Neutral Citation Number: [2024] UKIPTrib 7

Case No: IPT/22/12/H and IPT/22/11/H

IN THE INVESTIGATORY POWERS TRIBUNAL

Date : 17 December 2024

Before:

Lord Justice Singh (President)
Lord Boyd of Duncansby (Vice-President)
Judge Rupert Jones

B E T W E E N :

(1) Christine LEE
(2) Daniel WILKES

Claimants

- and -

SECURITY SERVICE

Respondent

MR R DE MELLO, MR P DIAMOND and MS S FERRIN (instructed by Luke & Bridger Law) appeared on behalf of the Claimants

MS V WAKEFIELD KC, MS R DAVIDSON and MS R EARIS (instructed by Government Legal Department) appeared on behalf of the Respondents

MR J GLASSON KC and MR J NICHOLLS appeared as Counsel to the Tribunal

OPEN JUDGMENT

Lord Justice Singh:

This is the judgment of the Tribunal.

Introduction

1. This case concerns whether the Respondent's decision to issue an Interference Alert ("IA") in relation to the First Claimant, and related actions which were taken in connection with the Second Claimant's employment in Parliament, were lawful on public law grounds and were compatible with the Claimants' human rights.

2. The Tribunal held hearings in OPEN and CLOSED. In addition to this OPEN Judgment, there is a CLOSED judgment. Assisted by Counsel to the Tribunal ("CTT"), the Tribunal has continued to bear in mind the ongoing duty of disclosure of OPEN material to the Claimants in line with the Tribunal's OPEN judgment ([2023] UKIPTrib 8) on the application of Article 6 of the European Convention on Human Rights ("ECHR") to these proceedings and the level of disclosure required to be made in respect of the CLOSED material.

Factual Background

3. The First Claimant ("C1"), Christine Lee, was born on 7 October 1963 in Hong Kong. In 1975, when she was 12 years old, she moved to join her parents and siblings in Belfast. Whilst growing up in Belfast during her teenage years, C1 was introduced to Christianity and remains a devout Christian. In 1990 she married her husband, Martin Wilkes, and they have two sons. The Second Claimant ("C2"), Daniel Wilkes, is their youngest son, and was born on 23 January 1994.

4. In 1994 C1 founded Christine Lee Immigration Consultancy Company Limited, which primarily provided immigration consultancy services to Chinese migrants. In 2002 C1 became a solicitor and transformed the company into a solicitors' firm called Christine Lee & Co (Solicitors) Limited ("CLCo"), providing a range of legal services mainly to people in the British Chinese community. From 2004 the firm set up consultation offices in Hong Kong, Guangzhou, and Beijing to provide immigration and investment advice to clients in Hong Kong and mainland China.

5. From the early 2000s until January 2022, C1 created and supported a number of community groups which have aimed to promote political participation and combat discrimination facing the British Chinese Community.

6. In 2002 C1 set up what would come to be the North London Chinese Association ("NLCA") with her long-time business partner, David Ho, to provide solutions to problems the Chinese community faced.

7. In 2006 C1 founded, and was the Director of, the British Chinese Project ("BCP"), an organisation with the stated purpose of operating as a non-profit and non-partisan organisation with a remit to provide community support to ethnic Chinese minorities and encourage their participation in UK political life. In her evidence before this Tribunal, C1 explained that she acted as Chair of the BCP, although she was not involved in the day-to-day running of the organisation; and from 2017 the organisation remained largely dormant before officially closing in February 2022.

8. C1 helped set up the All-Party Parliamentary Chinese in Britain Group ("APPCBG") as a forum for cross-party Parliamentarians to have an informed discussion about the issues concerning the Chinese community in Britain. From 2011 until 2019, when the APPCBG did not renew its registration with Parliament, it was chaired by the Rt Hon Barry Gardiner MP.

9. In 2010 C2 briefly volunteered in Barry Gardiner MP's office. Then, from September 2015 to August 2016, C2 was employed by Mr Gardiner on a part-time basis, when his task was mainly to respond to constituents' policy concerns and queries.

10. In November 2015 CLCo agreed to employ a research team for the offices of Barry Gardiner MP, which continued until June 2020.

11. In January 2017 C2 was offered a full-time role as Mr Gardiner MP's Diary Manager, a post which he held until 13 January 2022.

12. On 4 February 2017 an article was published in *The Times* entitled 'China cash link to Labour MP'. The article confirmed that payments to Barry Gardiner MP by C1's law firm: "... were declared and there is no suggestion of impropriety". C1 explains in her evidence that all payments were appropriately recorded in the register of members' interests. The underlying allegations were referred to and re-printed elsewhere, for example in a book by Clive Hamilton and Marieke Ohlberg called The Hidden Hand, published in March 2020.

13. In the course of these proceedings C1 has provided five witness statements, which explain in detail:

    i) The work of C1 at CLCo in China on behalf of Chinese individuals and businesses, CLCo's work as one of the law firms contracted by the Chinese Embassy and Consulate General, and her contact with Chinese Officials: see in particular C1's First Witness Statement dated 23 March 2022 at [31] to [34], Second Witness Statement dated 3 March 2023 at [84] to [163], and C1's Fourth Witness Statement dated 7 December 2023 [26] to [32] and [36] to [39]. Her business involved an element of self-promotion. CLCo described itself as Chief Legal Counsel to the Chinese Embassy, even though no such position exists.
    ii) The establishment of CLCo's offices in China, C1's frequent visits there and her attendance at conferences and meetings with Chinese Government Officials as part of her work. C1 explained the importance of being photographed with such officials (Second Witness Statement at [116,117]).

iii) C1's political and community work through the NLCA, BCP, APPCBG and elsewhere, including her contact with British politicians and donations made to individuals and political parties to promote the rights of the British Chinese community and build trade links between the UK and China. The donations were predominantly made through BCP and CLCo: see in particular C1's First Witness Statement at [10] to [30], and C1's Second Witness Statement at [10] to [76].

14. C1's statements are supported by statements prepared by:

i) C2 in two witness statements dated 23 March 2022 and 2 March 2023, which focus on his work at Barry Gardiner MP's office.
ii) Her son, Michael Wilkes, in a witness statement dated 2 March 2023, which focuses on his management of BCP.
iii) Her business partner at CLCo, David Ho, in a witness statement dated 2 March 2023, which focuses on CLCo's business operations in China and CLCo's donations to Barry Gardiner MP.
iv) Her husband and business partner at CLCo, Martin Wilkes, in a witness statement dated 2 March 2023, on the impact of the IA.
v) Seven of her close friends and siblings, whose witness statements attest to C1's Christian faith and the impact of the 13 January 2022 IA.

The Interference Alert dated 13 January 2022

15. On 13 January 2022 the Respondent issued the IA to the Parliamentary Security Director for onward dissemination to Parliamentarians, displaying C1's full name and photo "… to draw attention to an individual knowingly engaged in political interference and activities on behalf of the United Front Work Department ('UFWD') of the Chinese Communist Party (CCP)". The IA contained the following statements about C1, that she:

i) "has acted covertly in coordination with the UFWD and is judged to be involved in political interference activities[1] in the UK."

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[1] At the relevant time, the Respondent defined what is meant by political interference activity and when it crossed the threshold into becoming a national security threat as opposed to being both lawful and legitimate, as:

> "'Foreign interference comprises malign activity by a foreign state or those acting on its behalf which is designed to have or has a detrimental effect on the interests of the UK. This includes our government, democracy, public opinion, military, economy, critical infrastructure, academia, media, diplomacy, and UK-based diaspora communities. This activity can be deceptive, coercive or corruptive and is not limited to the covert domain. It includes the use of agents of influence, leverage of investments, financial inducement, disinformation, and cyber capabilities…'
>
> 'Foreign interference comprises malign activity by a foreign state or those acting on its behalf which is designed to have or has a detrimental effect on our democracy. This includes elections; political parties; Parliament and local

ii) "...is working in coordination with the United Front Work Department (UFWD) of the Chinese Communist Party (CCP). We judge that the UFWD is seeking to covertly interfere with UK politics through establishing links with established and aspiring Parliamentarians across the political spectrum. The UFWD seeks to cultivate relationships with influential figures in order to ensure the UK political landscape is favourable to the CCP's agenda and to challenge those that raise concerns about CCP activity, such as human rights."

iii) "... has been engaged in the facilitation of financial donations to political parties, Parliamentarians, aspiring Parliamentarians and individuals seeking political office in the UK, including facilitating donations to political entities on behalf of foreign nationals."

iv) "... has publicly stated that her activities are to represent the UK Chinese community and increase diversity however, the aforementioned activity has been undertaken in covert coordination with the UFWD with funding provided by foreign nationals located in China and Hong Kong."

v) "... has extensive engagement with individuals across the UK political spectrum, including through the now disbanded All-Party Parliamentary Chinese in Britain Group, and may aspire to establish further APPGs to further the CCP's agenda."

16. The IA states that "[a]nyone contacted by [C1] should be mindful of her affiliation with the Chinese state and remit to advance the CCP's agenda in UK politics. If you received any concerning or suspicious contact or would like any further information, please contact the Parliamentary Security Director (PSD)"; and lists the PSD as the point of contact.

17. The IA was then emailed to all Parliamentarians by the Speaker of the House of Commons, the Rt Hon Sir Lindsay Hoyle MP. In the email he highlighted "... the fact that [C1] has facilitated financial donations to serving and aspiring Parliamentarians on behalf of foreign nationals based in Hong Kong and China. This facilitation was done covertly to mask the origins of the payments. This is clearly unacceptable behaviour and steps are being taken to ensure it ceases." In the email he referred to a previous email that he had sent to Parliamentarians in July 2021 "... to alert you to activities of Janus Neidzwiecki, a Polish national and Oleg Voloshyn, a Ukrainian national who had both been working to gain the support of a number of politicians here at Parliament for policies in support of Russian state objectives."

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government; and public confidence in democracy. This activity can be deceptive, coercive or corruptive. This encompasses covert activity, such as agents of influence, cyber-attacks on electoral infrastructure and institutions, hack-and-leak operations, and deniable disinformation campaigns. It also includes more overt action, for example disinformation by representatives of the state or state-linked media. But it excludes truthful but biased media broadcasting'."

As the Respondent observes, each definition makes reference to political interference activity being "deceptive, coercive or corruptive."

Events Leading to C2's resignation from Barry Gardiner MP's Office

18. C2 alleges that on the same day, 13 January 2022, the Respondent's officials had a meeting with Barry Gardiner MP, where they disclosed information about C1 to those present at the meeting.

19. That morning, C2 received a letter from the Deputy Director of the Parliamentary Security Department that his Counter Terrorist Check ("CTC") Parliamentary Security Clearance was being suspended. The letter emphasised that "... a final decision has **not** yet been made" and invited any representations that C2 would wish to make.

20. C2 alleges that he was given an ultimatum by Barry Gardiner MP either to resign or be dismissed, which Barry Gardiner MP denies, in a letter dated 25 February 2022.

21. In a public statement issued by Barry Gardiner MP on 14 January 2022, he stated that "[C2] volunteered in my office many years ago and was subsequently employed by me as a diary manager. He resigned from my employment earlier today. The Security Services have advised me that they have no intelligence that shows he was aware of, or complicit in, his mother's illegal activity."

22. Subsequently C2 instituted proceedings against Mr Gardiner in the Employment Tribunal for constructive unfair dismissal, which were settled, with a self-written reference adopted and approved by Mr Gardiner.

Parliamentary discussion in the immediate aftermath of the IA

23. After the IA was sent to Parliamentarians on 13 January 2022, the Rt Hon Sir Iain Duncan Smith MP raised a point of order in the House of Commons and referred to C1 as "... an agent of the Chinese State".

