly – in open evidence – details of the Secretary of State's national security case against him (see paragraph 22 above). As a consequence, SIAC was in no doubt that "the nature of the case was broadly known to the applicant" (see paragraph 30 above). Furthermore, he was represented in this appeal by counsel and Special Advocates were appointed in order to address the evidence contained in the closed material. Indeed, the Court recalls that in *I.R. and G.T.* (cited above, §§ 63-65), a case which concerned the revocation of the applicants' leave to remain and their exclusion from the United Kingdom, the Court was satisfied that there were sufficient guarantees in the SIAC proceedings as required by Article 8 (see also *Abdul Wahab Khan v. the United Kingdom (dec.)*, no. 11987/11, § 33, 28 January 2014).

56. Nevertheless, the applicant contends that on the facts of the present case his exclusion from the United Kingdom prevented him from participating effectively in his appeal against the decision to deprive him of citizenship, because the very act of communicating with his lawyers from Sudan would have put him at risk of great harm from the Sudanese authorities. However, for the reasons set out below the Court does not consider that the applicant's exclusion from the United Kingdom rendered nugatory his procedural safeguards.

57. First of all, the Court does not accept that an out-of-country appeal necessarily renders a decision to revoke citizenship "arbitrary" within the meaning of Article 8 of the Convention. It would not exclude the possibility that an Article 8 issue might arise where there exists clear and objective evidence that the person was unable to instruct lawyers or give evidence while outside the jurisdiction; however, Article 8 cannot be interpreted so as

to impose a positive obligation on Contracting States to facilitate the return of every person deprived of citizenship while outside the jurisdiction in order to pursue an appeal against that decision.

58. Secondly, the Court notes that in the present case the applicant was able to judicially review the decision to exclude him from the United Kingdom and in those proceedings one of his main arguments was that his exclusion would prevent him from participating effectively in the appeal against deprivation of citizenship. He was also permitted to raise this argument as a preliminary issue before SIAC. SIAC, having carefully considered the open and closed material before it, concluded that there were a number of means by which the applicant could safely communicate with his lawyers, and that his fears relating to the interception of these communications were, in any case, unfounded (see paragraphs 28-29 above). This conclusion was not inconsistent with the findings of the High Court and the Court of Appeal in the judicial review proceedings. The High Court did not reach any conclusion on the applicant's ability to communicate with his lawyers from Sudan, since it found that he could travel to a safe third country (see paragraph 13 above). Insofar as the Court of Appeal considered this point, it noted that the Secretary of State had put forward "a substantial case to the effect that the applicant would be perfectly able to pursue his appeal from Sudan" (see paragraph 16 above). In light of the national courts' comprehensive and thorough examination of the applicant's submissions on this factual issue, the Court does not consider itself in a positon to call into question their findings that there did not exist any clear, objective evidence that the applicant in this case was unable to instruct lawyers while outside the jurisdiction.

59. Thirdly, it is apparent from SIAC's judgment of 22 December 2015 on the substance of the applicant's case that despite it having found "no good reason why he could not engage in the appeal and fully instruct his lawyers" (see paragraph 31 above), in view of the fact that the Special Advocates were not engaging with the closed national security case, it sought out the most independent and objective evidence in the closed case and adopted particular caution in drawing inferences adverse to the applicant (see paragraph 32 above). However, even following this cautious approach, it found that the closed evidence was "conclusive" (reaching the criminal standard of proof) that the applicant was in Somalia at the relevant time and that he had travelled there in the company of extremists to engage in terrorism-related activities; that from the closed evidence it was "probable" that he fought against AMISOM forces; that it was "highly probable" (also reaching the criminal standard of proof) that his terrorism-related activities were, at least in part, directly involved with Al Shabaab; and that there was conclusive closed evidence (again reaching the criminal standard) that he had established associations with known extremists in the United Kingdom and overseas (see paragraph 32 above).

60. Finally, the Court cannot ignore the fact that the procedural difficulties the applicant complains of were not a natural consequence flowing from the simultaneous decision to deprive him of his citizenship and exclude him from the United Kingdom. As the Court of Appeal noted in the judicial review proceedings, the reason why the applicant had to conduct his appeal from outside the United Kingdom was not the Secretary of State's decision to exclude him, but rather his decision to flee the country before he was required to surrender to his bail (see paragraph 15 above).