24. In a statement from Barry Gardiner MP dated 13 January 2022, he stated that he had "... been assured by the Security Services that whilst they have definitely identified improper funding channelled through [C1], this does not relate to any funding received by my office".

25. On Monday 17 January 2022 the Secretary of State for the Home Department ("SSHD") made a statement on foreign interference in UK politics in response to the IA, and announced that the Government "... will introduce new legislation to provide the security services and law enforcement agencies with the tools that they need to disrupt the full range of state threats".

Press Coverage in the immediate aftermath of the IA

26. On 13 January 2022, and during the following days, C1's name and photograph were widely publicised, with the majority of press outlets referring to her as a "Chinese spy" or a "Chinese agent": see, for example, the *Daily Mail* on 13 January 2022, *The Telegraph* on 13 January 2022, LBC on 13 January 2022, *The Spectator* on 13 January

2022, *The Daily Mirror* on 13 January 2022, *The Week* on 14 January, Sky News on 14 January 2022, and the *Diplomat* on 22 January 2022. C2 was also mentioned in multiple publications: see, for example, LBC, *The Spectator* and *The Daily Mirror*. C1's evidence is that journalists also camped outside her family home for around two weeks.

27. In the days that followed the publication of the IA C1 received racist and hateful emails to the CLCo enquiry line, which included rape and death threats.

Impact on C1

28. In her evidence C1 says that her health has been affected both mentally and physically, and that she has been diagnosed with severe depression: see, for example, C1's First Witness Statement at [54]. In her Second Witness Statement, written over a year after the publication of the IA, C1 states that she suffers from intrusive thoughts, flashbacks, sleep loss, panic attacks and depression for which she takes medication: see C1's Second Witness Statement at [184] to [185].

29. C1 describes how she has changed her appearance and contact details and goes by a different name because she lives under constant fear of being surveilled and reported on by the local and national press: see C1's Second Witness Statement at [172] to [176]. She also describes being "shunned" by the British Chinese community, who are afraid that they will be seen as being pro-China or as Chinese agents by association with her: see C1's Second Witness Statement at [178]. Regarding her personal finances, C1 describes how her bank withdrew her account and personal facilities without explanation in Summer 2022: see C1's Second Witness Statement at [179].

30. C1 also describes the impact that the "irreparable reputational harm" the IA has had on CLCo even after she resigned her directorship and distanced herself from her associated companies. She says that CLCo had to deal with online abuse, the withdrawal of banking facilities and a reduction in whole areas of work, in particular CLCo's work on behalf of asylum seekers, which ceased due to C1 being branded as a "Chinese spy" in the press: see C1's Second Witness Statement at [180] to [183].

31. C1's business partner, David Ho, describes how the Solicitors Regulatory Authority ("SRA") opened an investigation in to CLCo a week after the publication of the IA, to scrutinise CLCo's client accounts and political donations made by the firm: see his Witness Statement at [28]. On 27 September 2022 the SRA closed the investigation and confirmed that no further action needed to be taken: see Mr Ho's Witness Statement at [41] and the SRA letter dated 27 September 2022.

32. Further, on 23 May 2022 David Ho was detained for five hours at Birmingham Airport and interviewed about his work for CLCo: see his Witness Statement at [47]. C1 states that because of this, she is now unable to travel for fear of being detained without charge at ports: see C1's Second Witness Statement at [202].

Impact on C2

33. C2 describes how, after the IA, he had to change careers, he has lost contact with friends, and he fears that future employers will be hesitant to hire him due to his association with C1: see C2's Second Witness Statement at [3] to [14].

Procedural history

34. On 21 March 2022 the Claimants lodged their claims with the Tribunal.

35. On 13 June 2022 the claim forms and supporting documentation were provided to the Respondent; and the Tribunal directed the Respondent to provide a preliminary response to the claims and disclose documents and information under section 68 of the Regulation of Investigatory Powers Act 2000. ("RIPA").

36. On 2 December 2022 the Respondent submitted its preliminary OPEN response to the claims.

37. On 21 December 2022, the Tribunal granted the Claimants permission to file submissions in response to the Respondent's Preliminary OPEN Response, dated 10 March 2023.

38. On 30 January 2023 the Claimants requested disclosure of various documents, including the policy or guidance that the Respondent relied upon when forming the decision to issue the IA. The Respondent objected to the disclosure request on 16 February 2023.

39. On 26 April 2023 and 5 May 2023 CTT requested disclosure from the Respondent, arguing that the principles of *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269 ("*AF (No 3)*")were engaged by these proceedings. On 15 May 2023 the Respondent wrote to the IPT objecting to the request, asserting that *AF (No 3)* was not applicable to these proceedings.

40. Following a preliminary hearing on 11 July 2023, the Tribunal delivered an OPEN judgment on 22 September 2023 ([2023] UKIPTrib 8), concluding that it was not necessary to reach a final conclusion as to whether Article 6 of the ECHR applies to these proceedings, that *AF (No 3)* does not apply to these proceedings, and confirming that the Tribunal's usual procedures are capable of dealing with the claims fairly.

41. On 29 September 2023 the Respondent provided additional disclosure which stated that C1 held the position of Chief Legal Advisor to the Embassy of the People's Republic of China ("PRC") in the UK and that "a former client of [CLCo] was excluded from the United Kingdom owing to his involvement in providing financial donations to the UK political figures on behalf of the Chinese Communist Party."

42. Following an OPEN hearing on 20 October 2023 the Tribunal delivered an OPEN judgment ([2023] UKIPTrib 10), in which the Tribunal saw no cogent or persuasive reason to allow the Claimants to disclose the Respondent's Preliminary OPEN

Response to different individuals in separate proceedings at the Special Immigration Appeals Commission ("SIAC").

43. C1 responded to the Respondent's 29 September 2023 additional disclosure in her Fourth Witness Statement dated 7 December 2023, confirming that she was contracted to advise the Chinese Embassy to the UK and Special Consulate to Northern Ireland but never had role of 'Chief Legal Advisor'. She also said that she believed she knows the client that the Respondent was referring to, but that all her dealings with that client had led to no action being taken following investigation by the SRA : see C1's Fourth Witness Statement at [45].

44. On 5 April 2024, the Claimants submitted additional grounds of complaint asserting that the Respondent's decision to issue the IA without making further enquiries was irrational in light of C1's Christianity. The Claimants were subsequently permitted to adduce further evidence, comprising a Fifth Witness Statement by C1, supporting witness statements of those who attest to her Christian faith, and an "expert" report by Dr Corrina-Barbara Francis.

45. On 7 May 2024 the Respondent filed its response to the Claimants' additional grounds of complaint, stating that the grounds did not take the Claimants' case any further. The Respondent also argued that, as Dr Francis has not seen the CLOSED material, the evidence has limited (if any) relevance.

46. C1 did not choose to give oral evidence or be cross-examined. We were not invited to nor do we draw any adverse inference against C1 for her decision.

The Claimants' Submissions

47. The Claimants first contend that the Expert Report of Dr Francis is admissible and relevant because it goes to the Claimants' core contention that the Respondent acted on an incorrect basis of fact when issuing the IA, as Dr Francis concludes that C1 would be a "highly unlikely candidate" to engage in political interference activities on behalf of the Chinese Government.

48. Further, the Claimants submit that the various Parliamentary reports they refer to are admissible, as they are referred to as a matter of history and the facts contained therein are unlikely to be contentious. It should be noted that in their skeleton argument, at [13] to [14], the Claimants rely on the Intelligence and Security Committee of Parliament ("ISC") on China HC 287 dated 21 July 2020 and the House of Lords Report of UK and China Trade Relationship dated 10 September 2020, to support their contention that the Respondent did not recognise it had responsibility for counter-Chinese interference activity in the UK and has insufficient expertise relating to China.

Public law submissions

49. **The Respondent acted outside its powers in issuing the IA** – the Claimants contend that the Respondent has no power under the Security Service Act 1989 ("SSA") to name C1 and publicise the photograph of her. The Claimants submit that there is no express

power to issue an IA in section 1 or section 2 of the SSA. If there is such a power, they submit it does not extend to Parliament as the Parliamentary Commissioner for Standards has the task of advising MPs about questions of propriety and the Respondent's use of its power risks unintentionally furthering the interests of a political party contrary to section 2(2)(c) of the SSA. Finally, they submit that there is a pre-condition in section 1(2) that the Respondent must have reasonable grounds to believe that "agents of foreign powers" "...intended to overthrow or undermine parliamentary democracy...". They argue that the Respondent has not overcome this hurdle and that donations to political parties do not necessarily undermine Parliamentary democracy.

50. They argue that section 1(4) of the SSA limits the Respondent's powers to "... the prevention and detection of serious crime", and obliges the Respondent's powers to support "... other law enforcement agencies". In the present case, the Claimants submit that the Electoral Commission has sole non-delegable power to issue notices to persons suspected of making or facilitating impermissible foreign donations under the Political Parties, Elections and Referendums Act 2000 ("PPERA"), and that the section 61 PPERA offence of evading the restrictions on donations carries a maximum sentence of 1 year so in any event, C1's alleged conduct cannot be considered to be a "serious crime".

51. **Mistake of fact** – the Claimants rely on Dr Francis's expert report, which they say contrasts with the Respondent's alleged lack of institutional knowledge in relation to China, to submit that the Respondent's assertion that C1 was covertly acting on behalf of the UFWD was a material error of fact.

52. ***Tameside* duty** – the Claimants assert that the Respondent ought to have known that C1 was a devout and practising Christian which, in light of the "... available objective evidence at the time ... that the Chinese State persecuted Christians", should have prompted the Respondent to undertake further enquiries and establish whether the Chinese authorities would use foreign Christian Chinese nationals to act as their agents prior to publishing the IA.

53. **Procedural fairness** – the Claimants refer to *R v Secretary of State for the Home Department, ex p. Doody* [1994] 1 AC 531 at 560 to contend that the Respondent was obliged to seek representations from C1 prior to issuing the IA.

54. They make the further submission – which relates to their submissions under Articles 8, 10 and 11 of the ECHR that the issuing of the IA was not "in accordance with law" – in particular that it was not adequately foreseeable that C1's actions would amount to a breach of national security. The Claimants emphasise that the Respondent accepted that C1's activity was not criminal, and there is no prohibition of a citizen of the UK, acting on behalf of another state, from seeking to influence the UK Government's policies or politicians.

ECHR submissions

55. **Article 3** – the Claimants submit that the Respondent breached its positive systems/operational duty to not expose C1 to a serious risk of inhuman or degrading treatment contrary to Article 3. Therefore, the Claimants argue that C1 endured what

amounted to mental suffering, and treatment that humiliated / debased C1, diminishing her human dignity, and aroused feelings of fear, anguish and inferiority capable of breaking C1's moral and physical resistance. They argue that this was caused by the Respondent because, in issuing the IA, the Respondent knew that it would attract worldwide publicity, make C1 identifiable to the public, and result in C1 receiving racist abuse including rape and death threats.

56. **Article 8** – the Claimants submit that C1's Article 8 rights were engaged due to the seriousness of the repercussions and that the fact that the issuing of the IA was not based on a clear finding by an independent body of guilt or misconduct. They submit that such an infringement lacks foreseeability and was not in accordance with law. In the alternative they submit that the issuing of the IA was disproportionate as (i) there was a less restrictive way of achieving the legitimate aim of preserving national security through allowing C1 to make representations prior to the issuing of the IA and (ii) it did not strike a fair balance between C1's Article 8 rights and the general interests of the community in light of the manner in which the IA was issued, and the serious and irreparable harm that C1 suffered.

57. **Articles 10 and 11** – the Claimants submit that the issuing of the IA has restricted C1's ability to express herself, participate in the political process and associate with members of her community. The Claimants submit that, like the interference with Article 8, such an interference with C1's rights to freedom of expression and association are similarly disproportionate.

58. **Article 14** – the Claimants submit that they have been treated less favourably when compared to Janusz Niedzwiecki and Oleg Voloshyn who were accused of facilitating donations in connection with the Russian state in 2021. They further submit, relying on media reporting, that the Respondent did not issue IAs in similar cases where like allegations were made against Conservative MPs being funded by Russian and other foreign States and bodies. They therefore submit that C1 was treated less favourably because of her suspected links to the CCP and UFWD and, because of the alleged link to organisations of Chinese nationality, she has been treated less favourably when compared with those who had links to the comparator groups, i.e. donors connected with the Russian State who made political donations to MPs. The Claimants argue that the differential treatment is because of C1's nationality and constitutes direct discrimination.

59. In the alternative, the Claimants submit that the practice of issuing IAs in relation to those suspected of engaging in foreign political interference is indirectly discriminatory as it has a disproportionate impact on dual nationals/people with close ties to another country. They say that this treatment cannot be objectively or reasonably justified for the same reasons that the interference with the Claimants' Article 8, 10, and 11 rights were disproportionate.

Specific submission in relation to C2

60. The Claimants submit that C2's Article 8, 10, 11 and 14 rights were violated due to the serious and irreversible damage to C2's reputation that withdrawing his security clearance had, and that the withdrawal of security clearance was caused by the Respondent's issuing of the IA in relation to C1. They further submit that the settlement

of C2's Employment Tribunal claim has not vindicated C2's rights as any compensation received does not cover the reputational damage that C2 has suffered for being wrongly associated as the son of a spy.

The Respondent's submissions

61. The Respondent's submissions begin by addressing the expert evidence of Dr Francis, submitting that her report was based on unquestioning acceptance of C1's witness evidence without having seen the CLOSED material upon which the Respondent's assessments were based, as such her evidence should be afforded little or no weight.

62. Further, the Respondent submits that, in relation to the Parliamentary reports, the Claimants are not using them to rely on uncontentious points and, as such, the doctrine of Parliamentary privilege applies to prevent reliance on them in legal proceedings.

Public law submissions

63. The Respondent submits that the Supreme Court confirmed in *Begum v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765 ("*Begum SC*"), at paras 69-70, that, when a decision has been taken on national security grounds, the Tribunal should consider whether the findings of fact by the decision maker are reasonable in the *Wednesbury* sense and, if they are, the Tribunal should consider whether the decision is lawful on the basis of the factual picture as found by the decision-maker.

64. **The power to issue an IA** – the Respondent submits that the Court of Appeal held in *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2021] EWCA Civ 330; [2021] QB 1087 ("*the Third Direction Case*") that section 1(2) and (3) of the SSA confirmed the continuation of the prerogative powers that the Respondent possesses and that, once a national security threat was identified, the issuing of the IA was necessary in the discharge of the Respondent's statutory functions. The Respondent also submits that the Electoral Commission's powers under the PPERA do not limit the Respondent's statutory functions under section 1(2) and (3) of the SSA.

65. **Rationality** – the Respondent refers to *Begum SC* and the dicta of the House of Lords in *Secretary of State for the Home Department v Rehman* [2003] I AC 153 ("*Rehman*"), in particular at para 26, and submits that the Respondent's assessment that C1 constituted a risk to national security was not *Wednesbury* unreasonable.

66. **Error of fact** – the Respondent submits that it would not be appropriate for the Tribunal to make factual findings with respect to the core allegations in the IA given the limits imposed by *Begum SC* as interpreted by Elisabeth Laing LJ in *U3 v Secretary of State for the Home Department* [2023] EWCA Civ 811; [2024] 2 WLR 319 ("*U3*"), at para 174. Therefore, even if the Tribunal reaches a decision that the Claimants have proven a factual matter (e.g. C1's faith), such a finding may not displace the Respondent's national security assessment if it is based on material capable of rationally supporting it.

67. ***Tameside* duty** – the Respondent submits that the Claimants have not established that there has been a failure to take an obviously material consideration into account which meant that the failure to make further enquiries overcomes the high threshold of irrationality.

68. **Procedural fairness** – the Respondent submits that, as this case concerned the Respondent's assessment of C1's national security risk, there was no duty to seek representations as that would risk frustrating the purpose of the proposed action. In the alternative, the Respondent submits that the Claimants have now made detailed representations and the Respondent's assessment of the national security risk has not changed, meaning that it would have made no difference to the Respondent's decision to issue the IA if the Claimants had been given prior notice, citing *Simplex GE (Holdings) v Secretary of State for the Environment* (1989) 57 P & CR 306 ("*Simplex*").

ECHR Submissions

69. **Article 3** – the Respondent submits that the harm complained of by C1 does not meet the minimum threshold of severity required to engage Article 3. Further, the abuse to which C1 was subjected was not the result of action taken by the State and so the State's positive obligation was not triggered, as there is no evidence that the threats made to C1 represented a real or immediate risk of treatment contrary to Article 3, or that the police failed to protect C1 in response to the threats.

70. **Article 8** – the Respondent submits that, if the Tribunal concludes that the Respondent's national security assessment was rational, then the Tribunal must determine the Claimants' Article 8 complaints assuming that C1 constituted a national security risk.

71. Accordingly, the Respondent submits that C1's Article 8 rights were not engaged because, assuming that she did co-ordinate with UFWD and posed a national security threat, she could not have a reasonable expectation that such matters would be kept private.

72. In the alternative, the Respondent submits that the issuing of the IA was "in accordance with the law", as the Tribunal's oversight is more than sufficient to guard against the potential for arbitrary interference with the Claimants' ECHR rights, and that the potential consequences of the IA were reasonably foreseeable, if necessary after taking legal advice.

73. Finally, the interests of national security are a weighty consideration for which the Respondent has institutional expertise and responsibility, so that the Respondent's assessment of C1 as a national security threat should be afforded significant weight, and the decision to issue the IA was proportionate to any interference with C1's Article 8 rights.

74. **Articles 10 and 11** – the Respondent submits that there has been no interference with the Claimants' freedom of expression and association as they are still free to hold and express opinions and campaign for political causes. In the alternative, if the Tribunal

held that the Claimants' Article 10 and 11 rights were engaged, the same reasons justifying any Article 8 interference should lead to the conclusion that any Article 10 and 11 interference is proportionate.

75. **Article 14** – the Respondent asserts that race or nationality played no part in the decision to issue the IA, which was solely based on the threats posed by C1's links to the CCP and UFWD, and any person in an analogous position to C1 would have been treated in the same way. Therefore, there was no breach of Article 14 by way of direct discrimination.

76. Regarding indirect discrimination, the Respondent notes that this argument was advanced by the Claimants for the first time in their skeleton and, in any event, any disproportionate impact that the issuing of IAs could have on foreign or dual nationals is objectively justified by the risk to national security posed by those engaged in political interference activities.

Issues relating to C2

77. The Respondent submits that there has been no interference with C2's Article 8 rights, as the Respondent did not impugn C2's reputation. Further, it was made clear to C2 that the final decision regarding his security clearance would not be made pending any representations that C2 wished to make. In fact, C2 resigned before availing himself of that opportunity.

Application for Permission to Amend the Claimants' Grounds

78. In the skeleton argument for the hearing before us, at paras 118-125, a submission was advanced on behalf of the Claimants that there was indirect discrimination on grounds of ethnic origins (C1 being of Chinese heritage), contrary to Article 14 ECHR. It was acknowledged that this ground has not been pleaded previously. Accordingly, the Claimants require the permission of the Tribunal to amend their grounds to plead this point.

79. We refuse permission to amend the grounds to include a claim of indirect discrimination, for three reasons.

80. First, the application is made late in the day and was not formally made until the point was raised by the Tribunal itself at the hearing. No good reason has been advanced for the lateness.

81. Secondly, a claim of indirect discrimination requires evidence to be filed, and there ought to be a fair opportunity for the Respondent to address that evidence, for example by filing evidence in response to it. In circumstances where the point was raised for the first time in the Claimants' skeleton argument, the Respondent has not had a fair opportunity to consider this matter, and if so advised, to file evidence addressing it.

82. Thirdly, there is a need in this Tribunal, as there is in public law proceedings more generally, for "procedural rigour": see *R (Dolan) v Secretary of State for Health and*

Social Care [2020] EWCA Civ 1605, [2020] 1 WLR 2326, at paras 116-117. As the Court of Appeal made clear there, the reason why procedural rigour is important in public law cases is not for its own sake but so that justice can be done: this includes fairness to the parties so that, for example, a respondent knows that the grounds it has to face are in good time and can file relevant evidence in response. This also furthers the public interest and not only the interests of the parties. We bear in mind that this Tribunal is not the same as the High Court and so the formality of proceedings in that court should not necessarily be replicated in the Tribunal. On the other hand, we also bear in mind that Parliament has provided that certain types of proceedings can only be brought in this Tribunal and may not be brought in the High Court when otherwise they would be. These are proceedings brought under section 7 of the Human Rights Act 1998 ("HRA") against one of the intelligence services, of which the present case is an example: see section 65(2)(a) and (3)(a) of RIPA.

83. While the Tribunal will readily accommodate the needs of litigants in person, and excessive formality should be avoided (see *Al-Hawsawi v Security Service & Ors* [2023] UKIPTrib 5, [2024] 1 All ER 671 ("*Al-Hawsawi*") at para 53), in the current proceedings the Claimants have at all times been legally represented and there have been formal pleadings. In those circumstances there is no good reason why the allegation of indirect discrimination could not reasonably have been pleaded well before being raised for the first time in the skeleton argument for the substantive hearing before the Tribunal.

84. In any event, in our view, the suggested ground of indirect discrimination has not been clearly set out even in the Claimants' skeleton argument. At para 119 it is said that "The simple point being made is that the application of the rule (foreign political interference activity/threats) will have a potentially disproportionate impact on dual nationals or those living in, or with close ties to another country."

85. The suggested measure of general application needs to be set out clearly if an allegation of indirect discrimination on grounds of ethnic origins is to be made. We are not satisfied that an arguable ground has been advanced in this case and for that reason also we refuse permission to plead this ground.

Expert evidence

86. The Claimants have filed two reports which are said to be expert evidence. The first is by Dr Yeow Poon. It is unclear what his relevant expertise is for the purpose of these proceedings; he describes himself as a "management consultant". Nor is it clear what his instructions were for the relevance of giving an expert opinion. His report is described as being a "draft" and is unsigned. Furthermore, his summary of the allegation contained in the IA is inaccurate. His summary states that the IA describes C1 as an "alleged Chinese agent" who had "infiltrated Parliament", that she was a "Chinese secret agent seeking to influence British politics" and that she was "a suspected Communist spy at the heart of British democracy". The IA did not in fact use any of those phrases. Although the strict rules to be found in Part 35 of the Civil Procedure Rules do not apply to this Tribunal, we would nevertheless expect expert

evidence to be set out in proper form and this report is not. Accordingly, we refuse permission to admit this report.

87. The second expert report relied on is by Dr Corrina-Barbara Francis, who gives an opinion on the Respondent's national security assessment, as recorded in the IA. In particular, she casts doubt on whether the Chinese State would be willing to recruit a devout Christian to act as an agent for it.

88. We accept the Respondent's submission that, while this expert report is not inadmissible, it can only be given limited weight. This is both because the report has to accept the Claimants' statements to its author and the author has not seen the CLOSED material upon which the Respondent's assessment was based. In contrast, this Tribunal has seen that CLOSED material and is able to make its own assessment of it.