61. The Court recalls that in assessing the decision to deprive the applicant of his British citizenship, it must apply a standard of "arbitrariness" (see paragraph 49 above), which is a stricter standard than that of proportionality. Bearing this in mind, and having regard to the above considerations, it concludes that the decision was not "arbitrary".

(b) Consequences of revocation

62. The applicant was not rendered stateless by the decision to deprive him of his British citizenship, as he was entitled to – and has since obtained – a Sudanese passport. Furthermore, the Court cannot but have regard to the findings of SIAC in its judgment of 22 December 2005; namely, that the applicant had left the United Kingdom voluntarily prior to the decision to deprive him of his citizenship; his wife and child were no longer living in the United Kingdom and could freely visit Sudan and even live there if they wished; and the applicant's own natal family could – and did – visit him "reasonably often" (see paragraph 33 above). Although in his most recent correspondence the applicant contends that his wife and child are resident in the United Kingdom, he has not substantiated that claim. In any case, the fact remains that they are free to visit him in Sudan or even to relocate there.

63. The applicant does not appear to have complained in the domestic proceedings about the adverse impact of the impugned measures on his reputation. Before this Court he asserts that he has been placed on a list of persons prohibited from air travel, but he has advanced no evidence to substantiate that claim.

(c) Conclusion

64. In view of the above considerations, the Court considers that insofar as the applicant's Article 8 complaint concerns the decision to deprive him of his citizenship, it is manifestly ill-founded and, as such, must be rejected pursuant to Article 35 § 3(a) of the Convention

2. The exclusion of the applicant from the United Kingdom

65. As a matter of well-established international law and subject to their treaty obligations, States have the right to control the entry, residence and

expulsion of aliens. The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law, pursue a legitimate aim and be necessary in a democratic society (see, for example, *De Souza Ribeiro v. France* [GC], no. 22689/07, § 77, ECHR 2012).

66. In the present case the Court is prepared to accept for the purposes of the present decision that the applicant's exclusion from the United Kingdom interfered with his private and family life in the United Kingdom. However, in light of the findings set out at paragraphs 62 and 63, it would appear that his exclusion did not have a significant adverse impact on his right to respect for his family and private life or upon his reputation. Having regard to this limited nature of the interference, and SIAC's clear findings concerning the extent of his terrorism-related activities, the Court does not consider that the decision to exclude the applicant from the United Kingdom was disproportionate to the legitimate aim pursued: namely, the protection of the public from the threat of terrorism.

3. Conclusion

67. Accordingly, the Court considers that the applicant's complaint under Article 8 of the Convention is manifestly ill-founded and, as such, must be rejected pursuant to Article 35 § 3(a) of the Convention.

B. Alleged violation of Article 14 of the Convention read together with Article 8

68. The applicant further complained under Article 14 read together with Article 8 that he was treated differently from British citizens considered a threat to national security who did not hold a second nationality; and from non-national residents who enjoyed a suspensory appeal against the revocation of leave to remain in the United Kingdom. Article 14 provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

69. The Court notes that in the proceedings before the domestic courts the applicant did not argue that he was treated differently from a British citizen who posed a threat to national security. Before the High Court he argued that he had been treated differently from someone who had never held British citizenship (see paragraph 11 above), and before the Court of

Appeal that he had been treated differently compared to an alien who would be entitled to be present in order to appeal against the revocation of leave to remain (see paragraph 18 above).

70. Accordingly, the Court considers that the Article 14 complaint based on this ground must be rejected pursuant to Article 35 § 1 of the Convention for failure to exhaust domestic remedies.

71. The second alleged ground of discrimination – that he was treated differently from a non-national resident – was raised before the Court of Appeal. However, in the present case the applicant was not denied an in-country right of appeal because he was a British citizen; rather, the reason he did not have an in-country appeal against the decision to deprive him of his citizenship, and the reason he was not present during the judicial review proceedings, was because he had already left the United Kingdom of his own volition when the impugned decisions were taken (see paragraph 15 above). A non-national resident who had his leave to remain cancelled while out of the country would also not be permitted to return for the purposes of an appeal (see, for example, the situation of the first applicant in *I.R. and G.T. v. the United Kingdom*, cited above).

72. Accordingly, the Court considers that the Article 14 complaint based on this ground must be rejected as manifestly ill-founded pursuant to Article 35 § 3(a) of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 9 March 2017.

Abel Campos
Registrar

Linos-Alexandre Sicilianos
President