Parliamentary reports

89. Although they did not feature large at the hearing before us, there was reference in the Claimants' written submissions to various reports of the ISC. In particular, at paras 34-36 of the Claimants' skeleton argument, reliance was placed on the ISC report on Russia dated 21 July 2020 (HC 632). It was submitted, for example, that this report is relevant when examining whether the Respondent discriminated against C1 on grounds of nationality because it had failed to issue warnings against alleged Russian agents who had funded members of Parliament.

90. We accept the Respondent's submission that these Parliamentary reports are not admissible in evidence because that would contravene Article 9 of the Bill of Rights 1689, which provides that the "freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament", and more generally would infringe the principle of Parliamentary privilege. This is because, by way of example, the Respondent would be placed in the invidious position of having to impugn statements made in the report of the ISC in order to defend these proceedings. That course is not open to a court or tribunal: see *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] EWCA Civ 213; [2020] 4 CLMR 17, at paras 148-173, especially para 169.

91. We do not think that this leads to any unfairness to the Claimants, who have been able to mount and present their case without the need for reliance on Parliamentary reports. We are also comforted by the fact that, as the Divisional Court commented in *R (Wheeler) v Office of the Prime Minister & Ors* [2008] EWHC 1409, at para 54, the opinion expressed by a Parliamentary committee will generally be irrelevant to the issues to be determined by a court or tribunal.

Nature of these proceedings

92. The Claimants have brought proceedings in this Tribunal under section 7 of the HRA. Accordingly, there is strictly speaking, no "complaint" before this Tribunal: for a detailed explanation of the distinction between the two types of case that fall within the jurisdiction of the Tribunal, see *Al-Hawsawi*, at paras 36-45. Nevertheless, the grounds upon which the Claimants rely can be divided into two types: first, they rely on grounds of public law and, secondly, they rely on the Convention rights in the HRA. No pleading point has been taken by the Respondent and it is arguable that the public law grounds are relevant to the human rights grounds because any interference with Convention rights must be "in accordance with law" and, for this purpose, the law includes domestic principles of public law. We heard full argument on the public law grounds and we also consider that it would be in the public interest for us to give judgment on those grounds, as they raise some issues of principle of general application.

93. We are able to address many of the legal issues which arise in OPEN but, where necessary, we have set out our reasons in a CLOSED judgment.

Ground 1: *vires*

94. The first ground of challenge is that the Respondent does not have *vires* (that is the legal power) to issue an IA. There is no express power to do so in the SSA. We are satisfied, however, that there is an implied power to do so, under section 1(2) of the SSA.

95. Sections 1, 2(1) and 2(2) of the SSA, as amended, provide as relevant:

> **1. The Security Service**
> (1) There shall continue to be a Security Service (in this Act referred to as "the Service") under the authority of the Secretary of State.
> (2) The function of the Service shall be the protection of national security, and, in particular, its protection against threat from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.
> (3) It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands.
> (4) It shall also be the function of the Service to act in support of the activities of police forces, the National Crime Agency and other law enforcement agencies in the prevention and detection of serious crime.
> (5) Section 81 (5) of the Regulation of the Investigatory Powers Act 2000 (meaning of "prevention" and "detection"), so far as it relates to serious crime, shall apply for the purposes of this Act as it applies for the purposes of that Act.
>
> **2. The Director-General**
> 1) The operations of the Service shall continue to be under the control of a Director-General appointed by the Secretary of State.

2) The Director-General shall be responsible for the efficiency of the Service and it shall be his duty to ensure –
   a) That there are arrangements for securing that no information is obtained by the Service except so far as necessary for the proper discharge of its functions or disclosed by it except so far as necessary for that purpose or for the purpose of the prevention and detection of serious crime or for the purpose of any criminal proceedings; and
   b) That the Service does not take any action to further the interests of any political party; and
   c) That there are arrangements, agreed with the Director-General of the National Crime Agency for co-ordinating the activities of the Service in pursuance of section 1(4) of this Act with the activities of the police forces the National Crime Agency and other law enforcement agencies.

96. The relevant principles on implied powers in this context were set out by the Court of Appeal in *Privacy International v Secretary of State for Foreign and Commonwealth Affairs & Ors* (the "Third Direction" case) [2021] EWCA Civ, [2021] QB 1087, at paras 64-66. As the Court made clear, the Security Service was not created by the SSA: Parliament provided, in section 1(1), that there shall "continue" to be a Security Service. It had previously existed and acted under the Royal Prerogative. As the Court further explained, at para 65, by necessary implication the Respondent continues to have those powers which are reasonably incidental to the carrying out of its functions. When the SSA is read as a whole, the Respondent's general function of protecting national security undoubtedly includes the particular functions of protection from the activities of agents of foreign powers and the protection of Parliamentary democracy: see section 1(2) of the SSA.

97. Section 1(2) is to be read disjunctively, so that there is no pre-condition in section 1(2) that the Respondent must have reasonable grounds to believe that "agents of foreign powers" "...intended to overthrow or undermine parliamentary democracy". Each of the Respondent's particular national security functions is additional to the others: protection (i) against threat from espionage, terrorism and sabotage, (ii) from the activities of agents of foreign powers and (iii) from actions intended to overthrow or undermine Parliamentary democracy by political, industrial or violent means.

98. Further, the terms of section 1(2) make it clear that the Respondent's functions include protecting Parliamentary democracy from actions intended to undermine it by "political, industrial or violent means". While this may include means which are unlawful, and perhaps criminal, the implied powers of the Security Service are not confined to meeting only such unlawful means. Indeed, this may be inherent in the notion of "protection": since prevention is often better than cure and, while the criminal law usually looks back retrospectively to what has already occurred to see if it amounts to a criminal offence, it was clearly Parliament's intention in enacting the SSA that the Security Service should be able to take steps to protect Parliamentary democracy in advance and not only after criminal acts have occurred.

99. We do not accept the submission for the Claimants that, if there is no known instance where the Security Service issued an IA before the SSA, Parliament cannot have conferred power on it to do so now. The true issue is whether, if it had been thought necessary to issue an IA previously, in particular under the Royal Prerogative before

the SSA, the Respondent would have had the power to do so: we are left in no doubt that it would. The mere fact that a power may not have been exercised in the past does not mean that, in law, such power did not exist.

100. We do not accept the submission for the Claimants that the Respondent has no power to issue an IA because, if there is evidence of a criminal offence of interference with the electoral process, that is a matter for the Electoral Commission under the PPERA. First, as we have said, the powers of the Respondent include preventive powers, whereas the criminal law looks at events retrospectively. Secondly, and more fundamentally, there is a logical flaw in the argument for the Claimants: the fact that the Electoral Commission (or other bodies) may *also* have powers to act does not exclude the power of the Respondent to act in a manner which is authorised by law.

101. Finally in this context, we do not accept the suggestion made on behalf of the Claimants that this interpretation of the SSA would lead to the possibility that fundamental human rights might be infringed. At this stage the only issue is whether the Respondent had the power to issue an IA. If it does have that power, it will still be subject to the duty to act compatibly with Convention rights, under section 6 of the HRA and, if it were necessary to rely on it, the strong obligation of interpretation in section 3 of the HRA would be applicable.

Ground 2: error of fact

102. The second ground of challenge is that the Respondent made a material error of fact. It is submitted that the IA contains a number of inaccuracies and that this Tribunal should correct those inaccuracies, making findings of fact for itself on the usual civil standard of proof, that is the balance of probabilities. We reject that submission for two reasons.

103. First, it is inconsistent with the conventional principle of judicial review that questions of fact are for the decision-maker rather than for the reviewing court or tribunal provided that there is a rational basis for the view taken by the decision-maker. There is a limited exception to that general principle where there is an "established" and material error of fact: see the decision of the Court of Appeal in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044, at para 66 (Carnwath LJ, giving the judgment of the Court). As Carnwath LJ explained there, a mistake of fact will be "established" only if it is "uncontentious and objectively verifiable." This is not such a case. There are numerous and obvious disputes of fact. As is clear from the terms of section 67(2) of RIPA, this Tribunal must apply the principles which would be applied by a court on an application for judicial review: we can see no reason to depart from the conventional principle that judicial review is not available where there is an alleged error of fact, so long as there was a rational basis for the Respondent's view of the facts.

104. Secondly, as we have said under Ground 1, the context in which the IA was issued was the performance of one of the Security Service's functions to protect Parliamentary democracy by way of preventive action. In that context, a decision-maker may well have to act on the basis of an assessment of risk. That is not necessarily the same as acting on the basis of facts which are capable of proof in the legal sense. While facts may feed into the process of assessment of risk, the exercise is not confined to the establishment of facts.

105. The Claimants further argue that the Tribunal must decide for itself afresh whether the IA contains mistakes of fact in the same way that the High Court would determine a claim based on a breach of the Data Protection Act 2018 ("DPA").

106. They rely on the fourth data protection principle under section 89 of the DPA, which requires that personal data undergoing processing must be accurate. "Inaccurate" is defined under section 205 of the DPA: "in relation to personal data, [it] means incorrect or misleading as to any matter of fact". In enforcing this principle, section 100 empowers the High Court to order a data controller to rectify inaccurate data, section 167 of the DPA grants the court the power to make other compliance orders and section 168 empowers the court to grant compensation.

107. Thus it is submitted that the Tribunal must, when determining whether the IA was issued in accordance with law for the purposes of the Article 8 claim, determine for itself whether there has been a mistake of fact contained within it.

108. We reject this argument.

109. The High Court or other tribunals are the proper forums to determine alleged breaches of the DPA. Nonetheless, to the extent that the Tribunal may consider alleged breaches of the DPA when deciding whether the IA was issued in accordance with law, there remains no requirement placed upon it to determine for itself whether there has been a mistake of fact. As we have observed above, this Tribunal has an express statutory obligation to apply the principles of judicial review.

110. In any event, C1's personal data, as processed by the Respondent in the IA, was not required by the DPA to be accurate in this case because that requirement was exempted on national security grounds. There is an express exemption to most of the data protection principles, including the fourth, if "exemption from the provision is required for the purposes of safeguarding national security": see section 110(1) and (2)(a) of the DPA.

111. The fact that the national security exemption applied in this case is conclusively evidenced by a national security certificate made pursuant to section 111(1) of the DPA by the Right Hon. Sajid Javid MP (at that time SSHD) on 24 July 2019, which was to expire on 24 July 2024. It expressly exempted the application of section 89 of the DPA to personal data processed by the Respondent by virtue of column 2 of the certificate. That national security certificate has not been the subject of challenge for the purposes of section 111(3) DPA. It is conclusive evidence that the Respondent's exemption from the fourth data protection principle was required for the purpose of safeguarding national security.

112. Thus the DPA does not empower this Tribunal to determine for itself whether there have been mistakes of fact in the Respondent's processing of personal data in the IA so as to comply with the fourth data protection principle.

Ground 3: the *Tameside* duty

113. The third ground of challenge is that the Respondent breached the *Tameside* duty of reasonable inquiry: see the speech of Lord Diplock in *Secretary of State for Education and Science v Tameside MBC* [1976] AC 1014, at 1065. In particular, it is submitted that the Respondent failed to conduct reasonable enquiries as to whether C1 would act, or would be recruited to act, as an agent of the Chinese State given that she is a devout Christian.

114. It is well established that the legal test for whether the *Tameside* duty arises is whether the failure to make further inquiry was irrational: see e.g. *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647, at para 70. As Underhill LJ (who gave the judgment of the Court) explained under the third proposition in that paragraph, the court (or here the Tribunal) should not intervene merely because it considers that further inquiries would have been "sensible or desirable." It should intervene "only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision."

115. In the circumstances of this case we have reached the conclusion that it was not irrational for the Respondent to make the inquiries which it did: this is in part for reasons set out in the CLOSED judgment. We bear in mind the expert evidence filed on behalf of the Claimants, in a report by Dr Francis, but, as we have mentioned above, the weight that can be given to that evidence is relatively slight because Dr Francis was dependent on the account given by C1 and, for obvious reasons, could not have access to the CLOSED material in this case, which we have been able to consider.

Ground 4: procedural fairness

116. The fourth ground of challenge is that the decision of the Respondent to issue the IA was procedurally unfair. In particular, it is submitted that C1 should have been notified prior to any publication of the IA, stating that it was believed that she was involved in working with the UFWD; her representations should have been invited; and she should have been offered the right to challenge the prospective decision before this Tribunal.

117. Under this ground it is also submitted that the Respondent should have notified the Electoral Commission to take up the issue with C1. We can see no basis in law for that last submission. No such duty usually arises as a matter of procedural fairness and we were not shown any authority to support this submission.

118. Before we address the substance of this ground we should explain the evidence that we have taken into account in considering it.

Application by the Respondent to adduce late evidence

119. After the OPEN hearing in this case it became apparent that the Respondent wished to adduce late evidence in CLOSED relating to this ground. After discussion with CTT, a gist was provided to the Claimants in an email dated 28 June 2024:

1. "The Respondent has sought leave from the Tribunal to adduce further CLOSED evidence ('the further evidence') which: (1) states that MI5 did not consider whether C1 should be given advance notice of the Interference Alert before it was issued and an opportunity to make representations; (2) states that consideration was given to whether C1 should be spoken to in advance; and (3) addresses whether it would have been possible to give notice of the IA in advance. [...]"

120. The Tribunal set a timetable for the Claimant and CTT to make further submissions (if so advised).

121. On 2 July 2024 the Claimants served submissions. On 3 July 2024 the Respondent served its submissions. CTT served submissions in CLOSED on 5 July 2024 and a brief response was provided by the Respondent by letter in CLOSED dated 11 July 2024. Our reasons must in part be set out in the CLOSED judgment but we deal with the OPEN submissions here.

122. The Claimants submit that the further evidence should not be admitted by the Tribunal for three reasons. First, the Respondent failed to disclose it earlier in the proceedings despite the Claimants' request for such disclosure. Secondly, the Respondent delayed in adducing it, despite being aware that it relates to a live issue as set out in the Claimants' skeleton argument for the final hearing. Thirdly, the Respondent has failed to provide any good reason for such a course of action.

123. The Claimants accept that the Tribunal does have jurisdiction to consider new material, applying the principles of judicial review. In particular, the Claimants accept that the Tribunal may consider evidence which was before the decision-maker and evidence of the process by which the decision was taken: see *R v Secretary of State for the Environment, ex p. Powis* [1981] 1 WLR 584, at 595.

124. The Respondent submit that the Tribunal has jurisdiction to receive the further evidence, pursuant to the general provisions of section 68(1) of RIPA, which provides that, subject to any rules made under section 69, the Tribunal shall be entitled to determine their own procedure in relation to any proceedings before them. The Investigatory Powers Tribunal Rules 2018 (SI 2018 No 1334) ("the 2018 Rules") make no specific provision for the admission or exclusion of evidence served outside the Tribunal's directions. Further, as the Respondent correctly points out, the Tribunal must apply the same principles for making their determination as would be applied by a court on an application for judicial review: see section 67(2) of RIPA. The Respondent observes that the general rule in judicial review cases is that the court has a discretion to admit evidence served outside its directions. Relevant factors usually include: (a) the extent to which there has been a breach of directions, (b) the relevance of the material to the issues in the proceedings, and (c) whether late service has caused prejudice to the other party: see *R (LDX) v Chief Constable of Merseyside* [2019] EWHC 1821 (Admin), at paras 32-37.

125. We agree with the Respondent that, although the overriding object in the Civil Procedure Rules does not expressly apply in this Tribunal, similar considerations should be take into account in the exercise of this Tribunal's discretion in this context.

In particular, there is an obligation to deal with cases justly, which includes fairness to the Claimants as well as the Respondent and, in our view, also includes furtherance of the public interest.

126. We also agree with the Respondent that the Claimants have not identified any prejudice that arises, particularly in circumstances where both they and CTT have been given the opportunity to make submissions in response to the Respondent's application, late in the day though it has been made. Further, it has not been suggested by anyone that the Tribunal needed to hold a further hearing before determining this application on the papers.

127. Accordingly, we have reached the conclusion that it would be in the interests of justice, including the public interest, to grant the Respondent permission to adduce this further evidence.

128. The Claimants submit that, even if the evidence is admitted, it should be treated with caution and little weight should be attached to it. In particular, it is submitted that there is no evidence that any of the three courses of action identified in the gist were submitted by the Respondent for consideration to an independent person or body of sufficient standing, akin to some kind of judicial process.

129. The Claimants submit that there is no justifiable reason why the Respondent could not have spoken to C1 prior to the publication of the IA and they repeat submissions made in their skeleton argument and at the hearing before us.

130. The Respondent submits that the weight to be placed on the further evidence is a matter for the Tribunal and there is no general rule that evidence should be afforded less weight, even where it constitutes an *ex post facto* explanation of a decision. The Respondent invites the Tribunal to follow the approach suggested by Lord Kerr in *Re Brewster* [2017] 1 WLR 519 at para 52:

> "...if reasons are proffered in defence of a decision which were not present to the mind of the decision-maker at the time that it was made, this will call for greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when the particular scheme was decided. Even retrospective judgements, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide."

131. We set out in the CLOSED judgment what weight we have given to the further evidence.

132. On the more fundamental submission, we are satisfied that, in the present context, there is no right to prior notice or the right to make representations before an IA is issued. This is because of the particular statutory context and the needs of national security. Part of the statutory context is the opportunity to challenge an IA in this Tribunal, which affords fairness to a person such as C1 but does so after the decision has been taken and not prospectively.

133. There is of course no express duty to act fairly in the present context but that is unsurprising, since the power to issue an IA is (as we have held above) an implied power and not an express one.

134. We also bear in mind when considering the statutory context the contrast with deprivations of British citizenship on national security grounds pursuant to section 40(2) of the British Nationality Act 1981 ("BNA"). Section 40(5) stipulates that the Secretary of State must give written notice of the intention to deprive a person of citizenship "before making an order" for deprivation under section 40(2). Nevertheless, even in the context where there is an express statutory duty to give a notice of intention to do so before making an order for deprivation on the grounds of national security, the Court of Appeal has held that section 40(5) does not preclude a very short interval between giving notice of the decision and the making of the order: see *R (W2 and IA) v Secretary of State for the Home Department* [2017] EWCA Civ 2146.

135. Further and importantly, even in that statutory context, the SIAC has repeatedly held that there is no duty to consult on the part of the SSHD before making a deprivation order in a national security case nor a right to seek prior representations from the subject: see for example, *B4 v Secretary of State of the Home Department*, SC/159/2018, 1 November 2022 (since the hearing of the present case, that decision has been upheld by the Court of Appeal: [2024] EWCA Civ 900). This principle has been approved by the Court of Appeal – for example, in *Begum v Secretary of State for the Home Department* [2024] EWCA Civ 152 *("Begum (No 2")*, at paras 105-106, where the Court held that "the general rule in national security cases is that there is no duty to seek representations before making the deprivation order". This is so because the act of seeking representations is likely to be contrary to the national security of the UK: the individual may take immediate steps to return to the UK in the knowledge of what is about to happen, thus potentially frustrating the purpose of the order. Relying on its earlier decision in *U3 v Secretary of State for the Home Department* [2022] UKSIAC SC 153 2018 ("*U3*"), SIAC has held that the appropriate course is for the Security Service to consider post-decision evidence and representations as part and parcel of its general obligation to address anything new. In describing the "general rule", SIAC has contemplated the ability of an individual appellant, on the particular facts of their case to demonstrate grounds for an exception to be made.

136. Further, it is trite law that, where an Act of Parliament confers an administrative power, "there is a presumption that it will be exercised in a manner which is fair in all the circumstances": see *R v Secretary of State for the Home Department, ex p. Doody* [1994] 1 AC 531, at 560 (Lord Mustill, in setting out the first of his six propositions). As Lord Mustill went on to say, in his second and third propositions, "the standards of fairness are not immutable" and the principles of fairness "are not to be applied by rote identically in every situation." He continued: "What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects." Lord Mustill's fourth proposition was that an essential feature of the context is the statute which creates the discretion. His fifth proposition was that fairness will very often require a person who may be adversely affected by a decision to have an opportunity to make representations either before the decision is taken with a view to producing a favourable result, or after it is taken with a view to procuring its modification, or both. Lord Mustill's sixth and final proposition was that the person will very often be informed "of the gist of the case which he has to answer."

137. One especially important feature of the context in which the IA was issued is the national security aspect. Another is that the opportunity to have a fair hearing in proceedings to challenge an administrative decision may suffice to render the overall process fair, even when the usual right to advance notice and the opportunity to make representations in advance is excluded (expressly or by necessary implication) in a particular statutory scheme. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700 ("*Bank Mellat*"), although the Supreme Court was divided as to the outcome (the majority considering that the right to make representations in advance had not been abrogated in that context), we do not apprehend any difference between the majority and the minority judgments as to the relevance of the above two features as a matter of principle.

138. As the Supreme Court confirmed in *Begum SC*, at para 90, "fairness is not one-sided". In that part of his judgment, when dismissing Ms Begum's cross-appeal, Lord Reed PSC cited with approval a passage in the judgment of the Divisional Court, given by Flaux LJ, where he had said that the court has to keep in mind the public interest considerations, including the interests of national security.

139. In the present context, we are satisfied, having taken account of all aspects of the circumstances in which an IA is issued, and in particular the demands of national security, that fairness does not require the Respondent to give a person in C1's position the opportunity to make representations before an IA is issued. We are also satisfied that the opportunity to challenge an IA in proceedings before this Tribunal, whose procedures have been held by the European Court of Human Rights overall to be fair, renders the overall process a fair one.

140. Further and in any event, we are satisfied in this case that the principle in *Simplex* applies. For the reasons set out in CLOSED, we are satisfied that the outcome – the Respondent proceeding to issue theIA – would inevitably have been the same even if the Respondent had given C1 prior notice of the IA and the opportunity to make representations in advance of its issue.

Ground 5: irrationality

141. The fifth ground of challenge, and one which flows into the grounds under the HRA, is that the Respondent's assessments of the facts and national security evaluations contained in the IA were irrational.

142. We are satisfied that the Respondent's assessments contained in the IA, both of the facts and of the national security evaluation relating to C1 based on those facts, had a rational basis. This is for reasons which for the most part must be set out in the CLOSED judgment. In coming to this conclusion, we have considered all the evidence served on behalf of the Claimants in the interests of procedural fairness, notwithstanding the fact that it has been provided after the issue of the IA. Nonetheless, we are satisfied that it does not render irrational the assessments contained therein.

The approach required of the Tribunal under the HRA

143. Certain fundamental principles are common ground but should be set out here as they provide the framework within which the issues under the HRA must be determined by this Tribunal.

144. First, the Tribunal must apply the principles of judicial review: see section 67(2) of RIPA. But it is important that this should not be misunderstood. The principles of judicial review include review of an administrative decision on the ground that it was unlawful ("illegality" in Lord Diplock's famous trilogy of the grounds of judicial review, which he summarised as illegality, procedural impropriety and irrationality: see *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 374, at 410D).

145. Secondly, one ground of illegality is acting in a way which is contrary to section 6(1) of the HRA, which makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights, which are set out in Schedule 1 to the HRA. Those rights include, relevantly for the present case, the rights in Article 3, Article 8, Article 10, Article 11 and Article 14.

146. Thirdly, the rights in Article 3 are absolute and unqualified. They do not call for, or permit, balancing. For example, the prohibition on torture permits of no exceptions. This has the consequence that, for example, torture cannot be justified by reference to the interests of national security.

147. Fourthly, where an interference with Convention rights is in principle capable of being justified, for example under Article 8, the court or tribunal will have to consider whether the interference was in accordance with law. This has two aspects. First, the interference must have a basis in domestic law. This is why it has been submitted on behalf of the Claimants that the above grounds of public law are relevant to these proceedings, even though this is a "claim" under section 7 of the HRA and is not strictly speaking a "complaint" to this Tribunal. And it explains why the Respondent has not pursued a procedural objection that the Claimants are not entitled to advance the public law grounds.

148. The second aspect of the requirement in Convention law is that the relevant domestic law must itself have the "quality" of law, in particular that it must be reasonably accessible, reasonably foreseeable and must contain sufficient safeguards to guard against the risk of arbitrariness. It has not been suggested on behalf of the Claimants that the relevant domestic law lacks the quality of law in this sense, and we would in any event reject any such argument, so we need say no more about this.

149. Next, any interference with Convention rights such as those in Article 8 must be "necessary in a democratic society" and, in particular, must satisfy the principle of proportionality. This has been interpreted authoritatively in domestic case law under the HRA as having four limbs: see *Bank Mellat*, at para 20 (Lord Sumption JSC) and para 74 (Lord Reed JSC). The court or tribunal must ask:

> (1) whether the objective of the measure is sufficiently important to justify the limitation of the right;

(2) whether the measure is rationally connected to that objective;
(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and
(4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (this fourth test is sometimes called the "fair balance" test or proportionality *stricto sensu*, i.e. in the strict sense).

150. When the Tribunal has to assess proportionality, it must decide that issue for itself. It is not confined to asking whether the Respondent's assessment of proportionality was rational. Nevertheless, the Tribunal must give appropriate respect and weight to the assessment of the Respondent, both on grounds of institutional expertise and on grounds of democratic accountability: see the summary of the relevant principles in *Dalston Projects Ltd v Secretary of State for Transport* [2024] EWCA Civ 172; [2024] 1 WLR 3327 ("*Dalston*"), at paras 11-21 (Singh LJ).

151. In *Dalston* Singh LJ stated, at paras 17-21:

> "17. In my view the position was conveniently set out by Lord Sales JSC in *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408 ('*Ziegler*'), at para 130:
>
> > 130. It is well established that on the question of proportionality the court is the primary decision-maker and, although it will have regard to and may afford a measure of respect to the balance of rights and interests struck by a public authority such as the police in assessing whether the test at stage (iv) [of *Bank Mellat*] is satisfied, it will not treat itself as bound by the decision of the public authority subject only to review according to the rationality standard…this reflects the features that the Convention rights are free-standing rights enacted by Parliament to be policed by the courts, that they are in the form of rights which are enforced by the European Court of Human Rights on a substantive basis rather than purely as a matter of review according to a rationality standard, and that the question whether a measure is proportionate or not involves a more searching investigation than application of the rationality test. Thus, in relation to the test of proportionality stricto sensu, even if the relevant decision-maker has had regard to all relevant factors and has reached a decision which cannot be said to be irrational, it remains open to the court to conclude that the measure in question fails to strike a fair balance and is disproportionate."
>
> 18. Although Lords Sales was in the minority in *Ziegler*, that passage is not, I think, controversial, and is supported by the authorities cited there.
> 19. The only part of that passage which perhaps needs clarification is the reference to the court being "the primary decision-maker". When the passage is read as a whole it is clear that Lord Sales was not suggesting that the court is the primary decision-maker in the sense of the person who makes the underlying administrative (or legislative)

> decision which is under review. As Lord Bingham had said in *Huang*, at para 13, and Lord Sumption had said in *Lord Carlile*, at par 31, the court never has that role, because its function is still one of reviewing the decision of the public authority concerned.
> 20. That said, the rest of para 130 in Lord Sales' judgment in *Ziegler* makes clear that the standard of review is not the rationality standard. It also makes clear that the issue under the HRA is not a question of process but a matter of substance. Finally the passage makes clear that, depending on the context, the court may afford a measure of respect to the balance of rights and interests stuck by a public authority.
> 21. It is also well-established in the authorities that the context will include (1) the importance of the right...(2) the degree of interference; (3) the extent to which the subject matter is one in which the courts are more or less well placed to adjudicate, both on grounds of institutional expertise (eg they are the guardians of due process but are much less familiar with an area such as the conduct of foreign relations or national security) and democratic accountability (eg when it comes to social and economic policy, including the allocation of limited resources)."

152. Those principles are binding on this Tribunal, not only because they were summarised by the Court of Appeal but because they were laid down by the House of Lords and the Supreme Court in the decisions cited in that summary: see, in particular, the judgment of Lord Sales JSC in *Director of Public Prosecutions v Ziegler* [2021] UKSC 23, [2022] AC 408 ("*Ziegler*"), at para 130; *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420, at para 15 (Lord Hoffmann); and *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, at para 20 (Lord Sumption JSC).

153. By way of analogy, our attention was drawn to three decisions of the Court of Appeal and one of SIAC in which one of those decisions was distinguished. All four decisions arose in the context of a decision under section 40(2) of BNA, as amended, to deprive a person of British citizenship on the ground that this was conducive to the public good. This was because of the SSHD's assessment of the interests of national security. We are not concerned with such deprivation decisions. Nor are we concerned with the jurisdiction of SIAC, which has been considered in detail in the case law.

154. Nevertheless, we accept the submission for the Respondent that, by way of analogy, we should apply similar principles when considering the Respondent's assessments or evaluations of national security threats. This is both because, like SIAC, this Tribunal's jurisdiction requires it to apply the principles of judicial review; and, more fundamentally, because the House of Lords in *Rehman* and the Supreme Court in *Begum SC* have emphasised the separation of powers in the context of national security: that it is inherent in the judicial function that courts and tribunals should not simply substitute their own view of what national security requires but must give appropriate respect to the assessment of those to whom such functions are entrusted under our constitutional arrangements.

155. There should be no difference in approach to decisions taken by the Respondent as opposed to the SSHD. We note that decisions relating to deprivation on national security grounds and other decisions subject to review or appeal in SIAC are made by

the SSHD rather than the Respondent, although they may rely on the Respondent's advice or recommendations. Nonetheless, the same principles should normally apply to this Tribunal when reviewing decisions taken by the Respondent on national security grounds. While the Respondent does not have the direct democratic accountability of a Secretary of State, it is indirectly accountable through the SSHD and Home Office Ministers and its decisions are based upon the highest level of institutional competence or expertise.

156. The first of the four decisions to which we were referred is *P3 v Secretary of State for the Home Department* [2021] EWCA Civ 1642, [2022] 1 WLR 2869. Having considered the authorities in detail, particularly *Rehman* and *Begum SC*, Elisabeth Laing LJ summarised the role of SIAC as follows, at para 97:

> "… Even when SIAC had full jurisdiction in fact and law, and had power to exercise the Secretary of State's discretion afresh, there were narrow limits on its institutional capacity to review the Secretary of State's assessment of national security. SIAC has full power to review the compatibility of the Secretary of State's decisions with Convention rights. That means that SIAC must assess the risk of any breach of Article 3, and the proportionality of any interference with qualified rights for itself. It does not entail, in my judgment, however, that SIAC can, in assessing proportionality, substitute its evaluation of the interests of national security for that of the Secretary of State. The starting point for an assessment of proportionality is that the Secretary of State's assessment goes into one side of the balance, unless it is susceptible to criticism in one of the ways described in *Rehman*."

157. Earlier in her judgment, at para 77, Elisabeth Laing LJ had set out what those ways were. First, the factual basis of the executive's opinion that deportation would be in the interests of national security must be established by evidence, although SIAC's ability to differ from the SSHD's evaluation was limited by considerations inherent in the appellate process. Secondly, SIAC could reject the SSHD's opinion on the ground that it was one which no reasonable Minister could reasonably have held. Thirdly, an appeal to SIAC may turn on issues which were not within the exclusive province of the executive, such as compliance with Article 3 ECHR.

158. At para 102, Elisabeth Laing LJ concluded this section of her judgment by stating that, while there are significant procedural differences between an appeal to SIAC and a claim for judicial review, "there is a common principle, which is that in both contexts, what is balanced against the Convention rights of the appellant or claimant is the assessment of the executive, tested in the limited ways which are described in *Rehman* … and endorsed in *Begum*." She continued that, despite its expert membership, SIAC does not have the institutional competence to assess the risk to national security for itself. We would add that this is even truer of this Tribunal: although members of this Tribunal have relevant expertise and experience of national security issues, we are all lawyers by background, whereas SIAC's membership includes some non-lawyers, often with very extensive experience of national security issues at a very high level.

159. Further, Elisabeth Laing LJ observed that SIAC is not democratically accountable for its assessment of national security risks. As she put it, if SIAC were to call the risk incorrectly, it is the executive and not SIAC that would "suffer the political fallout."

The same is true of this Tribunal. It is precisely the strengths that an independent judicial body such as this Tribunal has that also mean that we must recognise our limitations when scrutinising the executive's assessment of national security risks.

160. In his concurring judgment, Sir Stephen Irwin said the following, at para 126:

> "Drawing the threads together, I accept that in approaching the evaluation of the national security assessment of the Secretary of State, SIAC must pay real respect, or great deference, to that assessment. That is the clear impact of *Rehman* and of the remarks of Lord Reed PSC, strictly obiter dicta but of the highest persuasive authority in *Begum*. I agree with Elisabeth Laing LJ that it is not a permissible approach for SIAC simply to substitute its own views on national security. However, it is the function of SIAC to scrutinise all the evidence, OPEN and CLOSED, with a critical and expert intelligence, to test the approach and the evidence bearing on the assessment, both for and against the conclusions of the Secretary of State, and then applying due deference, to decide whether the conclusions of the Secretary of State were reasonable and adopting the phrase of the Strasbourg court, conformed with common sense. In doing so, SIAC is bound to show deference at all stages and at all levels, to the assessments of those responsible for making those assessments professionally. In matters of high policy, that deference will be effectively simply acceptance. At more granular levels, SIAC will ask questions and consider the detailed replies. Experience suggests these questions will be considered thoughtfully, and the answers very frequently persuasive. Proper deference there must be, but it does not amount to a simply supine acceptance of the conclusions advanced by the Secretary of State. I do not understand that to be in any way implied by the decisions in *Rehman* or *Begum*."

161. At para 135, Bean LJ said that he "entirely" agreed with what Sir Stephen Irwin had said at para 126.

162. The second and third decisions we have considered are those of SIAC and the Court of Appeal in *U3*. *P3* was distinguished by SIAC in *U3* at para 30, where Chamberlain J said that the remarks of Sir Stephen Irwin were *obiter* in so far as they suggested that SIAC could interfere with a national security assessment on the ground that it "does not conform to common sense" if the assessment is not otherwise flawed on public law grounds. When *U3* was appealed to the Court of Appeal, SIAC's approach to this point was not criticised: see *U3 v Secretary of State for the Home Department* [2023] EWCA Civ 811, [2024] 2 WLR 319, at para 87 (Elisabeth Laing LJ).

163. Further, there is this additional point of distinction between the functions of SIAC and the Tribunal, which reinforces the view to which we have come about the proper role of this Tribunal in the present context. The Tribunal does not have the fact-finding function which SIAC does have in appeals under section 2B of the Special Immigration Appeals Commission Act 1997, as held in *U3*, at paras 173-178, concluding:

> "178. In summary, SIAC can, and in some cases must, make findings of fact based on its own assessment of the evidence on the appeal. As long as it respects the limits of the *Rehman* approach, it may make whatever

findings of fact it considers, in its expert judgment, it is able to make and which are appropriate in the appeal it is considering. A judgment SIAC makes about whether to make a finding, or not, is unlikely to be susceptible to challenge on an appeal on a point of law".

164. SIAC's jurisdiction differs from the Tribunal's for the reasons we have set out above when addressing the second public law ground of challenge. We do not have a fact-finding jurisdiction by virtue of section 67(2) of RIPA.

165. The last of the four judgments to which we were referred in this context is *Begum (No 2)*.

166. In *Begum (No 2)*, at para 10, the Court of Appeal (Lady Carr CJ and Bean and Whipple LJJ) set out the principles which govern the functions of SIAC on an appeal against a decision under section 40(2) of the BNA, as follows:

> "The relevant principles governing SIAC's jurisdiction and role on an appeal against a decision to deprive a person of citizenship under s 40(2) are now well established. In summary, those principles are:
>
> i) SIAC is not the primary decision-maker. The exercise of the power conferred by s 40(2) must depend heavily on a consideration of relevant aspects of the public interest, which may include considerations of national security and public safety. The primary decision is entrusted to the Secretary of State who has the advantage of a wide range of advice, including from security specialists.
>
> ii) SIAC's jurisdiction is appellate (and not supervisory). In general, SIAC's powers are restricted to considering whether the Secretary of State has acted in a way in which no reasonable decision-maker could have acted, or whether it has taken into account some irrelevant matter or has disregarded something to which it should have given weight, or has erred on a point of law (an issue which encompasses the consideration of factual questions). SIAC can consider whether the Secretary of State has made findings of fact which are unsupported by any evidence or based on a view of the evidence which could not reasonably be held.
>
> iii) SIAC must have regard to the nature of the discretionary power in question, and the Secretary of State's statutory responsibility for deciding whether the deprivation of citizenship is conducive to the public good. It will bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision.
>
> iv) In questions involving an evaluation of risk, SIAC allows a considerable margin, and real respect, to the Secretary of State's assessment. Some aspects of that assessment may not be justiciable; others will depend on an evaluative judgment. In matters of high policy, SIAC's deference may be effectively simple acceptance; at more granular levels, it is the function of SIAC to scrutinise all the evidence, open and closed, assisted by the invaluable contribution of the Special Advocates. It will apply a

critical and expert intelligence – a 'powerful microscope' – to test the approach and the evidence bearing on the assessment, both for and against the conclusions of the Secretary of State, and then, applying due deference, decide whether the conclusions of the Secretary of State are sustainable.

v) SIAC can make its own findings of fact which may be relevant to the assessment of national security, as long as it does not use those findings of fact as a platform for substituting its view of the risk to national security for that of the Secretary of State. Subject to that important limitation, it may make whatever findings of fact it considers it is able to on the evidence and which, in its expert judgment, it considers that it is appropriate to make.

vi) SIAC can determine whether the Secretary of State has complied with s 40(4) (concerning statelessness) and must also determine for itself the compatibility of the decision with the obligations of the Secretary of State under the Human Rights Act 1998, where such a question arises."

167. Much of that summary, but not all, has obvious relevance to the functions of this Tribunal too. But it is important to keep in mind that: (1) the particular issue which was addressed there was an appeal against a decision to deprive a person of British citizenship under section 40(2) of the BNA, a function which SIAC has but this Tribunal does not; (2) as we have mentioned above, this Tribunal has no appellate jurisdiction – whatever may be the precise position in appeals to SIAC, there can be no doubt that this Tribunal must apply the principles of judicial review and therefore has no fact-finding role itself; (3) the Court of Appeal made it clear that different considerations may arise where a court or tribunal has to adjudicate on a claim that there has been a breach of section 6 of the HRA – that is of course precisely the issue which does arise in the present proceedings before this Tribunal.

168. We hope that it will be of assistance if we draw the threads from the above authorities together by way of summary. This should provide the framework of principle to be applied by this Tribunal when considering claims that there has been a breach of a claimant's Convention rights under the HRA:

i) If the Convention right is an absolute right, notably Article 3, the interests of national security cannot justify a violation of that right.

ii) If, as is more often the case, the Convention right is a qualified right, such as the right to respect for private life in Article 8, in principle the interests of national security can justify an interference with that right, provided the interference is in accordance with law and satisfies the principle of proportionality. The test for proportionality is the familiar four-part test in *Bank Mellat*.

iii) The Tribunal itself must decide whether the principle of proportionality is satisfied. It is not confined to asking whether the Respondent's assessment of proportionality is rational.

iv) However, when the Tribunal is conducting the fair balance exercise under the fourth part of the proportionality test, and weighs the interests of national security on one side of the balance, it cannot substitute its own findings of fact for those of the Respondent. Its role is to consider whether the factual basis on which the Respondent acted had a rational basis.

v) Further, the Tribunal cannot go behind the Respondent's assessment of national security unless that had no rational basis.

vi) Although the Tribunal must form its own judgement on the question of proportionality, it must give due respect and weight to the assessment of the Respondent.

169. Against that background of principle we turn to the specific grounds advanced by the Claimants under the HRA.

Article 3 ECHR

170. Article 3 states: "No one shall be subjected to torture or to inhumane or degrading treatment or punishment".

171. It has not been suggested in the present case that the Claimants were subjected to torture. What is suggested is that they were subjected to inhumane or degrading treatment. As is well established in the Strasbourg case law, treatment must exceed a minimum threshold before it can be regarded as breaching Article 3, usually involving either actual bodily injury or intense physical or mental suffering: see e.g. *Mursic v Croatia* (2017) 65 EHRR 1, at paras 97-98.

172. Having considered the evidence in this case, in particular as to the consequential impact of the IA on C1 and C2, distressing though it was, we are not satisfied that it reached the minimum threshold required for a breach of Article 3.

173. Furthermore, the present case concerns an alleged breach of the positive obligations on the State to take action to prevent treatment by others, here in particular the media and private individuals who sent abusive messages to C1. It is primarily that conduct of third parties, and not the direct conduct of the Respondent, which can be said to have caused the impact on C1 and C2.

174. The positive obligations which can arise under Article 3 were summarised by Johnson J in *R (MG) v Secretary of State for the Home Department* [2022] EWHC 1847 (Admin) ("*MG*"), [2023] 1 WLR 284, at paras 6-8, as being a "systems duty", an "operational duty" and an "investigative duty", a classification which was endorsed by the Court of Appeal in *ASY & Ors v Home Office* [2024] EWCA Civ 373, at para 84 (Fraser LJ).

175. At para 6 of *MG* Johnson J gave examples of where courts had recognised that there were systems obligations placed upon the State in relation to both Articles 2 and 3 – noting at para 5 that there was "no practical difference" between the positive obligations under the two Articles. At para 6(4) of *MG* Johnson J recognised that, "In certain situations, public authorities fall under a 'lower level' duty to adopt administrative measures to safeguard life". At para 6(6), he referred to situations where "a public body is responsible for the welfare of individuals within its care and under its exclusive control – particularly young children who are especially vulnerable". However, none of those situations are apt in this case.

176. We are satisfied, in the present case, that there was no breach of any positive duties by the Respondent. It had no particular control over the actions of the media or other third

parties. What the submission for the Claimants must amount to in essence is that the Respondent was under a duty not to issue the IA at all, but that was something that it was entitled to do, and indeed had an obligation to do in order to fulfil its statutory function of protecting Parliamentary democracy.

177. While it could be argued that, even if the Respondent was entitled to issue the IA, it should not have issued a photograph of C1 as well, this would have led to the obvious difficulty that the correct person who was the subject of the IA might not have been identified by Parliamentarians or others who needed to know that person's identity.

178. We should add that there is no evidence that the abusive messages and social media commentary directed to or received by C1 in January 2022 represent a genuine and ongoing threat to her safety and, even if they did, there is no evidence that the police or other State authorities are unable or unwilling to provide C1 with reasonable protection.

179. Accordingly, we have reached the conclusion that there was no breach of Article 3 by the Respondent.

Article 8 ECHR

180. Article 8 provides:

> **Right to respect for private and family life**
>
> 1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

181. We accept that the test under Article 8(1) is whether there was a reasonable expectation of privacy. Under reference to the *Murray* factors, *Murray v Express Newspapers plc* [2020] EWHC 1908 (Ch), 3 WLR 1360 CA (quoted with approval by the Supreme Court in *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] AC 1158 at [50]), the Respondent submits that C1's political interference activities were not an aspect of her private life that she was entitled to keep quiet.

182. We do not accept the Respondent's submission that there was no interference with C1's rights under Article 8, in particular the right to respect for private life. It is true that much of C1's activities were open. C1 promoted herself and her business. Her contacts with British Parliamentarians was often at fundraising events or conferences. She was often photographed with politicians and officials, both British and Chinese. She was a professional person engaged in political campaigning on behalf of the Chinese community. It is however in this role that she is alleged to have engaged in political activities.

183. We reject the Respondent's submission that this case is analogous to *In re JR38* [2015] UKSC 42, [2016] AC 1131 ("*In re JR38*"). That case concerned an applicant who had been involved in serious rioting. At the request of the police, photographs of the applicant and others, taken during the course of the rioting, were published in local newspapers to assist the police in identifying the rioters and to deter further acts of public disorder. The majority of the Supreme Court held that there was no interference with the right to respect for private life in Article 8(1), although (if there had been such an interference) the Court was unanimous that any interference was justified under Article 8(2). Before us Ms Wakefield placed particular reliance on the judgment of Lord Toulson JSC, with whom Lord Hodge JSC agreed. At para 100, Lord Toulson quoted an earlier judgment, *Kinloch v HM Lord Advocate* [2013] 2 AC 93, at para 21, where Lord Hope DPSC had said that the "criminal nature" of what a person was doing "was not an aspect of his private life that he was entitled to keep private." More generally, Lord Toulson held that the crucial question under Article 8(1) is whether a person had a reasonable expectation of privacy in the matter under consideration, and that the reasonable expectation test is an objective one. He said that the purpose for which the police act may be relevant to whether this reasonable expectation test is satisfied. At para 98, Lord Toulson said that, for example, "the publication of a photograph of a young person acting in a criminal manner for the purpose of enabling the police to discover his identity may not fall within the scope of the protection of personal autonomy which is the purpose of Article 8, but the publication of the same photograph for another purpose might."

184. We have reached the conclusion that *In re JR38* is distinguishable, because it has not been found by any authoritative determination that C1 was acting in a criminal manner. Nor has there been an authoritative determination by an independent body that C1 acted in a manner prejudicial to national security. The best that can be said is that the IA was issued by the Respondent following an investigation by the Respondent.

185. We consider that a closer analogy can be found with the more recent decision of the Supreme Court in *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] AC 1158 ("*Bloomberg*"). In that case the Supreme Court held that in general a person has a reasonable expectation of privacy in relation to information that they are under criminal investigation but where they have not been charged. In giving the main judgment, Lord Hamblen and Lord Stephens JJSC acknowledged, at para 53, that there are some types of information which will normally not be regarded as giving rise to a reasonable expectation of privacy, for example "involvement in current criminal activity". They also acknowledged, at para 54, that a relevant factor will be whether the information is already in the public domain. We have found particularly helpful the discussion of "reputational damage" at paras 114-125. The Supreme Court there recognised, following the authorities from the European Court of Human Rights which are cited there, that a person may not have a reasonable expectation of privacy in a wider category of cases than just those where they have been found to have acted in a criminal manner: there may be other "misconduct entailing a measure of legal responsibility with foreseeable negative effects on 'private life'", citing *Denisov v Ukraine* (unreported) ("*Denisov*"), at para 98. But the Supreme Court said that such cases will ordinarily be ones where misconduct has been "established after authoritative findings following an official investigation", for example a finding of medical malpractice by the General Medical Council. In the present context, we bear in mind that the essential

purpose of the IA was preventive: there had not yet been an authoritative finding that C1 had been engaged in criminal or other misconduct.

186. Further, we also bear in mind the serious consequences of the IA, not only for the personal reputation of C1 but also for her professional and business activities. As the Supreme Court said in *Bloomberg*, at paras 115-116, citing decisions of the European Court of Human Rights such as *Denisov*, the concept of "private life" in Article 8 is broad enough to include activities of a professional or business nature.

187. Accordingly, we have reached the conclusion that there was in this case an interference with C1's right to respect for private life in Article 8.

188. Nevertheless, we accept the Respondent's submission that the interference with Article 8 rights was in accordance with law. It is well established in the case law of the European Court of Human Rights that an interference may be "in accordance with law" if it is in accordance with policies which the State has adopted, in other words documents that do not strictly have the force of law, but in general such policies must be published, otherwise they will not be "foreseeable", which is one of the requirements of the "quality" of law.

189. In this context we must consider the submission for the Claimants that the Respondent's policies on when an IA may be issued were not made public at the relevant time but we have reached the conclusion that it was not necessary for all the Respondent's policies on disclosure of information to be made public. In the context of national security it is well established in the Strasbourg case law that it may not be possible or appropriate to place material in the public domain that may alert potential subjects of interest that they are or have been the subject of surveillance. The requirement is rather that there should be adequate safeguards against the risk of arbitrary conduct by the State. In the present context we are satisfied that there are adequate safeguards of that type. Those safeguards include the opportunity to challenge an IA before this Tribunal, which can fairly and thoroughly explore all relevant evidence, including where necessary in CLOSED.

190. We are also satisfied that that prior independent consideration was not required by law before the issue of the IA in this case for the reasons outlined above: the necessary safeguards include the post-decision opportunity to challenge it before the Tribunal. The authorities do not impose a more stringent duty in this case. In addition, the requirement of independent executive authorisation or prior review has typically been applied to bulk data cases such as *Big Brother Watch & Ors v UK (GC)* 21 May 2021 [2021] ECHR 439 where the surveillance conducted on behalf of the State is taking place 'below the waterline'. In this case the IA was made open to all Parliamentarians and 'above the waterline'. Its subject, C1, has the opportunity to challenge it before the Tribunal in a human rights claim.

191. Even if the law had imposed a requirement of prior independent authorisation, we are satisfied that it was complied with on the facts of this case.

192. For the reasons set out in OPEN and CLOSED, we have reached the conclusion that the IA was issued in accordance with domestic law and all the public law challenges have failed so this part of the Convention requirement is satisfied. We have already

accepted that the IA was issued in accordance with the law for the purposes of section 1(2) of the SSA. The national security risk posed by C1 was rationally assessed and the issue of the IA falls within the national security functions of the Respondent to protect against by virtue of section 1(2) of the SSA: from the activities of agents of foreign powers or from actions intended to undermine Parliamentary democracy by political means. We have rejected all of the other public law challenges to the issue of the IA for the reasons set out above.

193. Furthermore, we accept the Respondent's submission that the interference with C1's Article 8 rights was "necessary in a democratic society" to achieve one or more of the legitimate aims set out in Article 8(2).

194. C1 claims that the disclosure and manner in which the information was disseminated was disproportionate. This includes a challenge that it was foreseeable that the IA would be discussed in Parliament thereby depriving her of any legal recourse against false statements attacking her reputation. It is submitted that the Respondent knew that she would not be able to defend herself against statements made in Parliament.

195. We reject this ground.

196. As we have explained above, the question of determining a breach of Article 8, including all matters of proportionality such as the striking of a fair balance, is for us as the Tribunal to decide afresh. We do not simply conduct a rationality review of any assessment which the Respondent might have made as to whether there has been an infringement of C1's Article 8 rights. We have conducted the proportionality assessment and balancing exercise for ourselves.

197. We are satisfied that the decision to issue the IA was a proportionate response to the threat posed by C1. It met all the requirements of the principle of proportionality: see the four tests in the Supreme Court judgments in *Bank Mellat* (above).

198. First, the objective of protection of national security was sufficiently important to justify limiting C1's right to respect for private life and other qualified rights relied on by C1, such as Articles 10 and 11.

199. Second, the IA was rationally connected to the objective: it was targeted to those considered at greatest risk from contact with C1 (ie. Parliamentarians) rather than the world at large, and it was framed in terms designed to mitigate the threat posed by C1 by ensuring that those individuals were mindful of C1's connections to the Chinese State in any interactions that they had with her. The target audience was elected MPs and members of the House of Lords who had a right to know of a threat to them – as, it might be said, did the wider public have the right to know of someone seeking to influence their elected representatives to Parliament.

200. Nonetheless, even if the Respondent did not issue the IA in confidence or contemplated that it would be raised under Parliamentary privilege or that it would be disclosed to the wider public, such actions were justified and rationally connected to the IA's objective. The Respondent's decision to issue the IA was not based on the fact that discussions in Parliament might confer any kind of immunity. The IA also had a

photograph on it to prevent the wrong person being identified, given C1's common surname.

201. Third, the issue of the IA was the least restrictive measure available to the Respondent which was capable of effectively addressing the risk that C1 posed.

202. Fourth, the issue of the IA struck a fair balance between C1's rights and those of the community, given the risk to national security posed by C1.

203. The consequences of the issue of the IA, including the widespread publicity, abusive personal messages and adverse impact on her finances and working life have undoubtedly been serious for her. We have accepted that there has been a significant impact on her personal and professional life, as is set out above (even though it has fallen short of the threshold required under Article 3).

204. Nonetheless when carrying out the balancing exercise under the fourth test, we have come to the clear view, for the reasons set out in OPEN and CLOSED, that the public interest in the protection of national security outweighs the interference with C1's right to respect for private life. The issue of the IA was therefore proportionate.

205. In conclusion, the issue of the IA did not infringe C1's right to respect for private life under Article 8: it was issued in accordance with the law, the interference was justified, necessary and proportionate.

Articles 10 and 11 ECHR

206. Although the Claimants' grounds and written submissions referred to Articles 10 and 11 of the ECHR, that is the rights to freedom of expression and freedom of association, these were not the subject of any submissions at the hearing before us. In any event, any interference with those rights would be justified for the same reasons with the reasons for interference with the Article 8 rights. Those reasons must be set out in large part in the CLOSED judgment.

Article 14 ECHR

207. Article 14 provides:

> **Prohibition of Discrimination**
>
> The enjoyment of the rights and freedoms set forth in this 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.

208. The legal principles to be applied under Article 14 are not in dispute. They can conveniently be found summarised, by reference to the case law of the European Court

of Human Rights, in the judgment of Lord Reed PSC in *R (SC & Ors) v Secretary of State for Work and Pensions & Ors* [2021] UKSC 26, [2022] AC 223("*SC*"), at para 37. Lord Reed extracted four propositions from the approach of the Grand Chamber in the case of *Carson v United Kingdom* (2010) 51 EHRR 13, para 61. The second proposition is "…in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar situations;" see also para 47, where it was emphasised that there is required to be "an actual difference in treatment between comparable cases, directly based on a prohibited ground of discrimination".

209. We reject the submission that C1 was discriminated against on grounds of nationality. We are satisfied that the Respondent issued the IA in this case for legitimate reasons which had nothing to do with C1's nationality. In particular, the allegation that the IA was issued for political reasons, let alone for party political reasons, is not supported by any evidence. The reasons for our conclusion on Article 14 are set out below and in the CLOSED judgment.

210. Both Claimants allege that the issue of the IA was in breach of Article 14 of the ECHR on the grounds of race or nationality because no IA was issued in relation to non-Chinese individuals in an analogous position to C1 (ie. individuals suspected of political interference). This is said to amount to direct discrimination on the grounds of nationality or ethnicity contrary to Article 14.

211. The Claimants rely in OPEN on press / media reporting of interference activities alleged to have taken place by either Russian nationals or those acting on behalf of the Russian State against whom, it is said, that a similar alleged threat arises but in respect of whom no IA or other executive action has been taken.

212. We are satisfied that the OPEN material relied upon is not capable of establishing that any of these individuals are in an analogous position to C1 for the purposes of Article 14, or that there is no objective basis for any difference in treatment. For this reason, we are satisfied that the Respondent was not required to disclose what CLOSED material, if any, it held about these individuals.

213. As noted above, the decision was made on grounds of national security in order to counter the threat posed by C1's links to the CCP and UFWD. We are satisfied that a person in analogous situation to her, who posed the same threat to national security but of a different nationality or race, would have been treated in the same way irrespective of nationality or race.

The position of C2

214. We conclude that there has been no breach of C2's rights for reasons set out in OPEN and CLOSED.

215. We are satisfied that there has been no breach of C2's Article 8 rights because no act of the Respondent falls within the ambit of its scope.

216. First, the Respondent made no attack on C2's reputation and the IA did not even mention him. Secondly, the Respondent did not terminate C2's employment – he resigned following what he says was an ultimatum from his employer (the UK Parliament), albeit that this was disputed by the employer. Thirdly, responsibility for making decisions whether to issue or withdraw CTC clearances does not lie with the Respondent but rather with the public bodies with responsibility for the risks associated with the employment of individuals in certain posts. On 13 January 2022, C2's employer informed him in writing that the decision-maker was "minded to" revoke his CTC clearance and invited his representations. C2 was informed that his clearance had been suspended pending a final decision, and of his right to an appeal of any subsequent decision to revoke his clearance. C2 resigned later the same day. Fourthly, there is no evidence that Parliament publicised its decision to suspend C2's security clearance and it follows he suffered no damage to his reputation capable of engaging Article 8.

217. In so far as Article 14 is concerned, it is not engaged because the Respondent's acts do not fall within the ambit of Article 8. Even if they had, we are satisfied that there has been no direct discrimination on the grounds of race, ethnicity or nationality nor breach of Article 14 for the same reasons we have given in relation to C1.

Conclusion

218. For the reasons set out in the CLOSED judgment and this OPEN judgment, these claims are dismissed.

219. The relevant appellate court for the purposes of an appeal under section 67A(2) RIPA is the Court of Appeal of England and Wales.

Annex

Glossary

2018 Rules	Investigatory Powers Tribunal Rules 2018 (SI 2018 No 1334)
APPCBG	All-Party Parliamentary Chinese in Britain Group
BCP	British Chinese Project
BNA	British Nationality Act 1981
CCP	Chinese Communist Party
C1	First Claimant
C2	Second Claimant
CLCo	Christine Lee & Co (Solicitors) Limited
CTC	Counter-Terrorist Check
CTT	Counsel to the Tribunal
DPA	Data Protection Act 2018
ECHR	European Convention on Human Rights
HRA	Human Rights Act 1998
IA	Interference Alert
ISC	Intelligence and Security Committee of Parliament
NLCA	North London Chinese Association
PPERA	Political Parties, Elections and Referendums Act 2000
PRC	People's Republic of China
PSD	Parliamentary Security Director
RIPA	Regulation of Investigatory Powers Act 2000
SIAC	Special Immigration Appeals Commission
SRA	Solicitors Regulatory Authority
SSA	Security Service Act 1989
SSHD	Secretary of State for the Home Department
UFWD	United Front Work Department